

BILLBOARD & SIGN REGULATION:
Recent Cases and Trends

2011 TCAA Summer Conference
Chris Nichols



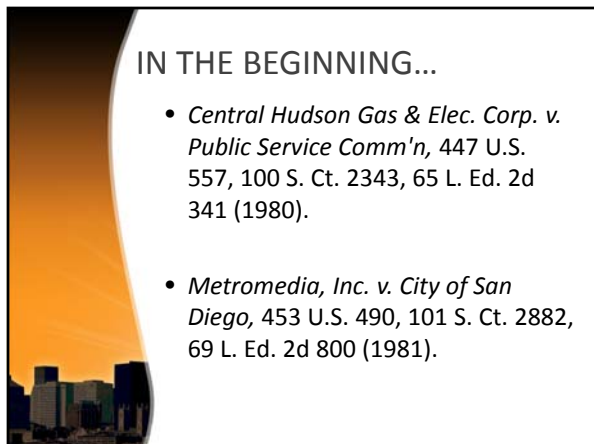
BILLBOARD & SIGN REGULATION:

- Select Texas Cases
- Pitfalls to Avoid
- Concurrent Permitting
- 2011 Legislative Session
- Digital Signage and the Scenic Community
- Exchange Programs / Ordinances



IN THE BEGINNING...

- *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).
- *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981).




Central Hudson (1980)

- State of New York banned all promotional advertising by utility companies operating in New York.
- New York State Superior Court ruled there were no violations of the 1st or 14th Amendment.
- The Supremes: four-prong analysis
 - Lawful activity; not misleading
 - Restriction implements a substantial interest
 - Restriction directly advances substantial interest
 - Restriction reaches no further than necessary

Metromedia (1981)

- Affirmed Supreme's four-prong analysis.
- Yes, you can ban billboards
- Justified by interests in safety and community appearance
- Offsite commercial advertising may be *prohibited* when onsite commercial advertising is *permitted*.
 - Greater interest in advertising goods and services at your place of business than at another offsite location.
 - **YOU MAY NEVER REGULATE CONTENT...**

In the news...

Jilted ex-boyfriend puts up abortion billboard 

Mon Jun 6, 6:22 pm ET

ALAMOGORDO, N.M. – A New Mexico man's decision to lash out with a billboard ad saying his ex-girlfriend had an abortion against his wishes has touched off a legal debate over free speech and privacy rights.

- "As distasteful and offensive as a sign may be to some, for over 200 years in this country the First Amendment protects distasteful and offensive speech..."

**Morales v. City of South Padre Island,
2010 LEXIS 55362 (S.D. Tex. 2010).**

- Ordinance regulating the display of commercial signage within the City.
- As applied: Tino's prohibited from passing out food samples to walking traffic, changing color scheme to its side of shopping center location, and no artful drawings of food in its windows.
- Plaintiff alleged fraud and negligent misrepresentation claims against SPI, Board of Adjustments and Public Works employee.

**Morales v. City of South Padre Island,
2010 LEXIS 55362 (S.D. Tex. 2010).**

- 1st Amendment violations, void the ordinance, issue declaratory judgment and in the interim issue a preliminary injunction or TRO.
- Court analyzed request for injunctive relief focusing first on the likelihood of success against the *Central Hudson* and *Metromedia* factors.
 - Legal? *Yes*
 - Substantial gov't interest (aesthetics / traffic safety)? *Yes*
 - Ordinance further gov't interest? *Yes*
 - Ordinance reach further than necessary? *No*
 - 9th Circuit precedent no good here in 5th Circuit land; no content-based argument

**State v. Cent. Expressway Sign Assocs.,
302 S.W.3d 866 (2009).**

- State petitioned to condemn land for highway construction improvements.
- Easement for billboard located on subject land.
- State Expert Witness = \$350,000 FMV
- Billboard Expert Witness = \$2,500,000 FMV
- State's expert excluded for no advertising revenue.
- No taking w/o just compensation BUT only two instances where compensation includes bus. revenue.
- Case remanded back for new trial w/o excluded testimony.

**Lamar Corp. v. City of Longview,
270 S.W.3d 609 (2008)**

- Ordinance prohibiting billboards within 1,500 ft. of public parks
- 3 non-conforming signs allowed to remain
- Good repair; maintained in safe condition.
- Alteration = permit; maintenance did not.
- Declaratory judgment claims dismissed for lack of subject matter jurisdiction (211.011)
- Takings: no compensation from valid exercise of police power; property must be valueless.

**Houston Balloons & Promotions v. City of Houston,
589 F. Supp. 2d 834 (S.D. Tex. 2008) [MSJ];
2009 U.S. Dist. LEXIS 53693 (S.D. Tex. June 24, 2009) [Trial]**

- City of Houston passed ordinance banning all *non-generic* AGDs (attention getting devices) but allowed *generic* messages or no messages at all on other AGDs
- Constitute a content-based regulation???
- Back to the *Central Hudson* and *Metromedia* factors.
 - Houston asserted substantial gov't interest in visual aesthetics and traffic safety.
 - Nothing that justified the difference between a *non-generic* versus a *generic* AGD classification.
 - Inconsistent enforcement.
 - End Result: Constitutional rights violated.
 - Houston later amended the ordinance banning all AGDs.

**Primary Media, LTD v. City of Rockwall,
2011 Tex. App. LEXIS 1933
(Tex. App. Dallas, Mar. 17, 2011).**

- Primary Media appealed an adverse summary judgment requiring the removal of a billboard they erected in 2007 in Rockwall's ETJ.
- Cross MSJs at trial court; trial court granted City MSJ w/o stating why. Primary appealed.
 - Primary attacked Ordinance based on reference to prior repealed ordinance; partial extension to ETJ.
 - Rockwall failed to prove scrivener's error.
 - End result: More than one sign ordinance with varying extensions to the ETJ.

RTM Media, LLC. v. City of Houston, 584 F.3d 220 (5th Cir. Tex. 2009).

- Bakery owner advertised on RTM-owned billboard located in the Houston's ETJ; City fined bakery owner for violation of sign code.
- RTM sued citing illegal distinction between commercial and non-commercial speech.
- No ban on billboards in the ETJ that existed pursuant to valid TxDOT permits.
- Temporary injunction initially issued; later dissolved and granted City's MSJ.
- The Fifth's: Houston's ordinance narrowly tailored to reduce commercial billboards making it constitutional.

TxDOT Permitting & Concurrent Jurisdiction

- Regulatory authority over erection/operation of off-premise signage along interstate / state highways
- Highway Beautification Act = establishes minimum standards for states or lose federal highway \$\$\$
- State permit required along with any local permits



TxDOT Permitting & Concurrent Jurisdiction

- TxDOT represents default permitting authority
- TxDOT permit excuses obtaining local permit?
- City certification to police its own interstate corridors to ensure compliance with local regulation and permitting requirements
- Old v. New TxDOT Permit Application
 - Waiver and Estoppel




Old TxDOT Permit Application

D. The City previously signed off on permits for two similar signs owned by [REDACTED].

20. The City apparently considered the foregoing when it signed off on [REDACTED]'s permit applications submitted to TxDOT to erect two signs adjacent to I-35 in 2003. (Ex. 3, RFA 1 and 2; Ex. 4, RFA 1 and 2; Ex. 9; Ex. 10; Ex. 14) Thus, the City has previously agreed that [REDACTED]. Application should be granted as a permitted use within the [REDACTED] Zone.

21. In addition, based on this prior issuance of permits to [REDACTED], the City has waived the right to now claim that the Application should not be approved and the permit should not be granted.



New TxDOT Permit Application

Form R736204.4 (Rev. 08/11)
Page 2 of 6

Part VIII - City / Municipality Verification

This part of the application MUST be completed by an authorized city official if the proposed sign location is within the boundaries of an incorporated city / municipality. The purpose of this section is to confirm the zoning of a proposed sign location and any applicable sign ordinances.

Name of City: _____

Official's Name & Title: _____

Address: _____

Phone Number: _____

Does your city / municipality have a comprehensive zoning ordinance? Yes No

What is the zoning designation of the location described in Part II, above: _____

Is the above zoning designation a commercial or industrial type zone that allows the erection of off-premise outdoor advertising structures? Yes No

Does your city / municipality have a prohibition on off-premise outdoor advertising structures? Yes No

If yes, please clarify if exceptions to the prohibition on off-premise outdoor advertising structures exists for this proposed location: _____

City Official's Signature: _____ Date: _____ Address of Property: _____

2011 Legislative Session

- H.B. 1765 / S.B. 971
- Amendment to Ch. 418 of the Loc. Gov't Code.
- Statewide electronic billboards as part of an emergency public message system.
- Emergency Management Division would create emergency information network system.
- Vendors to erect and maintain signs free of local regulation.
- 2.5% of yearly gross revenue to City.
- "Vendor" was not defined...

The "Vendor"



A New Advertising Age




Scenic Community on Digital Signs

- Safety First
- Public Choice
- Review the studies:
 - Billboard funded studies
 - Government funded reviews of studies
 - Maryland State Highway Administration
 - Federal Highway Administration

Scenic Community on Digital Signs

- Like billboards, once digital billboards or other signage is permitted and/or up, it's up.
- Ban now, allow later approach.
- Houston, Fort Worth and Austin prohibit all digital billboards.
- Other cities are conducting pilot programs to study traditional to digital billboard conversion.



In the news...

Billboard plan requires 2 down for every 1 up on busy streets

By David Burge / El Paso Times

Posted: 02/17/2010 12:00:00 AM MST

EL PASO -- After nearly two years of debate and 14 public meetings, the City Council may be nearing a decision on how to regulate billboards.

Scenic Community "Protections" for Digital Billboards / Signage

- Preserving visual aesthetics and traffic safety
 - Identify and protect scenic areas of community
 - City "gateways", parks, schools, historic areas
 - Allowed locations v. prohibited locations
 - It's just business...what's in it for the City?
 - Permitting schemes
 - Traditional billboard exchanges
 - Location moratoriums
 - Sunset provisions
 - Strong ordinances that will withstand scrutiny

Face / Square Footage "Swaps"

- Hayward, CA = 4 to 1 (Traditional to Digital)
- Cheyenne, WY = 3 to 1
- Sacramento, CA = 24 to 8 (3:1) + financials
- Gulfport, MS = 6 to 1 + square footage reqts.
- Minnetoka, MN = 15 to 6
- Tacoma, WA = 15 to 1 (5 physically existing)
- Tukwila, WA = 7 to 1
- Pinellas County, FL = 8 to 1 (15 sec. limitation)

*Scenic Community
Ordinance Recommendations*

- Get one.
- No content regulation; *time, place & manner*.
- Extend it.
- Avoid variances
- Substitution clauses
 - Non-commercial messages may be substituted for commercial messages on any *lawful* sign.
- Avoid political sign regulations.
- Enforce it.
