GUIDE

League of Oregon Cities

Guide to Drafting a Sign Code

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I. Introduction

A. Overview of the Guide

This guide is intended to provide a combination of guidance, background, and tools to enable public officials in Oregon to make better decisions about how and when to regulate signs in their communities. It begins with an inventory of particular types of legal rights that can be affected by the way a city regulates signs – including rights to free expression under the U.S. and Oregon Constitutions, rights to compensation under constitutional and state law, and rights to continue using a sign that was lawful when it was established. A description of the way that certain federal and state statutes regulating outdoor advertising affect local authority and responsibilities follows. Then, the guide identifies a list of recurring problem areas that cities encounter when regulating signage, and suggests solutions or alternatives. It ends with an updated version of a model sign ordinance, and checklists that can serve as important tools for cities in this process.

B. Limitations of the Guide

This guide is intended to orient non-attorney public officials in Oregon about some of the legal issues that arise when Oregon cities endeavor to regulate signs. Because the free expression clause of the Oregon Constitution has been given a special meaning by the Oregon Supreme Court, and because Oregon has adopted statutes which can affect local authority and responsibilities in this area, the guide also includes state specific information.

1. The Guide is not a one-size-fits-all solution

The best approach to sign regulation in any given community often depends on considerations that vary between cities. For example, not all cities place the same weight on aesthetic considerations, quaintness or avoiding any risk of distractions along roadways. Risks that are high in certain contexts—such as the risk of distraction along a limited-access highway through a growing community—are not matched in urban downtown areas where traffic speeds rarely reach 30 miles an hour. One city might attempt to create a "Times Square" type of excitement around a sports arena or concert venue (in which flashy signs are a critical part of the ambiance) while another city may place the same emphasis on century-old historic shops and restaurants (where modern or digital signage would disrupt the design theme).

While this guide includes a type of model sign ordinance as well as general guidance, the model ordinance and general guidance works best as a starting point. While cities should not disregard important constitutional principles when they are contrary to what the city is seeking to accomplish, at the same time cities should take care to see that the purpose statement in the sign code, and the record that is made when it is adopted, reflect actual aspirations and circumstances in that community.

2. The Guide is not a guarantee of freedom from litigation

One of the objectives of this guide is to reduce the risk that a city unwittingly crosses a constitutional or statutory boundary. However, cities with sign laws adopted in good faith, with the best intentions and advice, can also become the target of lawsuits. For example, a suburb that has found a fully-constitutional way to prohibit the erection of new billboards might still be sued by a company that is seeking to fill a hole in their network and is unafraid of losing. Another city might be sued because a stakeholder understands that he or she does not have a constitutional right to erect a sign in a particular place but wants to bring a "test case."

3. The Guide is not a substitute for involving your city's own attorney

An important premise of this guide is that any changes that are made to laws or policies are made with the active participation of the city's regular attorney. No guide can achieve the kind of trusting relationship that commonly exists between an elected body or appointed staff and the attorney or law firm they have chosen to advise them. City attorneys can also bring many benefits to the process of amending a sign code that cannot begin to be provided in this guide. For example, city attorneys may understand that adding provisions to a sign code applicable to the use of publicly-owned property may conflict, in one or more particular cities, with a separate chapter on the use of city property. The codes of some cities have business regulation chapters that already address some of the commercial activity that some businesses seek to conduct through signage. Because city attorneys will likely need to become involved in sign code enforcement, it is particularly important that they are involved in the process of writing or revising the standards and procedures.

II. Legal and Constitutional Considerations

A. Constitutional rights to free expression

1. The First Amendment to the U.S. Constitution

The free speech clause of the First Amendment to the U.S. Constitution provides that "Congress shall make no law. . .abridging the freedom of speech." Information conveyed by signs is free speech protected by the free speech clause. Because sign ordinances regulate signs and the information they convey, courts must determine whether sign ordinances violate the free speech clause.

a. Varying levels of scrutiny of laws regulating speech or expressive conduct

Not all laws that affect expressive conduct or speech are evaluated under the same test. There are three major tests that have been applied to First Amendment claims against sign regulations. One is considered a "strict scrutiny" test, and the others are slightly different "intermediate scrutiny" tests. Although the application of the proper test is usually one of the last steps in the process of determining whether a sign law violates the First Amendment, understanding the differences between strict and intermediate scrutiny is critical to understanding the importance of court decisions that will control *whether* the required scrutiny of the law is strict or intermediate.

When strict scrutiny is required in a free speech clause case, the law will be considered constitutional only if the government proves that the restriction (1) furthers a (2) compelling interest and (3) is narrowly tailored to achieve that interest. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 US 721, 734 (2011) . Laws rarely survive strict scrutiny. The U.S. Supreme Court has not found that a law regulating expression satisfied the requirements of strict scrutiny since 1992, in *Burson v. Freeman*, 504 US 191 (1992). In the lower courts, it is truly rare to find any case upholding a sign regulation when strict scrutiny is applied.

Among the laws that the U.S. Supreme Court has subjected to strict scrutiny under the First Amendment, and that failed such scrutiny, are: a law that exempted labor disputes from a ban on residential picketing, *Carey v. Brown,* 447 US 455, 458-59 (1980); a law that exempted pickets involving school labor disputes from a ban on picketing within 150 feet of schools in session, *Police Dept. of City of Chicago v. Mosley,* 408 US 92, 95 (1972); a law that prohibited a subset of expression arousing anger or violence if the expression was on the basis of race, color, creed, religion, or gender, *R.A.V. v. City of St. Paul,* 505 US 377, 391 (1992); and a law that prohibited recipients of federal funding from broadcasting editorials that related to controversial issues of public importance, *F.C.C. v. League of Women Voters of California,* 468 US 364, 383 (1984).

Among the laws that the U.S. Supreme Court has subjected to only intermediate scrutiny, and that passed such scrutiny, are laws requiring concerts in a public park to use the city's own noise-limiting amplification system, *Ward v. Rock Against Racism,* 491 US 781, 784 (1989), and laws that prohibit the attachment of signage to utility guy wires, *Members of City Council of City*

of Los Angeles v. Taxpayers for Vincent, 466 US 789, 806-07 (1984). The Supreme Court has also found a total ban on signage in residential areas, *City of Ladue v. Gilleo,* 512 US 43, 54 (1994), and a ban on residential for-sale signage, *Lindmark Associates Inc. v. Willingboro,* 431 US 85, 93 (1977), to violate intermediate scrutiny.

The U.S. Supreme Court has articulated two very similar intermediate-scrutiny tests. The best-known is the test used for time, place, and manner regulations. The U.S. Supreme Court has held that a law is a reasonable time, place, and manner regulation if (1) it is content-neutral, (2) it serves a significant governmental interest, and (3) it leaves open ample alternate avenues of communication. *Heffron v. International Soc's for Krishna Consciousness,* 452 US 640, 648-55 (1981). The U.S. Supreme Court has adopted another test for laws that regulate commercial speech. Speech that "does no more than propose a commercial transaction" falls within "the core notion of commercial speech." *Bolger v. Youngs Drug Products Corp.,* 463 US 60, 66 (1983). If speech contains a mixture of advertising and speech on public issues, it can still be treated as commercial speech if it involves advertising, refers to a specific product or service, and is the result of economic motivation. *Id.* at 66-68. Signs giving the name of a business or identifying its products, billboards, and other commercial advertising material, are common examples of commercial speech.

Signs that have no discernable connection to the commercial interests of the speaker are considered noncommercial expressions. The U.S. Supreme Court has held (1) that speech is protected by the free speech clause if it concerns lawful activity and is not false or misleading. If the answer is "yes," then a law regulating commercial speech: (2) must serve a substantial governmental interest; (3) must directly advance the asserted governmental interest; and (4) must be no more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 US 557, 564 (1980). To distinguish it from strict scrutiny and the time, place, and manner test, this is usually known as "the *Central Hudson* test." *Edenfield v. Fane*, 507 US 761, 769 (1993).

When either kind of intermediate scrutiny is applied to a sign law, the law is relatively more likely to be upheld, although that outcome is hardly inevitable. Since 2011, the U.S. Supreme Court has been increasingly demanding when applying intermediate scrutiny in free speech clause cases. See, e.g., *McCullen v. Coakley,* 573 US 464, 489-90 (2014); *Sorrell v. IMS Health, Inc.,* 564 US 552, 563-64 (2011).

Now that you see the difference between strict scrutiny and intermediate scrutiny, you can better understand the importance of the questions that determine whether strict scrutiny is required. With a few exceptions, a law must be "content-neutral" to avoid strict scrutiny. *Reed v. Town of Gilbert, Arizona,* 576 US 155 (2015). The most relevant such exception is for laws that regulate commercial speech, which can be content-based without triggering strict scrutiny. *Central Hudson,* 447 US at 563-66; *Bolger,* 463 US at 65. The reasons for giving governments greater latitude to regulate commercial speech than is available to regulate noncommercial speech relate in part to a desire to preserve the level of protection that noncommercial speech currently receives. As the U.S. Supreme Court has stated several times, "[t]o require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution,

simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." *Metromedia v. San Diego,* 453 US 490, 605 (1981) (White, J., plurality) (quoting *Ohralik v. Ohio State Bar Assn.,* 436 US 447, 456 (1978)).

b. The current meaning of "content-neutral"

In 2015, the U.S. Supreme Court decision in *Reed v. Town of Gilbert* was a pivotal case signaling when a sign regulation should be considered content-neutral. In that case the town's sign code imposed different size, location and duration requirements for temporary signs depending on whether they fit within certain categories. 576 US 155 . Political signs (i.e. election signs) were subject to one set of size, location, and duration standards. *Id.* Signs for qualifying events were subject to a less-favorable set of size, location and duration standards. *Id.* Ideological signs were subject to a set of different size, duration, and location standards, which were generally more favorable than those for qualifying event signs. *Id.*

The suit arose when a church that relied upon directional signage to help lead attendees to the current location of its worship services contended that it should be allowed to post qualifying event signs as large as political signs, for periods as long as allowed for political signs. *Id.* at 156. Before the U.S. Supreme Court agreed to review the case, the town had won every decision in the lower courts. *See Reed v. Town of Gilbert,* 587 F3d 966, 979 (9th Cir 2009). However, the lower courts had applied the most commonly-used test for content-neutrality, a pragmatic test under which a law was considered content-neutral so long as it was "justified without reference to the content of the regulated speech," and was not adopted by the government "because of disagreement with the message" the speech conveyed. *See Hill v. Colorado,* 530 US 703, 719 (2000) (quoting *Ward v. Rock Against Racism*, 491 US 781, 791 (1989)). It was generally known as the *Ward* test for content-neutrality. The plaintiffs urged the court to adopt a test more difficult for governments to satisfy, under which a sign law would be content-based if one needed to read the sign in order to determine whether it complied with the regulation.

The U.S. Supreme Court first reached the question of the proper test for content-neutrality and adopted a harsher test than the *Ward* test. It explained:

- A government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 156-157 (quoting *Police Dept. of Chicago v. Mosley,* 408 US 92, 95 (1972);

- "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id* at 156-157;

- "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id. at 163.*

The court concluded that the town's treatment of directional signs was content-based because even a purely directional message that merely bears "the time and location of a specific event" is considered one that "conveys an idea about a specific event." *Id.* at 170. For that reason, the regulation was based on the idea or message expressed.

The *Reed* decision transformed the *Ward* test, from a "shield" that a government could use to argue that a sign regulation that distinguished on its face between topics or subjects was content-neutral, into a "sword" that a party challenging such an ordinance could use to attack it, regardless of the distinctions it made on its face, by showing that the law was justified based on the content of the regulated speech, or that it was adopted by the government because of disagreement with the message the speech conveyed. *Reed, 576 US at 167.*

However, in April 2022, the U.S. Supreme Court ruled in favor of the City of Austin, Texas, in a challenge to the city's off-premises sign regulations in the case *City of Austin v. Reagan National Advertising*, *596 US 61 (2022).*[1] In this case, the U.S. Supreme Court clarified the outstanding question that local governments had been struggling with since the *Reed* decision: Whether on-/off-premises sign regulations (i.e., regulations that regulate off-premises signs such as billboards differently than on-premises signs) are "content-based" and therefore presumptively unconstitutional.

The U.S. Supreme Court distinguished between strict and intermediate scrutiny application depending on which type of sign regulation was at issue. The Court concluded that "strict scrutiny" standard of review applies to content-based restrictions, but here, the City's on-/off-premises sign regulations were content-neutral and therefore subject to the "intermediate scrutiny" standard of review. The intermediate scrutiny is a much lower burden for a regulation to pass muster under the First Amendment.

The plaintiffs in *Austin* owned two billboard companies who applied for permits to digitize some existing billboards. The City had a regulation prohibiting new billboards but allowed existing billboards to remain. The owners of existing billboards could change the face of the sign but could not increase the degree of nonconformity, including changing the method or technology used to convey a message. The City's regulations did allow digitization of on-premises signs in some circumstances. Per the City's regulation, "off-premises" signs advertise "a business, person, activity, goods, products or services not located on the site where the sign is installed." Based on this regulation, the City denied the plaintiffs permits.

The plaintiffs sued the City over the permit denials, arguing that the on-/off-premises distinctions were content-based and therefore unconstitutional under *Reed*. The plaintiffs relied on the *Reed* argument that "if you have to read the sign to regulate it" the regulation is content-

[1] For an additional analysis of the leading federal First Amendment Speech caselaw, please visit Harvard Law Review, *City of Austin v. Reagan National Advertising of Austin, LLC*, 136 Harv L Rev 320 (Nov 2022) at https://harvardlawreview.org/print/vol-136/city-of-austin/ (last accessed February 2, 2024).

based and strict scrutiny would apply. Put differently, you would need to read the sign to know whether it is to be located on the same premises as the person, place, or thing being discussed.

The Fifth Circuit District Court upheld the City's permit decision, but the Fifth Circuit Court of Appeals reversed, holding that the off-premises sign regulation was content-based and failed the "strict scrutiny" test—thus rendering it unconstitutional under the First Amendment. In reversing the Fifth Circuit Court of Appeals decision, U.S. Supreme Court Justice Sonia Sotomayor wrote for the majority:

> The Court of Appeals interpreted *Reed* to mean that if "[a] reader must ask: who is the speaker and what is the speaker saying" to apply a regulation, then the regulation is automatically content based…this rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent. Unlike the regulations at issue in *Reed*, the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny.

Id. at 6.

The U.S. Supreme Court distinguished on-/off-premises sign regulations from the type of regulations at issue in *Reed.* The Court distinguished *Austin* from *Reed*, with the majority concluding that:

> Unlike the sign code at issue in *Reed*, however, the City's provisions at issue here do not single out any topic or subject matter for differential treatment. A sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations. Rather, the City's provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation.

Id. at 8.

The majority's opinion emphasized this country's long history of regulating signs based on the on-/off-premises distinction, including the federal Highway Beautification Act of 1965, state laws, and thousands of local codes throughout the country. The U.S. Supreme Court also cited several of its own decisions upholding off-premises sign regulations and location-based rules.

The U.S. Supreme Court remanded the case back to the Fifth Circuit Court of Appeals to determine whether the regulations could meet the intermediate scrutiny test for content-neutral regulations.

What we understand from *Austin* is the following: (1) A regulation is content-based if it singles out any topic or subject matter for differential treatment or if it uses function or purpose in a way that is simply a proxy for subject matter; and (2) A regulation is content-based if it singles out any topic or subject matter for differential treatment or if it uses function or purpose in a way that is simply a proxy for subject matter.

c. For now, the overall meaning for cities is that a regulation permitting the digitizing of on-premises signs, but not off-premises signs, will be considered facially "content-neutral" for First Amendment purposes even if it requires the city to read the signs, since it does not discriminate based upon the topic or message expressed. This is a win for cities and local governments who can once again feel confident in creating, retaining, or reinstating reasonable on-/off-premises sign regulations.[2] **Areas of uncertainty about content-neutrality after *Reed***

The *Reed* decision should have had no *direct* effect on commercial speech, but sign companies have tried to use its sweeping language in cases involving commercial speech. Because *Reed* involved speech that was undisputedly noncommercial, and the plaintiffs' attorney acknowledged in oral argument that the Supreme Court treats commercial speech differently, the court's holding in *Reed* did not directly affect commercial signage. Nor did the Supreme Court overrule, or even mention, the precedents that allow differential treatment of commercial and noncommercial signage. But the decision was written by Justice Clarence Thomas (who has long disagreed with the court's precedents requiring a lower level of protection for commercial speech), and his opinion for the court in *Reed* never acknowledged that commercial speech should be treated differently. (Note: The court's opinion was similarly silent about whether obscene speech should continue to be treated differently.)

At least three of the six justices who joined the court's opinion consider "[r]ules distinguishing between on-premises and off-premises signs," and "[r]ules imposing time restrictions on signs advertising a one-time event," to be content-neutral. *Id.* at 174 (Alito, J., concurring, joined by Justices Sotomayor and Kennedy). These items were included in what Justice Alito identified as a non-exhaustive list of "some rules that would not be content based[.]" *Id.* Most planners and lawyers with experience in sign regulation understand that an on-premises sign means one that advertises something on the premises, and an off-premise sign advertises something off the premises, but it is not certain that the three concurring justices shared that understanding. Moreover, as Justice Kagan pointed out in her separate opinion, the concurring justices' statement that a rule "imposing time restrictions on signs advertising a one-time event" would be content-neutral is difficult to reconcile with the question that the court necessarily decided in *Reed. Reed*, 576 US 155, 181 fn.* (Kagan, concurring with the judgment).

[2] While the federal case law impacts the First Amendment of the U.S. Constitution analysis, it is imperative that the Oregon Constitutional analysis thresholds are met as well, as Oregon Constitution Article I, Section 8, free speech provisions, are more protective than that of the U.S. Constitution. *See Section II(C) below.*

Language in the court's opinion in *Reed* that was not essential to the outcome could have a radical effect if treated as law. Neither the plaintiffs nor the Town argued that a law could become content-based if it draws distinctions based on the function or purpose of a sign, yet Justice Thomas's opinion for the court includes a brief tangent, in which he appeared to observe that "defining regulated speech by its function or purpose" distinguishes based on the message a speaker conveys. *Id.* at 163-164. While it is easy to imagine a regulation for which that reasoning may be true (such as a sign law that permits yard signs only if they have as their purpose or function the re-election of incumbents), sign-code provisions that differentiate based on the purpose or function of a sign are unavoidable, and often innocuous. For example, any good sign code defines the word "sign," and unless that definition attempts to differentiate between structures or displays based on their function or purpose, it will be extraordinarily overbroad.

d. The tensions between targeted regulation and overly-fine distinctions

In retrospect, the reason the town of Gilbert's sign code was such a tempting target for a content-neutrality attack was that it drew particularly fine distinctions in its treatment of noncommercial signs, to the point where it allowed election signs for a different period than it allowed ideological signs. A simpler, less nuanced sign code can be more likely to satisfy the *Reed* version of the content-neutrality requirement. But the simplicity of a flat, or across-the-board standard can become a problem even under intermediate scrutiny, because (as noted above) the time, place and manner test and the *Central Hudson* test disfavor overly-inclusive restrictions on speech. A court might consider an overly broad regulation of commercial speech as "more extensive than necessary to serve" the asserted government interest, and it might consider an overly broad regulation of noncommercial speech as one that fails to serve the asserted governmental interest.

This tension is better addressed by eliminating exceptions to noncommercial speech regulation and other sign code complexities that are difficult to justify, especially if it is possible that a judge could conclude the regulation can only be applied by reading the sign. But it is worth remembering that *Reed* does not necessarily require communities to become *more* permissive as they go about stripping content-discrimination from their sign codes. Given the added difficulty of finding a content-neutral way to continue to allow real estate agents to post temporary "open house" signs at residentially-zoned street corners without also allowing similarly-sized baby billboards advertising internet-based dating services, a community could justifiably forbid both.

e. Discretion is distrusted: how the paradigm for sign regulation must differ from the paradigm for ordinary land-use regulations

It is usually considered good advice in drafting land use ordinances to preserve substantial discretion. That is because it is often difficult to foresee every bad idea that an applicant or other property owner might come up with regarding the use of his or her property and preserving the ability to exercise discretion to say "no" under those circumstances is a practical solution to the problem.

Yet that rule of thumb can't be used when regulating signs. Where expressive conduct or speech is concerned, courts *distrust* discretion. They presume that, if a city preserves for itself the discretion to go beyond clearly-articulated standards and criteria when responding to requests for permission to engage in protected speech or conduct, that discretion may be abused to encourage speech they like while discouraging or preventing speech they don't like. For that reason, courts often demand that the standards be "narrowly drawn, reasonable, and definite." *Thomas v. Chicago Park Dist.,* 534 US 316, 324 (2002). The fact that much of the Supreme Court's First Amendment jurisprudence arose in the civil rights era of the 1960s, from standardless denials of permits for voting rights marches and the like, helps to explain the Court's distrust of discretion in this field.

As a result, a sign code should not include as a permit criterion that the application or the sign is acceptable to a particular city board or official. See *City of Lakewood v. Plain Dealer Pub. Co.,* 486 US 750, 769 (1988) (holding unconstitutional a news-rack permitting ordinance in part because "nothing in the law as written requires the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application."). Nor should it classify signs as special or conditional uses, at least if the criteria for the consideration of conditional use permits applies equally to sign permits. *See Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir.1996). Whether a new convenience store in a residential neighborhood is consistent with the character of the neighborhood is a perfectly fine question for a planning commission to ask but asking the same question regarding a "save the whales" sign creates an occasion for the commission to exercise undue discretion regarding protected expression.

f. The overbreadth doctrine – and how it forces cities to worry about hypothetical sign proposals

For an ordinary land use regulation (that does not regulate expressive conduct or speech), its legality will most likely be determined in the context of a particular application to do a particular thing. Therefore, in such ordinary situations, it can often be a waste of time and energy to consider an endless series of hypothetical things that a land use law might allow or forbid, if those things are particularly unlikely to be proposed.

Again, on this subject, sign regulation must be viewed differently. Where expressive conduct or speech is concerned, judges have a special concern that the mere presence of an overly broad law on the books will chill valuable speech. For that reason, in free speech cases, courts generally relax the requirement that a plaintiff actually intend to engage in protected conduct that is actually restricted by the law under challenge. Instead, if a law is written so broadly that its "sweep" includes a substantial amount of protected conduct, someone whose conduct could be lawfully restricted by a narrower law is nevertheless allowed to challenge the law's overbreadth, and if successful, benefit from the law's demise. *See, e.g., Forsyth Cty., Ga. v. Nationalist Movement,* 505 US 123, 129 (1992). Courts believe that only by allowing this kind of "overbreadth" challenge will laws that restrict both unprotected and protected expression or conduct be changed before too much protected expression is chilled.

g. A timely decision, adequately explained

Another way that regulating signs must differ from regulating other land uses for First Amendment reasons concerns the subject of delayed decision making. When a developer seeks a variance or other approval for an ordinary development idea, courts place little or no constitutional significance on whether the city takes weeks, months or even years to decide whether to grant it. But where the activity is protected by the First Amendment, courts view a requirement that the speaker first obtain a permit before engaging in the expressive activity as a "prior restraint" on speech, warranting special protections. *Forsyth County,* 505 US at 130. Put another way, courts view pre-approval requirements as opportunities for censorship, not just through denial of permission, but through delaying the decision of whether to approve for so long that much of the mischief of censorship is accomplished before approval occurs.

In addition to satisfying the requirements or intermediate or strict scrutiny described above for other forms of sign regulation, a *content-based* permitting regime must not involve "undue delay" in acting on permit requests. (Since the U.S. Supreme Court's 2002 *Thomas* decision, time limits have not been constitutionally required for content-neutral permit schemes. *See S. Oregon Barter Fair v. Jackson Cty., Oregon*, 372 F3d 1128, 1137 (9th Cir 2004); *Granite State Outdoor Advert., Inc. v. City of St. Petersburg, Fla.,* 348 F3d 1278, 1282 (11th Cir 2003). The difficulty, however, is knowing at the time of drafting or revising a sign code whether a judge will consider the particular parts of the sign code involved in a future dispute to be content-neutral or content-based.) Courts decide what constitutes "undue delay" on a case-by-case basis. *City of Littleton, Colorado v. Z.J. Gifts D–4* LLC, 541 US 774, 781 (2004). For ordinary sign permits, absent special circumstances (such as an upcoming election or event), a delay of several weeks is currently considered constitutional. Where no special circumstances were present, compliance with a statutory requirement of approval within 90 days was considered sufficient. *Advantage Media, L.L.C. v. City of Eden Prairie,* 456 F3d 793, 804 (8th Cir 2006).

A further procedural requirement for the administration of content-based permit regimes is that the decision maker state the reasons for denying permission. *Thomas,* 534 US at 324. "Requiring officials to state their reasons for restricting speech is particularly important because without a written explanation it is 'difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power.'" *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, 550 F3d 788, 801 (9th Cir 2008) (quoting *Plain Dealer*, 486 US at 758).

2. Vagueness

Constitutional litigation about sign ordinances sometimes involves an allegation that one or more of the regulations in the code should be declared "void for vagueness." I, e.g., *G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.3d 1064, 1084-85 (9th Cir 2006). Courts usually view regulations more closely whenthey implicate First Amendment rights when considering vagueness claims, compared to ordinary land use or police power regulations. *Id.* at 1084. Courts pose two questions: (1) whether the regulation fails to give persons of ordinary intelligence adequate notice of what conduct is proscribed; and (2) whether the law permits "arbitrary and discriminatory enforcement. *Id.* (quoting *Hill v. Colorado,* 530 US 703, 732 (2000)). However, this does not

require that sign codes include only objective standards. "Vagueness doctrine cannot be understood in a manner that prohibits governments from addressing problems that are difficult to define in objective terms." *Gammoh v. City of La Habra,* 395 F.3d 1114, 1121 (9th Cir 2005). For example, the "element of subjectivity" that was present in the City of Lake Oswego's requirement of "compatibility" did not cause the requirement to fail either part of the test. *G.K. Ltd. Travel,* 436 F3d at 1085.

In considering an allegation that a sign code provision is unconstitutionally vague, courts do not focus on the most imprecise words in isolation but view the regulation as a whole. "[O]therwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Gammoh,* 395 F3d at 1120.

B. Preparing for challenges to enforcement

As a matter of local administrative law, a party who challenges a quasi-judicial or administrative decision such as the denial of a permit required by a land use ordinance can argue that it was arbitrary and capricious. *See, e.g., Archdiocese of Portland v. Washington Cty.,* 254 Or 77, 82, 684 (1969). As the Oregon Court of Appeals recently reaffirmed:

> The terms 'arbitrary and capricious action,' when used in a matter like the instant one, must mean willful and unreasoning action, without consideration and in disregard of the facts and circumstances of the case. On the other hand, where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion had been reached.

Bradley v. State, ex rel. Dep't of Forestry, 262 Or App 78, 94 (2014) (quoting *Jehovah's Witnesses v. Mullen et al,* 214 Or 281, 296 (1958)). This standard requires the city to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (quoting *Motor Vehicle Mfrs. Assn. v. State Farm Mut.,* 463 US 29, 43 (1983)).

A city can take several steps at the time of drafting or revising its sign code to improve the chances that its decisions to grant or deny a sign permit withstand scrutiny under this standard. First, it can include an adequate statement of purposes, which encompasses not simply the objectives for restricting signage within the community (such as the risk of distraction and aesthetics) but also the objectives for *not* restricting certain types of signage (such as wayfinding and free expression). Second, the chances of arbitrary decision-making can be reduced through the use of objective standards wherever objectivity does not undermine the stated purposes of the code. Third, including in the administrative section of the ordinance procedures for requiring all of the kinds of information from applicants that are needed in order to apply the criteria will reduce the chances that a court later faults the city for making a decision without sufficient evidence in the record, or based on factors that fall outside the criteria.

When city decisions fail under an "arbitrary or capricious" standard, it is often because there is little or no factual basis in the record for the factual determinations made. It is generally

not necessary for a city to commission studies of traffic safety or survey citizens regarding aesthetic preferences in order to avoid having its sign permit decisions overturned in court. However, city staff and decision-makers should anticipate the need for evidentiary support for findings supporting a denial, even if the ordinance places the burden of demonstrating satisfaction of the criteria for approval on the applicant.

C. The Oregon Constitution's Free Expression Clause (Art. I, Section 8), as a source of added limitations

The free-expression clause of the Oregon Constitution is phrased somewhat differently than the First Amendment to the United States Constitution. It states that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Because of the phrase "on any subject whatever," it has been interpreted to prohibit distinctions in state and local sign regulations that differentiate on the basis of subject matter.

1. Art. I Section 8 interpreted in *West Coast Media LLC v. City of Gladstone*

In *West Coast Media, LLC v. City of Gladstone* in 2004, an applicant for a billboard permit argued to the LUBA and the Oregon Court of Appeals that the City of Gladstone's ban on off-premises advertising "was unconstitutional in that it prohibited freestanding signs carrying commercial advertising but did not prohibit freestanding signs containing public service information or political advertising." 192 Or App 102, 107 (2004). The LUBA agreed with the applicant, because the City Code "selectively allows some [types of] off-premises speech and prohibits others, based on the content of that speech." *Id.* With little additional explanation, the Court of Appeals agreed, *id.,* 192 Or App at 108.

2. Art. I Section 8 as interpreted in *Outdoor Media Dimensions v. Dept. of Transportation* and *Lombardo v. Warner*

However, on March 23, 2006, the Oregon Supreme Court issued decisions in two billboard cases, in each case interpreting Article I Section 8 when applying the Oregon Motorist Information Act (OMIA), ORS 377.700 to 377.840. *See Outdoor Media Dimensions v. Dept. of Transportation*, 340 Or 280-281 (2006) and *Lombardo v. Warner*, 340 Or 264, 267(2006).

In *Outdoor Media Dimensions,* the court considered several issues—most notably whether the OMIA's requirement of a permit for a sign advertising goods, products, services, facilities or activities not conducted on the premises where the sign is located, while requiring no permit for a sign advertising such things if sold, offered, or conducted on the premises on which the sign is located, unconstitutionally discriminated on the basis of subject matter. On that issue, the court held that "[t]he OMIA's different treatment of on-premises and off-premises speech" violated the free-expression clause because that distinction treated signs differently based on whether the message related to activity conducted on the premises where the sign is located. 340

Or at 296,. "The broad sweep of Article I, section 8, compels us to conclude that the provision was not intended only to prevent content-based restrictions that are motivated by an intent to censor offensive, disruptive, or potentially harmful speech." 340 Or at 298 On this basis, the court struck down the OMIA's permit requirement for outdoor advertising signs, viewing that remedy as less draconian than requiring everyone with an on-premise sign within the area regulated by OMIA to now obtain a permit from the department. *Id.* at 282-84.

Notwithstanding this ruling, the court held that "the OMIA's provisions regarding the erection and maintenance of signs visible from public highways, including the permit and fee requirements—again with the exception of the statute's different treatment of on-premises and off-premises signs, as discussed below—are content-neutral time, place and manner restrictions that do not violate Article I, section 8." 340 Or at 292.

In *Lombardo v. Warner,* the court interpreted the OMIA's variance provisions from otherwise applicable restrictions on the display of temporary signs visible from public highways. 340 Or at 267. Specifically, it interpreted an exception to the OMIA's permit requirement that allows ("for good cause shown") temporary signs on private property, which the OMIA defines as signs that "'do[] not exceed 12 square feet," that are "not on a permanent base," that are not displayed for compensation, and (for signs not erected by a resident on his or her own property) that do not remain in place for more than 60 days in a calendar year. *Id.,* (quoting ORS 377.735 (1)(b)). It held that the Oregon Department of Transportation's discretion in granting a variance was limited by the department's own rule and by state and federal constitutions. *Id.* 340 Or at 272-73. It also held that the OMIA should be construed to require the agency to act on variance requests within a reasonable time. *Id.* 340 Or at 273.

3. How Oregon's Court of Appeals has softened the impact of *Outdoor Media Dimensions*

Based on the March 2006 Oregon Supreme Court decision in *Outdoor Media Dimensions*, lower courts have reconsidered and reversed earlier rulings against billboard owners who failed to obtain permits required by OMIA for such signs. *See Drayton v. Dep't Of Transp*., 209 Or App 656, 661 (2006).

However, sign companies and proponents have encountered difficulty when attempting to build on that decision as a basis to de-regulate signage at the state and local level. One important reason was the willingness of Oregon's appellate courts to remedy the presence of discrimination on the basis of subject matter within a sign code by invalidating exceptions to restrictions, rather than the restrictions themselves. For example, in *Clear Channel Outdoor Inc. v. City of Portland*, 243 Or App 133 (2011), the city conceded that the distinction in its sign code between "signs" (which were regulated) and "painted wall decorations" (which were not), turning on the presence of "text, numbers, registered trademarks or registered logos," would be considered content or subject-matter based discrimination in violation of Article I, Section 8. 243 Or at 144. Had the Court of Appeals chosen to require the city to invalidate not just the exemption from regulation, but the word "sign" as well, the sign code would have been rendered useless. 243 Or at 148. Instead, it concluded that the city council would likely have preferred to strike the exemption rather than effectively extending the exemption to all signs, and therefore struck the

exemption, but not the definition of "sign." That allowed the city to apply other parts of the sign code to deny the plaintiff's requested sign permits. 243 Or at 151.

4. Does the "well-established historical exception" doctrine require a different result?

At the very end of its analysis of the meaning of the free expression clause in *Outdoor Media Dimensions*, the Oregon Supreme Court paused to note that, under the established framework for interpreting that clause (first articulated in *State v. Robertson*, 293 Or 402 (1982)), a regulation "may be permitted notwithstanding Article I, section 8" if the scope of the content-based restraint "is wholly confined within some historical exception." *Outdoor Media Dimensions,* 340 Or at 299 (quoting *Robertson,* 293 Or at 412). That exception applies where "the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 [when the Oregon Constitution was adopted] demonstrably were not intended to reach.'" *State v. Plowman*, 314 Or 157,164(1992) (quoting *Robertson*, 293 Or at 412). In *Outdoor Media Dimensions,* because the state "has offered no argument as to any such historical exception," and the court was "aware of none," *Id.* that *Robertson* factor did not stand in the way of the court's ruling regarding the on-premise/off-premise distinction. *Outdoor Media Dimensions,* 340 Or at 299.

Several years later, in *State v. Moyer,* the Oregon Supreme Court relied upon the "well-established historical exception" doctrine when concluding that a regulation of false speech about campaign conditions violated Article I Section 8. 348 Or 220, 233 (2010). It explained that "[w]hether a statute that restrains expression is 'wholly confined within some historical exception' requires the following inquiries: (1) was the restriction well established when the early American guarantees of freedom of expression were adopted, and (2) was Article I, section 8, intended to eliminate that restriction." *Id.* Noting that similar laws were accepted in the era when the Oregon Constitution was adopted, the court inferred that it was unlikely that the framers of the constitution considered that kind of communication a form of constitutionally-protected expression. *Id.,* 348 Or at 234.

However, the "well-established historical exception" element was litigated as part of a successful challenge to the Port of Portland's policy of refusing to permit the placement of advertising materials at the Portland International Airport that contain religious or political messages. In *Oregon Natural Resources Council Fund v. Port of Portland*, the Court of Appeals first found that the Port's policy was written in terms directed to the substance of any 'opinion' or any 'subject' of communication within the meaning of *Robertson* and *Outdoor Media Dimensions,* because it "expressly regulates based on the *content* of particular advertisements, prohibiting religious and political content while allowing commercial content." 286 Or App 447, 464 (2017). The Port argued, however, that the "proprietary function doctrine" (arising from its ownership of the Airport and advertising spaces) "is a well-established historical exception to the rules that otherwise applied to state actors, and is a doctrine of constitutional significance." *Id.* 286 Or App at 465. The Court of Appeals rejected this assertion, explaining that "none of the principles in the 'government as proprietor' case law naturally extend to the context of governmental interference with free expression, {*Robertson],* 286 Or App at 460-61, let alone

demonstrate a 'well established' exception for the type of speech restriction at issue in this case." *Id.* 286 Or App at 465-466.

D. Potential compensation demands

1. The Takings Clauses in the U.S. and Oregon Constitutions

The Fifth Amendment of the United States Constitution and Article I, Section 18, of the Oregon Constitution prohibit the taking of property for a public purpose without just compensation. Sign owners and disappointed applicants for sign permits sometimes allege that sign regulations constitute such a taking. *See. e.g., Ackerley Commc'ns, Inc. v. City of Salem, Or.,* 752 F2d 1394, 1396 (9th Cir 1985)*; Meredith v. City of Lincoln City,* No. CIV. 03-6385-AA, 2008 WL 4937809, at *5 (D Or Nov 6, 2008); *Lamar Advert. of S. Dakota, Inc. v. City of Rapid City*, 138 F Supp 3d 1119, 1131 (DSD 2015).

However, a common disadvantage facing claimants in the billboard context is that their property rights are often nothing more than leasehold interests which constitute one "stick" in the bundle of property rights held by the property's owner. A regulation that deprives a rooftop sign of its value may not constitute a taking because of the reasonable economic value that remains in the rest of the parcel when viewed as a whole. Thus, as the California and Michigan Supreme Courts have reasoned, "we do not believe that a property owner, confronted with an imminent property regulation, can nullify… a legitimate exercise of the police power by leasing narrow parcels or interests in his property so that the regulation could be characterized as a taking only because of its disproportionate effect on the narrow parcel or interest leased.'" *Regency Outdoor Advert., Inc. v. City of Los Angeles*, 39 Cal 4th 507, 523 (2006), as modified (Oct. 11, 2006) (quoting *Adams Outdoor Advert. v. City of E. Lansing*, 463 Mich 17, 25 (2000).

2. Can There Be a Right to Compensation under Oregon's Outdoor Motorist Information Act or the Highway Beautification Act?

Part of the legislative compromise that enabled the passage of the federal Highway Beautification Act and its counterparts in states (such as Oregon) that opted into the program, was the inclusion of certain statutory rights to compensation to the owners of signs removed.

The Oregon Outdoor Motorist Information Act provides in relevant part:

> (2) All outdoor advertising signs that are lawfully located outside of a commercial or industrial zone and visible from an interstate highway or a primary highway shall be removed *upon payment of just compensation as provided by ORS 377.780.*
>
> (3) *Upon payment of just compensation*, the Oregon Department of Transportation may remove any lawful outdoor advertising sign located in a scenic area designated pursuant to ORS 377.505 to 377.540.
>
> (4) Outdoor advertising signs in existence on May 30, 2007, that are lawfully located outside of a commercial or industrial zone in existence on July 1, 1971, and visible from a secondary highway and not within a scenic area existing on July 1, 1971, or

thereafter designated a scenic area may be removed *only upon payment of just compensation* as provided in ORS 377.780. *Upon payment of just compensation*, the department may remove the outdoor advertising sign. It may not be reconstructed or replaced if destroyed by natural causes and may not be relocated.

(5) If a secondary highway existing on July 2, 1971, is subsequently designated as an interstate or primary highway, *upon payment of just compensation*, the department may remove outdoor advertising signs not conforming to the provisions of ORS 377.700 to 377.844.

(6) If any other highway is designated as an interstate or primary highway, *upon payment of just compensation*, the department may remove a nonconforming outdoor advertising sign lawful before such designation but nonconforming thereafter.

See ORS Chapter 377.

These provisions either directly or indirectly apply to removal *by the Oregon Department of Transportation,* however. The department is specifically referenced in subparts 3 through 6. Although subpart (2) does not specifically mention the department, it does refer to "payment of just compensation *as provided by ORS 377.780*, "and that section is applicable "Where the Department of Transportation elects to remove and pay for a sign . . ." ORS 377.780 (1), and references only the Department. (Counterparts to the Oregon statute in other states have "just compensation" provisions that are worded more broadly, and that have been successfully enforced against local governments. See, e.g., *Lamar Advert. Co. v. Charter Twp. of Clinton,* 241 F Supp 2d 793, 800 (ED Mich 2003) (upholding state statutory claim to just compensation from a township in Michigan).

The Ninth Circuit has also ruled, in a case arising from Ashland, Oregon's removal of a billboard, that the Highway Beautification Act (including its compensation provisions) "creates no federal rights in favor of billboard owners" and "creates no private cause of action for their benefit." *Nat'l Advert. Co. v. City of Ashland, Or.,* 678 F2d 106, 109 (9th Cir 1982).

3. Measures 37 and 49 (codified at ORS 195.305)

"In 2004, the voters enacted Measure 37, which permitted an owner of property that is subject to land use restrictions that went into effect after the owner purchased the property to bring a claim either for the diminution in value resulting from those restrictions or for a waiver of those restrictions in lieu of compensation." *Pete's Mountain Homeowners Ass'n v. Clackamus Cty.,* 227 Or App 140, 143–144 (2009) (citing ORS 197.352 (2005)).

However, "[i]n November 2007, the voters enacted Measure 49, and, on December 6, 2007, the measure took effect. . . Measure 49 supersedes Measure 37 and replaces the remedies formerly provided by Measure 37." *Id.,* 227 Or App at 144 (citing Or Laws 2007, Ch. 424 § 5). As codified in ORS § 195.305, the right is now limited to restrictions on *the residential use* of private real property *or a farming or forest practice*[.]" *Id.* at subd (1). Based on the effect of Measure 49 on Measure 37, a federal court has considered Measure 37 by a sign owner moot. *Meredith v. City of Lincoln City,* No. CIV. 03-6385-AA, 2008 WL 4937809, at *6 (D Or Nov 6, 2008).

E. Signs as prior nonconforming uses

"A nonconforming use is one that lawfully existed before the enactment of a zoning ordinance and that may be maintained after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area." *Dodd v. Hood River Cty.,* 317 Or 172, 179 fn.10 (1993) (*citing Clackamas Co. v. Holmes,* 265 Or 193, 196-197 (1973)). "The use must be an existing one when the zone is adopted; one merely contemplated is not protected." *Parks v. Bd. of Cty. Comm'rs of Tillamook Cty*., 11 Or App. 177, 197 (1972).

Nonconforming use protections against the enforcement of city zoning ordinances are not created by statute, but by city ordinances. *See City of Mosier v. Hood River Sand, Gravel & Ready-Mix, Inc.*, 206 Or App 292, 310 (2006) ("We conclude that ORS 215.130(7)(b) applies to counties, not cities. The applicable legal standard in this case, therefore, is [the nonconforming use section of the city code].") But as courts construe city ordinance provisions, court decisions arising in cities or counties are important. *Id.,* 206 Or App at 311-312 (construing the discontinuance exception in a city ordinance based on two cases arising under the county statute).

1. Legality of the use

The doctrine only protects the ability to continue prior *lawful* nonconforming uses (that is, a use that was lawful before a change in the zoning made that use nonconforming). *Lawrence v. Clackamas County*, 180 Or App 495, 501rev. den., 334 Or 327 (2002).

a. Alteration of the use:

"A nonconforming use cannot be changed to a new and different use and continue to be protected." *Parks v. Bd. of Cty. Comm'rs of Tillamook Cty*., 11 Or App 177, 197 (1972).

"[T]he law of nonconforming uses is based on the concept, logical or not, that uses which contravene zoning requirements may be continued only to the extent of the least intensive variations – both in scope and location – that preexisted and have been continued after the adoption of the restrictions." *Clackamas Cty. v. Gay*, 133 Or App 131, 135 (1995). This is reflected in the narrow definition of "alteration" of a nonconforming use in Section § 215.130 (9), which includes "(a) [a] change in the use of no greater adverse impact to the neighborhood; and (b) [a] change in the structure or physical improvements of no greater adverse impact to the neighborhood."

For example, the City of Portland's sign code includes a procedure under which sign companies or property owners can seek an "area enhancement" upon the satisfaction of three specified criteria. *See* Portland City Code § 32. The requesting partymust establish that the adjustment "will not significantly increase or lead to street level sign clutter, to signs adversely dominating the visual image of the area, or to a sign which will be inconsistent with the objectives of a specific plan district or design district," and that "[t]he sign will not create a traffic or safety hazard." *Id.* 32.38.030. In addition, the applicant must either establish that "[t]he adjustment will allow a unique sign of exceptional design or style which will enhance the area or

which will be a visible landmark," or that "[t]he adjustment will allow a sign that is more consistent with the architecture and development of the site." *Id.* These criteria were upheld by the Oregon Court of Appeals against a First Amendment challenge, *Clear Channel Outdoor, Inc. v. City of Portland,* 243 Or App 133, 159 (2011). They were considered content-neutral and not overly broad, so long as they were construed "to require consideration only of the proposed sign's objective, non-expressive physical features, and to exclude any consideration whatever of the subjective content of the sign's message." 243 Or App at 161, 262 and did not grant undue discretion to the city, 243 Or App at 166.

The only circumstance in which a county is required by statute to permit an alteration of a nonconforming use is if that alteration was lawfully demanded by a governmental authority. Otherwise, allowing the alteration is a matter of county discretion. *Cyrus v. Deschutes Cty.,* 194 Or App 716, 722 (2004) (interpreting ORS 215.130). A city zoning ordinance that includes a comparable provision should be fully enforceable.

Simply changing the image displayed on a sign, without changing the nature and purpose of the use or its quality, character, or degree, is not considered a change, extension, or alteration of the use or structure for purposes of prior nonconforming use status. *See, e.g., Barron Chevrolet, Inc. v. Town of Danvers*, 419 Mass 404, 410 (1995). The same is generally true for repairs to a sign's structure that replace "what is torn or broken." *Total Outdoor Corp. v. City of Seattle Dep't of Planning & Dev.,* 187 Wash App 337, 350 *review denied,* 184 Wash 2d 1014 (2015). However, if changes made in the name of "repair" encompass rebuilding to dimensions larger than those allowed at the time that more restrictive regulations were adopted, it should be treated as an enlargement. *Id.,* 187 Wash App at 35.

b. Expansion of the use

"Rules that restrict the ... expansion of nonconforming uses are common." *Parks v. Bd. of Cty. Comm'rs of Tillamook Cty.,* 11 Or App 177, 197. However, a city has discretion to authorize expansions, whether by ordinance (*Ne. Neighborhood Ass'n v. City of Salem*, 59 Or App 499 (1982) (upholding LUBA decision to allow enlargement of a permitted use where it was authorized by ordinance) or on a case-by-case basis, pursuant to the application of legislatively-adopted criteria. *Vanspeybroeck v. Tillamook Cty. Camden Inns, LLC,* 221 Or App 677, 692 (2008).

Where upgrading a static sign to digital or moving causes at least one of the dimensions of the sign face (such as its thickness) to increase, that also constitutes an enlargement or expansion. *Adams Outdoor Advert., L.P. v. Bd. of Zoning Appeals of City of Virginia Beach*, 274 Va 189, 196 (2007).

c. Destruction of the use

Laws vary in their treatment of restoration of prior lawful nonconforming uses that are destroyed by fire, natural disaster or other peril. Counties have discretion under § ORS 215.130(6) to permit restoration under such circumstances, but it must "be commenced within one year from the occurrence of the fire, casualty or natural disaster."

F. The interplay between federal, state, and local authority to regulate signs

In certain areas, local authority to regulate more restrictively is impaired (or "pre-empted") because of the adoption of a federal or state regulation concerning the same or similar subject. Not so with the authority of Oregon cities and counties to regulate signs. Oregon cities and counties may regulate them more restrictively than the standards in the federal Highway Beautification Act or the Oregon Motorist Information Act require.

"In the context of noncriminal legislation, the Oregon courts have adhered to the principle that, in the absence of a manifest intent by the state legislature to exclude local law, city legislation is not preempted by state laws that the local provisions simply duplicate or 'supplement.'" *City of Portland v. Dollarhide,* 71 Or App 289, 294–295 (1984), *aff'd*, 300 Or 490 (1986). The Oregon Legislature has not demonstrated any "manifest intent" to preempt local law in this area. In fact, the Oregon Motorist Information Act specifically provides that nothing in it "is intended to permit a person to erect or maintain any sign that is prohibited by any governmental unit." ORS 377.740.

"In passing the Highway Beautification Act of 1965 .... Congress did not intend to preempt the subject of highway advertising control." *Markham Advert. Co. v. State,* 73 Wash 2d 405, 417 (1968). As noted in a formal opinion of the Office of the Attorney General of Oregon, "[a]n opinion of Edwin J. Reis, Assistant Chief Counsel for Right-of-Way and Environmental Law of the Federal Highway Administration, dated September 6, 1972, makes it clear that the Federal Highway Administration has not preempted state or local zoning law authority." 36 Or Op Atty Gen.1145 (June 21, 1974). The attorney general's opinion further states that "it is our opinion, in light of the federal act and the Oregon statutes, that cities and counties are not preempted from exercising their police power as they deem necessary for the control or removal of billboards, so long as the purpose of their action is not to circumvent the federal act. It is our opinion from the cases and opinions set forth that the federal government will not in any way penalize the State of Oregon for the removal or control of billboards by the cities or counties within the state under the existing statutes, regardless of where the signs are located."

The effect of the federal and state billboard standards sometimes depends on local land-use law and local zoning decisions. For example, the HBA standards permit the erection and maintenance of outdoor advertising within 660 feet of the nearest edge of the right of way of interstate or primary highways *in areas zoned for business, industrial or commercial activities*. See 23 U.S.C. § 131(d). Therefore, by zoning or rezoning property, a city or county can cause an otherwise unlawful new billboard to be lawful. To discourage abusive commercial or industrial rezonings that are designed to defeat the effect of the federal Act, however, a federal regulation states that "[a]ction which is not a part of comprehensive zoning and is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes." 23 C.F.R. 750.708 (b). That Rule also refuses to recognize zoning decisions that are not "in accordance with statutory authority" or by units of government that are not authorized to zone. *Id.* at (c). For example, if a city rezones a golf course to a designation that includes "industrial" uses on the list of permitted uses, notwithstanding how it is guided in its comprehensive

plan, and then issues permits for new billboards on that course in areas adjacent to a federally-funded freeway, such zoning may be disregarded for purposes of assessing the billboard company's compliance with a state statute adopted to carry out the state's obligations under the Highway Beautification Act. *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits in the City of Mounds View*, 664 NW2d 1, 10 (Minn 2003).

III. Recurring problem areas in regulating signage

It is possible to identify several areas of sign regulation that give rise to the greatest number of questions from city officials or other citizens.

A. What should be treated as a sign

The most common word in nearly every sign code is the word "sign." Therefore, it is particularly important that a city avoid content-based distinctions in the "sign" definition itself, because if a court declares the definition of "sign" unconstitutional, that flaw may make most if not all of the code inoperable, at least until the definition is amended.

A common but avoidable problem in the sign codes of many cities is that the definition of "sign" also includes exemptions which are best parked elsewhere in the code. For example, the definition of "sign" in the sign code of a mid-sized city in North Carolina specifically exempted "public art" and "holiday decorations." Because a federal district court judge concluded that those two distinctions were content-based, the list of provisions that the district court judge struck down included limits on the size of "signs" in a residential area and the prohibition of signs in a residential area with fluorescent colors, both of which the plaintiff had violated. *Bowden v. Town of Cary*, 754 FSupp2d 794, 802 (EDNC 2010). It would have been better for the city to have placed those exclusions in a separate section, so that the constitutionality of the definition of the word "sign" would not be affected.

In considering a definition of "sign" that is unlikely to be struck down after *Reed v. Town of Gilbert*, consider one like the definition of "street graphic" in "*Street Graphics and the Law* 75 (4th edition 2015): "Any structure that has a visual display visible from a public right of way and designed to identify, announce, direct or inform."

B. Electronic message and digital signs

For over a century, sign companies have used technology to make static messages on signs come to life, and thereby attract attention. As signs began to incorporate the appearance or reality of motion, regulators began to restrict the use of such technologies. For decades, many sign codes have prohibited signs or lights that moved, flashed, traveled, blinked or used animation. Consistent with this approach, terms of agreements between states and the Federal Highway Administration generally prohibit flashing, intermittent, or moving lights in areas within 660 feet of a federal-aid highway. See *Scenic Am., Inc. v. United States Dep't of Transportation*, 836 F3d 42, 46 (DC Cir 2016) ("Nearly all of the [Federal-State Agreements] contain a prohibition against 'flashing,' 'intermittent,' and 'moving' lights.").

As new sign technologies emerged, new ordinances were drafted to address such new technologies. Drafters introduced new terms and concepts into sign regulation, such as:

- "Electronic changeable message displays" (any sign that uses electronic means such as combinations of LEDs, fiber optics, light bulbs, or other illumination devices within a display area to cause one display to be replaced by another);
- "Dwell time" (the number of seconds between changes in the appearance of a changeable message sign);

- "Video displays" (an electronic changeable message sign using instantaneous transitions and giving the illusion of motion, with no meaningful dwell time between changes in the display); and

- "Sequential messaging" (dividing a single message into a series of shorter displays that must be viewed from start to finish in order for the viewer to fully understand the message).

The "prohibited signs" section of the Oregon Motorist Information Act generally prohibits (along state highways in places visible to the traveling public) the erection or maintenance of a sign that "contains, includes or is illuminated by any flashing, intermittent, revolving, rotating or moving light or moves or has any animated or moving parts," with exceptions that include "signs or portions thereof with lights that may be changed at intermittent intervals by electronic process or remote control that are not outdoor advertising signs," and those digital billboards that meet six specified criteria. *See* ORS 377.720 (3).

The best digital display element of a sign ordinance for any particular community will often reflect the degree of risk-aversion and aesthetic and policy preferences of the elected and appointed officials. Whether and how to regulate dynamic signs are discretionary choices. Those choices should be made in light of safety, aesthetics, planning, and other policy considerations.

It is relatively easy to regulate dynamic displays on signs in a content-neutral way. Cities should anticipate that courts reviewing content-neutral dynamic display regulations might take an approach that is somewhat more demanding than accepting any rational basis but is less demanding than "strict scrutiny."

In this field—like many others—conclusive scientific proof is elusive. Sign proponents argue that the evidence fails to demonstrate that driver behavior is influenced by the presence of electronic or digital signs. Nevertheless, legitimate human-factors studies of driver behavior and safety form pieces of a broader puzzle. When fit together properly, these pieces can support the conclusion that frequently changing dynamic signs may have safety implications.

A community might choose to await conclusive proof that such signs cause accidents, but it is not required to do so. A city that studies the special safety issues created by dynamic signs may conclude that dynamic signs are more likely to pose safety hazards and may regulate them

more restrictively on that basis. A city could also decide to regulate dynamic signage more or less restrictively based on whether a particular environment poses more or less of a risk to traffic safety. A heavily-traveled road with vehicles entering from driveways or at-grade streets and relatively high speeds interrupted by stop lights, may be a particularly unsafe environment for the added distraction of dynamic signs. A downtown entertainment area with no high speed traffic and pedestrians crossing only at controlled intersections could be a relatively safer area to allow dynamic signage.

C. Commercial advertising in residential areas

Communities typically seek to limit commercial signage in residential areas. The Supreme Court recognized a century ago that the municipal police power includes the ability to exclude billboards from residential areas, at least where the ban was subject to an exception for consent of those nearby property owners most affected by them. *Cusack Co. v. City of Chicago*, 242 US 526, 531 (1917). Two years later, it explained that billboards "properly may be put in a class by themselves and prohibited 'in the residence districts of a city in the interest of the safety, morality, health and decency of the community.'" *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 US 269, 274 (1919). Although those decisions predate the Supreme Court's recognition of commercial speech as a form of speech potentially protected by the First Amendment, by adopting an appropriately-worded ordinance (that does not extend the prohibition to noncommercial speech), cities may still prohibit billboards from exclusively residential areas without running afoul of the U.S. Constitution.

Soon after the Supreme Court recognized that the First Amendment can extend to commercial speech, it reviewed a case in which a township prohibited the posting of real estate "for sale" and "sold" signs, hoping to stem a tide of homeowners moving out of a newly-integrated community. *Linmark Assocs., Inc. v. Willingboro Twp.,* 431 US 85, 94 (1977). The court found that the ordinance left homeowners with unsatisfactory alternative channels for communicating their interest in selling their homes and was not necessary to assure that the community remained an integrated one. It also considered the means that the township chose to advance its legitimate end was a "highly paternalistic approach," depending on suppressing information that the township considered to be potentially harmful because it reflected poorly on the locality. *Id.* at 95-97. While the court's reasoning in *Linmark* was superseded by the Supreme Court's adoption of the four-part *Central Hudson* test for evaluating restrictions on speech, it has never questioned *Linmark's* holding that "for sale" or "sold" signs cannot be prohibited.

Some have asked whether a city that carves out real estate "for sale" signs from a prohibition to comply with *Linmark* is thereby creating either a content-based exception that violates *Reed v. Town of Gilbert,* 576 US at 163-164, or a preference for one form of commercial speech that is not equally available to noncommercial speech, in violation of *Metromedia Inc. v. City of San Diego,* 453 US 490, 514 fn 1 (1981). Cities can avoid being caught between the "rock" of *Linmark* and the "hard place" of *Reed* and *Metromedia* by doing two things. First, in place of a regulation that allows an additional "for sale" or "for rent" sign, the city should allow an additional sign on *a lot that is* for sale or rent (or includes a structure or unit that is for sale or for rent). That shifts the law's focus away from what the sign says, to what activity is taking place on the property, making it content-neutral. Second, the city should include in its sign code a "content-

substitution clause," specifically providing that, notwithstanding any other provision in the sign code, a noncommercial message of any type may be substituted for any duly permitted or allowed commercial message or any duly permitted or allowed noncommercial message. See *Get Outdoors v. Chula Vista,* 407 FSupp 2d 1174 (S D Cal 2005). Inclusion of a content-substitution clause effectively inoculates the code against a claim that it favors commercial speech over noncommercial speech in violation of *Metromedia*.

D. Temporary and portable signs

The same general principles that apply to regulations of permanent signs should apply to temporary or portable signs. Cities can choose to regulate temporary or portable signs differently than permanent signs. However, after *Reed v. Town of Gilbert,* a city should not regulate those signs that involve an event in any way that requires a city to read the date or time of the event to determine whether it complies.

The Ninth Circuit Court of Appeals recently upheld the ability of cities to prohibit motorized or non-motorized "mobile billboard advertising displays" within city limits, without violating the First Amendment. *Lone Star Sec. & Video, Inc. v. City of Los Angeles,* 827 F3d 1192, 1200 (9th Cir 2016). Companies in those cities would park trailers bearing signs in the wee hours of the morning (in parking spaces not yet occupied, usually near heavily-traveled intersections or off-ramps), and not consider themselves subject to local billboard regulations. Others bolted signs to motor vehicles but otherwise followed a similar business model. The court rejected the argument that "the word 'advertising' renders the challenged regulations content-based on their face," applied intermediate scrutiny, and found that "by removing from city streets vehicles that have no purpose other than advertising, the mobile billboard regulations are narrowly tailored to the Cities' interests in parking control and reducing traffic hazards." *Id.* at 1201. It also recognized that a flat prohibition, rather than a permit-based system, was justified because "mobile billboards are difficult to control precisely because they can be moved in and out of a jurisdiction with ease." *Id.*

Before *Reed,* communities typically regulated temporary event signs by allowing them so long as they were not posted more than a specified number of days or weeks before the event depicted on the sign and were removed within a specified number of days after the event is completed. After *Reed,* a regulation phrased that way would likely be content-based, because an enforcement officer would need to read the date of the event on the sign in order to perform the calculations.

One safer alternative after *Reed* would be to adopt a permit-based system under which the start date for the period is not based on anything that the permit-holder states on the sign, but instead is based on the date that the permit is issued. For example, a city could create a relatively simple permit system under which an applicant who seeks to put up a temporary sign could submit a postcard-sized form with his or her name and address and receive in return a sticker (with a date a specified number of days into the future) to put on the back of the sign. For example, if the city wanted to permit temporary signs for up to seven days, the date on the sticker would be seven days after the date it is issued. If the sign is not removed by the date on the city-issued sticker, it would then violate the ordinance. The constitutional significance of the procedure is

that it can be carried out without any need for the enforcement officer to read any part of the permit-holder's message.

Finally, a city that decides to simply ban residents from putting up *any* sign on their property may be acting in a content-neutral way, but such a sweeping regulation would fail the "time, place and manner" test. The U.S. Supreme Court struck down such a regulation in Ladue, Missouri, finding that it "almost completely foreclosed a venerable means of communication that is both unique and important." *City of Ladue v. Gilleo*, 512 US 43, 54 (1994).

E. Directional signage

Another popular form of signage is designed to help drivers or pedestrians reach their intended destinations, without undue delay. They range from permanent signs along major roadways indicating the distance and direction to a business, to additional on-site signs that direct customers to a drive-through entrance, to small signs posted by realtors on the route to a house that is holding an open house, to the signs used by the plaintiffs in *Reed v. Town of Gilbert* to direct parishioners to the location of their Sunday morning services.

As noted above in Section III, the Supreme Court considered duration and size restrictions on the directional signs in *Reed* to be content-based, because it held that a law that applies to particular speech because of the idea or message expressed was content-based, and the sign's directional message (described as "inviting people to attend its worship services") was treated as an "idea." *Reed,* 576 US at 163-164. Even before *Reed,* a sign code that gave preference to commercial directional signage (such as a relator's "open house" signage down the street from a house for sale) without giving at least as much protection for noncommercial directional signage, would likely violate the First Amendment. *See Nat'l Adver. Co. v. City of Orange,* 861 F2d 246, 248 (9th Cir 1988). This is a further reason to include the kind of content-substitution clause described above in Section D.

Most examples of directional signs fall on the "commercial" side of the line between commercial and noncommercial expression, and for that reason are not directly affected by *Reed.* However, in light of the Oregon Supreme Court's interpretation of the Oregon Constitution in *Outdoor Media Dimensions,* 340 Or at 296, as forbidding laws distinguishing between on-premise and off-premise advertising, cities in Oregon with directional-sign regulations are potentially vulnerable to an attack under Article 1 Section 8, even if the law only involves commercial signage.

Similar to the way that content-neutrality can be achieved with "for sale" sign provisions by revising them to apply to signs on property that is for sale, it is possible to re-write sign regulations allowing additional signage for restaurants with drive-through windows and menu boards without ever mentioning the content of the sign. In place of a regulation that exempts a "drive-in" directional sign, a city could allow an extra sign on property that includes a drive-through window if the sign is less than two square feet in area and less than three feet in height and is located within six feet of a curb cut. In place of a regulation that exempts menu boards in a drive-through restaurant lane, a city could allow an extra sign on property that includes a drive-through

window if the sign is less than 10 square feet in area, less than six feet in height, and faces the drive-through lane.

F. Historic or iconic signage

Some signs, such as the leaping-white stag neon sign in Old Town in Portland, or the Public Market Center signs above Pike Place Market in Seattle, are beloved. Sometimes citizens worry about such signs when communities are considering regulating signs more restrictively, and fear that adopting such restrictions will lead to the removal of such signs.

However, iconic signs—and other not-so-iconic signs that are already established in a particular location—can be left in place as sign regulations are strengthened, so long as nonconforming use and structure provisions remain in place and expressly apply to the sign code. As explained in section II above, such signs may lose their protection as nonconforming structures if they are expanded, or abandoned for extended periods of time. Yet the unchanging things that cause the signs to be considered iconic make the risk of expansion and abandonment less likely.

G. Variations by zoning district or location

Sign regulations can and often do vary between types of zoning districts and types of property uses. As noted above in Section C, the U.S. Supreme Court has recognized that cities have particularly broad latitude to ban billboards in exclusively residential areas. *St. Louis Poster Advertising Co*., 249 U.S. at 274. Justice Alito's concurrence in *Reed* expressly recognized that the Court's standard for content-neutrality is not violated by "[r]ules distinguishing between the placement of signs on commercial and residential property," or "[r]ules that distinguish between the placement of signs on private and public property." *Reed,* 576 US at174 (Alito, J, concurring).

Because of the relatively wide variety of potential property uses within a commercial or industrial zoning district, cities should consider differentiating within a type of zoning district based on the nature of the particular property use on the site. For example, a city's code could allow a larger monument sign within a commercial district if it is located at the entrance of an office building or research facility, without extending that right to every property within the commercial district.

Cities can also consider sign code provisions that apply in designated "areas of special character." See Daniel Mandelker, John M. Baker, and Richard Crawford, *Street Graphics and the Law,* 84 (4th ed 2015). Under this approach, a city could designate by ordinance, after notice and a hearing, a contiguous area that contains unique architectural, historic, scenic or visual features that require special regulations so that signage in that area will enhance its character. The regulations applicable only in an area of special character could be more permissive in one respect (such as allowing projecting signs over entrances to businesses) while being more restrictive in another respect (such as prohibiting fluorescent paint colors on signs in a historic colonial area).

H. A non-exhaustive list of key types of sign regulations to avoid

- Laws that do not relate to any of the objectives stated in the sign code's "purposes" section.
- Laws that specifically apply to "election" or "political" signs.
- Laws that prohibit all signs in residential areas.
- Laws that specifically apply to "indecent" signs.
- Laws that specifically refer to churches, temples, monasteries or nunneries.
- Laws that exempt "grand opening" signs from all prohibitions, including those that apply to noncommercial signage.
- Laws that allow certain types of flags (American, state, governmental) but would not include (for example) a Greenpeace or "Peace in the Gulf" flag.
- Laws that classify signs as conditional or special uses, subject to the ordinary criteria for approval of conditional or special use permits.
- Laws that authorize a city or county official to withhold a sign permit even if it satisfies all of the other criteria for its issuance.