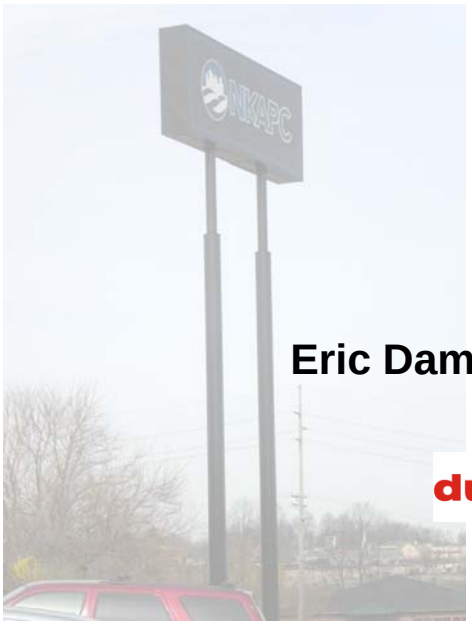
Sign Regulation in Northern Kentucky



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Introduction

This Study

Duncan Associates has been retained by the Northern Kentucky Area Planning Commission (NKAPC) to assist the commission and its staff in updating the sign ordinance provisions of the model zoning ordinance that it provides to constituent local governments. The project has six tasks:

Task 1 Constitutional Review

We will make a complete review of all of the provisions of the model sign ordinance and make specific recommendations for bringing those provisions into conformance with Constitutional law as it has recently been construed by the courts.

We will provide a legal memo identifying areas of concern and recommending specific changes to address those concerns. Where there are alternative ways to address an issue, we will identify the one that we believe is the most defensible, but we will identify other approaches that we believe may be viable for possible consideration. As a result of this work, we may, at no additional cost, recommend some interim amendments to address any major issues while the work on the rest of the project continues.

Task 2 Context Review

We will conduct a complete context review for the sign regulations, including:

a. Regional planning goals and objectives

b. Local planning goals and objectives

c. Purposes and context of zoning districts in which signs are located

d. Other policy documents that you may bring to our attention

e. Issue identification

f. Field analysis.

Items a through d will be accomplished through office review. See Task 3 for issue identification. For the field analysis, the project manager, Eric Damian Kelly, will spend one to two days touring the major commercial corridors of the county, with brief extensions into adjoining counties to identify obvious anomalies.

Task 3 Basic Stakeholder Participation

We recommend a basic stakeholder participation program to include at least the following:

a. A kickoff meeting (or meetings if it seems preferable to separate stakeholders into different groups) to allow stakeholders to identify issues that concern them;

b. A follow-up meeting to discuss preliminary findings from Task 2 and to obtain stakeholder input on the policy choices;

c. A formal presentation of Task 5 Recommendations Package, to obtain feedback before going into a public hearing process.

Task 4 Recommendations for Administration and Enforcement

On one of our early trips to the county under this contract, we will meet with individuals primarily responsible for administering and enforcing the sign provisions of the ordinance. We will review any enforcement case files that the NKAPC may provide. We will review applicable provisions of state law as they affect enforcement of a sign ordinance. Based on this work and our experience in helping other communities to implement sign ordinances, we may include new provisions to deal with signs in the right-of-way, temporary signs, signs posted on utility poles and trees without business names, and a broader array of tools for administrative and civil enforcement of the sign ordinance; other provisions are likely to evolve from our meetings with staff.

Task 5 Recommendation Package

At this stage, we will assemble a single report that highlights all of the major changes recommended as a result of the work under all of the earlier tasks. We will, at the same time, work on Task 6, but we believe that it is simpler to discuss major policy changes in a more general context than a marked-up copy of an ordinance.

Task 6 Draft Model Sign Ordinance

In this task we will prepare proposed amendments to the ordinance, incorporating all of the recommendations evolving from the prior tasks, with modifications that may arise through Task 5 or other informal reviews. We will also prepare proposed findings to support the adoption of the ordinance and will provide copies of what we believe are relevant background studies to document the governmental interest of NKAPC's constituent governments in regulating signs. We will work with staff to prepare reasonable modifications to the ordinance as it goes through the adoption process.

Duncan Associates

Duncan Associates is a consulting firm specializing in plan implementation. Its main office is in Austin, Texas, and it has additional offices in Chicago and West Palm Beach. Project manager for this project is Eric Damian Kelly, Ph.D., FAICP, who works out of a virtual office in Muncie, Indiana. Kelly is co-author, with Connie Cooper, of a Planning Advisory Service Report entitled *Everything You Always Wanted to Know about Regulating Sex Businesses* (American Planning Association, 2000). For more information, see www.duncanplan.com

This Report

This report contains the results of Task 1, Constitutional Review and Analysis, and about half of the analysis for Task 2, Context Review. This report contains some very specific recommendations to address Constitutional issues facing all local governments with sign ordinances. Recommendations to modify other provisions of the sign ordinance are very

preliminary in this draft but are used to illustrate an approach to sign regulation that is conceptually different from the one now in use in Kenton County.

This report will provide a working document for further substantive discussions with staff, stakeholders, Planning Commission members, and attorneys and professional staff for constituent local governments.

Constitutional Analysis

Introduction

This memorandum provides a legal analysis of major issues arising in current litigation over sign regulation and applies them to the current model sign regulations used by the Northern Kentucky Area Planning Commission to serve its members. The memo is organized around the major principles, rather than around the sign regulations, but it contains citations back to specific sections of the sign regulations. The memo also includes initial recommendations for addressing these issues in the new sign regulations.

This memo was prepared by Eric Damian Kelly, Ph.D., FAICP, of Duncan Associations. Dr. Kelly is not licensed to practice law in Kentucky and has provided this memorandum as a background and educational piece, for use by NKAPC, its legal advisors, and affected local government attorneys in offering advice to the planning commission and local elected officials. Dr. Kelly is General Editor of *Zoning and Land Use Controls*, a 10-volume legal treatise published by Matthew Bender; in that capacity and in his consulting work, he makes a diligent effort to follow the evolution of the law in this and related fields.

Overarching Principle – Courts will uphold properly drafted sign regulations, based on aesthetic and/or safety purposes

Even in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), in which the Supreme Court struck down San Diego's sign ordinance as unconstitutional and required five different opinions to do so, seven justices agreed that San Diego's interest in promoting traffic safety and avoiding visual clutter was sufficient to justify a complete prohibition of off-site signs. 453 U.S. at 507-08 (opinion of White, J., joined by Stewart, Marshall, and Powell, JJ.); 453 U.S. at 552 (Stevens, J. dissenting in part); 453 U.S. at 559-61 (Burger, C.J., dissenting); 453 U.S. at 570 (Rehnquist, J., dissenting). Thirteen years later, when it struck down another local sign ordinance, the Supreme Court once again affirmed in dicta the authority of local governments to regulate signs:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs--just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. However, because regulation of a medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs.

114 S. Ct. at 2041-2042 (Citations omitted).

The Supreme Court upheld a complete ban on posting private signs on public property, in a challenge brought by persons wanting to place political handbills and signs in various public

places. *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984).

Signs are typically regulated under a zoning ordinance, and regulations are thus dependent in part on the location of signs. In *Taxpayers for Vincent,* the Supreme Court thus rejected an argument that the city's ban on signs on public property was unconstitutional because it was not extended to private property; the court determined that the city could exercise its legislative discretion in deciding where signs would be allowed.

Following similar principles, the Eleventh Circuit has upheld a ban on billboards in historic districts. *Messer v. City of Douglasville,* Ga., 975 F.2d 1505 (11th Cir. 1992).

Principle 1 – Noncommercial speech must be treated at least as favorably as commercial speech

Overview of the Law

In *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), the Supreme Court struck down San Diego's sign ordinance because its ban on off-premise signs had the effect of treating commercial signs more favorably than noncommercial signs, many of which can be difficult to tie to a particular site.

The plurality in *Metromedia* provided this brief legal analysis:

> The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

453 U.S. at 513.

There were multiple opinions in the case, resulting in some confusion over its interpretation. Perhaps for that reason, it was largely ignored by local governments for nearly two decades, although we called attention to this basic principle in *Sign Regulation for Small and Midsize Communities,* a Planning Advisory Service Report published in 1989, and Daniel Mandelker has consistently noted the significance of this case in his teachings and writings.

In *Metromedia,* the plurality cited *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), for these principles to be used in evaluating the Constitutionality of sign ordinances and other restrictions on activities protected by the First Amendment:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is

> valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

453 U.S. at 507, 101 S.Ct. at 2892, 69 L.Ed.2d at 815.

The Supreme Court revisited this issue in a different context in *Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994). Here the Court held that a local government could not prohibit the display of political messages at a residence. The message in this case was a sign, erected during the first Gulf War, saying "Peace in the Gulf." Although one of the problems with the LaDue, Missouri, ordinance was that it permitted real estate signs and "identification" signs in the same places that it banned political signs, the focus of the Supreme Court in its opinion was not on the discrimination against noncommercial speech but on the value of signs as an easy and inexpensive way for residents to communicate their opinions on public issues.

During the last seven or eight years, an increasing number of challenges to local sign ordinances combined with restatements of the principles of *Metromedia* in the federal circuit courts, have led to a significant number of decisions striking down local sign ordinances under these principles.

Two courts have struck down limitations on the number of political signs to be allowed on a single property. *Arlington County Republican Comm. v. Arlington County*, 983 F.2d 587 (4th Cir. 1993) (striking down ordinance imposing two sign limit); accord, *Fehribach v. City of Troy*, 341 F. Supp. 2d 727 (E.D. Mich. 2004), also striking down a two-sign limit. *Arlington County* has been cited only twice in the Sixth Circuit, in *Feribach*, which squarely followed it, and in another Michigan case, cited in the next paragraph.

See, also, *Dimas v. City of Warren*, 939 F. Supp. 554 (E.D. Mich. 1996), holding unconstitutional a time limit on election-related signs, allowing them to be posted only 15 days before an election. For other cases striking down time limits on political signs, see *Outdoor Systems, Inc., v. City of Merriam*, 67F. Supp. 2d 1258 (D.C. Kan. 1999), and *Curry v. Prince George's County*, 33 F. Supp. 2d 447 (D. Md. 1999). Note that the fundamental Constitutional problem with imposing fixed time limits on political signs is that almost all local sign ordinances allow real estate signs to be erected for an indefinite time before the sale or lease of the premises (some ordinances, like the NKAPC model, require removal of such signs after the sale or lease is complete); because real estate signs are clearly commercial signs, allowing those signs to remain up indefinitely while limiting the duration of display of political signs relates directly to the principle requiring that noncommercial speech be treated at least as well as commercial speech.

The issue in commercial districts is somewhat different. The current NKAPC model regulations include an excellent clause for substitution of messages:

> Message Substitution: Subject to the property owner's consent, a noncommercial message of any type may be substituted in whole or in part for the message displayed on any sign for which the sign structure or mounting device is legal without consideration of message content. Such substitution of message may be made without any additional approval or permitting. The purpose of this provision is to prevent any inadvertent favoring of commercial speech over noncommercial speech, or favoring of any particular noncommercial message over any other noncommercial message. In addition, any onsite

> commercial message may be substituted, in whole or in part, for any other onsite commercial message, provided that the sign structure or mounting device is legal without consideration of message content. This provision does not create a right to increase the total amount of signage on a parcel, lot or land use; does not affect the requirement that a sign structure or mounting device be properly permitted; does not allow a change in the physical structure of a sign or its mounting device; and does not allow the substitution of an off-site commercial message in place of an on-site commercial message or a noncommercial message.

Excerpt is from §14.5.H. of the Zoning Ordinances of Fort Mitchell and Erlanger, which are based on the county model; see, also, §14.1.H., Crescent Springs and Kenton County Zoning Ordinances. Under this provision, any sign can presumably be used for a political or other noncommercial message. There has been little litigation over noncommercial signage in commercial districts, but one of the few reported cases involved an ordinance that had a similar substitution of message clause that the courts found inadequate to protect noncommercial speech. See *Beaulieu v. City of Alabaster*, 338 F. Supp. 2d 1268 (N.D. Ala. 2004), aff'd. 454 F.3d 1219 (11th Circ. Fla. 2006), holding the Alabaster sign ordinance unconstitutional as applied to an attorney who wanted to erect a political sign in front of her law office and was told by a code official that she could have a temporary real estate sign but not a political sign.[1] The difficulty that the district found with the substitution of message language was that it could be read to require, for example, that the property owner first conform with the requirements for erecting a real estate sign on commercial property and then "substitute" the message. Clearly the intent of the substitution language in that case and in the current county model is to allow the placement of a noncommercial sign rather than the real estate sign; because some other judge may read the language as narrowly as two courts in the Eleventh Circuit did, there should be an explicit provision to allow a sign for noncommercial purposes wherever a specific type of commercial sign is allowed.

A similar issue arose in state court in neighboring Ohio. In City of *Painesville Bldg. Dep't v. Dworken & Bernstein; Co., L.P.A.*, 89 Ohio St. 3d 564, 2000 Ohio 488, 733 N.E.2d 1152 (2000), where the court held that a time limit imposed on political signs in commercial as well as residential districts was unconstitutional. The court found:

> particularly as there is no evidence before us that the Painesville zoning code imposes durational limits upon any other category of signs, even those which generally pertain only to special occurrences, such as signs advertising one-time events, *e.g.*, yard sales or charitable fund-raisers. Indeed, the Painesville zoning code allows certain signs of a

[1] We were directly involved in the matter, retained by the city to prepare corrective amendments to their sign ordinance after the attorney who brought the various Granite State cases in Florida brought a broad facial challenge to the city's sign ordinance. The ordinance included the "substitution of message" clause discussed below, and accepted by the district court in upholding the Atlanta ordinance. Unfortunately the codes official did not interpret the "substitution of message" clause as intended and the judge accepted his interpretation and then held it unconstitutional.

> commercial nature to be placed in residential districts without limitation as to the period of time they may remain posted, including professional signs, "for sale, lease or rent" signs, and "development for sale" signs, without concern as to the "psychological and economic effects" they might produce. See Section 1135.02(c).

89 Ohio St. 3d at 571, 733 N.E.2d at 1158. See, also, *Savago v. Village of New Paltz*, 2002 U.S. Dist. LEXIS 15215 (N.D.N.Y. 2002).

Current Issues in NKAPC Model Ordinance

The principle difficulty with the current NKAPC Model Ordinance, as adopted in the 4 communities used as examples here (primarily Fort Mitchell, Erlanger and the Unincorporated portions of Kenton County) is that, except for the "substitution of message" clause discussed above, the ordinance is largely silent as to noncommercial signs, while making express provision for a variety of types of commercial signs. In principle, the "substitution of message" language should allow someone to "substitute" a political message for a "for sale" message on a real estate sign, but, as the district judge in Alabama pointed out to the author of this report, the logic is a little twisted. The problem is even more stark under the NKAPC model, which requires permits for real estate signs (see introductory language to §14.7 of the Fort Mitchell and Erlanger Zoning Ordinances; §14.3 of the Crescent Springs and Kenton County ordinances); thus, a property owner would presumably have to apply for a permit for a real estate sign, possibly with no intention of erecting such a sign, and then "substitute" a political message on it, either before or after erecting the real estate sign. That kind of example makes the author more sympathetic with the judge. It is far safer to make explicit provision for noncommercial messages in every circumstance.

Although several of the categories of messages that are essentially exempt from the ordinance, because they are excluded from the definition of "sign," are noncommercial (grave markers, cornerstones, official notices), several are commercial (vending machines, pay phones, manufacturer's marks, news racks). All of these are qualitatively different from other types of signs that are excluded from the definition of sign. There are clear public policy reasons for deciding not to regulate architectural details and noncommercial symbols integrated into architecture. There are practical reasons for not attempting to regulate signs on mass transit and other vehicles, or on shopping carts or golf carts through a local sign ordinance. Deciding not to regulate "cultural decorations" in residential areas is a logical public policy decision. All of those distinctions, however, are based largely on the physical characteristics and/or context of the element that might otherwise be considered a sign. The first examples given here, however, are based on content. Under the principle explained in this section, the distinctions for the noncommercial messages are probably justifiable. The protection for messages on

Figure 1 A vending machine and a grave marker are practically, aesthetically and legally quite different.

vending machines, for manufacturer's marks and for news racks is not, however, justifiable.

There is a similar problem with several of the categories of "special signs" allowed with a permit but without a fee under Section 14.7 of the Fort Mitchell and Erlanger ordinances (§14.3 of the Crescent Springs and Kenton County ordinances). Real estate signs, signs on construction projects and professional nameplates all involve commercial messages, with no offsetting type of "special sign" to be allowed without a fee for noncommercial messages.

The problem continues in Section 14.13 of the Fort Mitchell and Erlanger ordinances (14.9 of the Crescent Springs and Kenton County ordinances), which deals with the classification of signs. With slight variation among classes, each includes introductory language to the effect that such signs "shall be only business or identification signs." The definitions article includes these related definitions:

> SIGN, BUSINESS: A sign which directs attention to a business, profession, industry, to type of products sold, manufactured, or assembled, and/or to service or entertainment offered upon said premises and located upon the premises where such sign is displayed.
>
> SIGN IDENTIFICATION: A sign used to identify: the name of the individual, family, organization, or enterprise occupying the premises; the profession of the occupant; the name of the building on which the sign is displayed. Specific definitions taken from Article VII, Section 7.0, Fort Mitchell Zoning Ordinance, but are identical in other ordinances reviewed. Although the "substitution of message" language presumably also applies to these signs, a strict construction of the ordinance would suggest the need to apply for a "business" or "identification" sign and then to "substitute" a noncommercial message on such a sign. For further elaboration on these issues, see discussion under Principle 4 (A Corollary to Principles 1 through 3) – Exemptions are Problematic, beginning on page 18.

Recommendations

Most of the content-based provisions of these definitions can be eliminated. Sign regulations for major signs in commercial and industrial districts can simply allow "signs with any message except an off-site commercial message," entirely avoiding this issue. For reasons explained under "Principle 3 – Content-based distinctions among types of commercial speech are subject to increased scrutiny," beginning on page 13, the concept of an "identification sign" as distinguished from other signs with commercial messages should be eliminated.

In residential districts, we would recommend limiting the total number of signs allowed on a lot at any time to some reasonable number, such as 4 or 5 (the offending limit on

Figure 2 A combination sign in a commercial district near the NKAPC office.

political signs in *Arlington County* was 2), with a further restriction that not more than two could be permanent and not more than two could bear commercial messages; the property owner could then use some or all of the signs for noncommercial speech.

We recommend below that the county go to a single size limit on permanent and temporary signs in residential districts. We could use the two square foot limit now in the ordinance for permanent signs, which are likely to relate to addresses and home occupations; we could use the six square foot limit now imposed on real estate signs as the limit for each temporary sign.

Figure 3 The current definition of "identification sign" requires content-based interpretations. Is "ATM" part of the bank name and thus a legitimate part of "identification"? If not, does it matter?

We would also recommend limiting commercial messages in residential areas to messages related to activities lawfully conducted on the premises, including the proposed sale or lease of the premises. Note that the suggestion of allowing two temporary signs to be used for commercial messages would allow a property owner to have "for sale" and either "open house" or "garage sale" signs in the yard at the same time; although it seems unlikely that a resident would have a garage sale and an open house on the same weekend, the ordinance could allow for that eventuality by permitting as many as three of the signs to be used for limited commercial messages.

If local officials want to allow signs for home occupations, that issue can be addressed by allowing one (or more) of the permanent signs to be used for a commercial message for an activity lawfully conducted on the premises. Typically, local governments that allow for such signs allow only a wall sign to have such a message; they also typically limit the size of the wall sign to one or two square feet. Such additional regulations are consistent with the goals of significantly limiting sign clutter in residential neighborhoods while still allowing reasonable alternative avenues for noncommercial messages.

Figure 4 Limiting identification signs to business names does not necessarily eliminate sign clutter; rules on legibility and conspicuity can do that.

For reasons explained in our recommendations under Principle 3 (see page 17), we recommend eliminating the concept of "identification signs" entirely. We also recommend eliminating the concept of "business signs." Although at first reading this definition seems entirely reasonable, it is far too similar to the definition that caused the Supreme Court such concern in *Metromedia.* Under *Metromedia* and its progeny, it is entirely acceptable to ban off-site commercial messages; by doing the opposite, however, and expressly allowing on-site commercial messages, the ordinance can be read to have the effect of

discriminating against noncommercial speech – regardless of the intent. The "substitution of message" clause and the intent statement about "neutrality of message" should allay some of those concerns; those, however, are useful bandages for wounds that cannot be easily fixed. In this case, the problem can simply be eliminated while still fulfilling the county's purposes – by simply banning off-site commercial messages and allowing all other messages on signs in commercial districts.

Note that this basic approach eliminates all content-based distinctions except the two basic ones cited above as acceptable to the courts – the distinction between commercial and non-commercial messages and the distinction between on-premise and off-premise commercial messages.

Principle 2 – Content-based distinctions among types of noncommercial speech are likely to be found unconstitutional

Overview of the Law

The Supreme Court squarely faced this issue in *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988), where it struck down as unconstitutional an ordinance in Washington, D.C., which prohibited within 500 feet of a foreign embassy, any sign tending to bring the foreign government into "public odium" or "public disrepute". There it applied strict scrutiny to the ordinance, essentially reversing the presumption of validity normally accorded local laws, and found that the ordinance failed.

Figure 5 Ordinances that tie "political" signs to "elections" preclude many types of expression of personal opinions.

The Eleventh Circuit's analysis in the important flag case of *Dimmitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993), essentially rested on this ground. The ordinance banned most flags but contained an exception for "governmental" flags. Noting that the exemption would not extend to a "Greenpeace" or a "union" flag, the court held:

> The City's interests in aesthetics and traffic safety cannot justify limiting the permit exemption to government flags. The deleterious effect of graphic communication upon visual aesthetics and traffic safety, substantiated here only by meager evidence in the record, is not a compelling state interest of the sort required to justify content based regulation of noncommercial speech.

985 F.2d at 1569-70.

See, also, *Fla. Outdoor Adver., L.L.C. v. City of Boynton Beach*, 182 F. Supp. 2d 1201 S.D. Fla. 2001), and *Wilton Manors St. Sys. v. City of Wilton Manors*, 2000 U.S. Dist. LEXIS 22143 (S.D.

Fla. 2000), in both of which the court found that various exceptions for certain types of noncommercial signs contributed to the facial unconstitutionality of the ordinance.

For an unsuccessful local attempt to make a distinction among types of noncommercial speech, see *Outdoor Systems, Inc. v. City of Lenexa*, 67 F.Supp.2d 1231, 1239-40 (D.C. Kan. 1999), where the city attempted to distinguish between "political" signs and "campaign" signs and the court found the distinction unconstitutional. And for an application of similar Principles, see *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), reh'g denied, 2000 U.S. App. LEXIS 11394, *cert. denied*, 532 U.S. 903, 149 L. Ed. 2d 135, 121 S. Ct. 1225 (2001), where the court rejected as unconstitutional an effort by the State of Missouri to prohibit the Ku Klux Klan from participating in the state's "adopt a highway" program and erecting a related sign along the highway.

Note that courts in three circuits (not including the Sixth) have held that the special treatment of signs posted by civic, educational and religious organizations "is the kind of under-inclusiveness the First Amendment tolerates" *(National Advertising v. City of Denver*, 912 F.2d 405, at 409 (10th Circ. Colo. 1990); followed in *Infinity Outdoor Inc. v. City of New York*, 165 F. Supp. 2d 403 (E.D.N.Y. 2001)), provided that the provisions preferring such signs do not restrict the content of the signs. See *Infinity Outdoor Inc. v. City of New York*, 165 F. Supp. 2d 403 (E.D.N.Y. 2001), where the court upheld a preference for signs posted by civic, religious and educational institutions on their property. The court cited *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. Wis. 1999), which had upheld an ordinance with a number of exceptions that it referred to as "common sense." That decision, however, included "construction signs," which are inherently commercial signs, among those exceptions and seems to be of questionable vitality as to that point. The Eleventh Circuit cited the Denver case for a different proposition in *Southlake Prop. Assocs. v. City of Morrow*, 112 F.3d 1114 (11th Circ. 1997), a Georgia case.

Current Issues in NKAPC Model Ordinance

The earlier revisions to the model ordinance largely eliminated such problematic distinctions. The treatment of traffic control signs as "special signs" (Sect. 14.7.E. in the Fort Mitchell and Erlanger ordinances, §14.3 in the Crescent Springs and Kenton County versions) is clearly essential to public safety. The special treatment of flags without commercial messages is based on design, height and number and not on message.

The one problematic distinction is the provision for special signs for "duly authorized special events" (Sect. 14.7.F.) appears to violate this principle, as well as raising issues of undue discretion, discussed below under "Principle 6 – Review of sign applications should be based on objective standards," beginning on page 26. "Special event" is not defined either in the sign article or in Article VII of the ordinances reviewed. Given its common, ordinary meaning, as a court might do, a "special event" could include such commercial activities as grand openings or anniversary sales. Its meaning as commonly used in planning and public administration

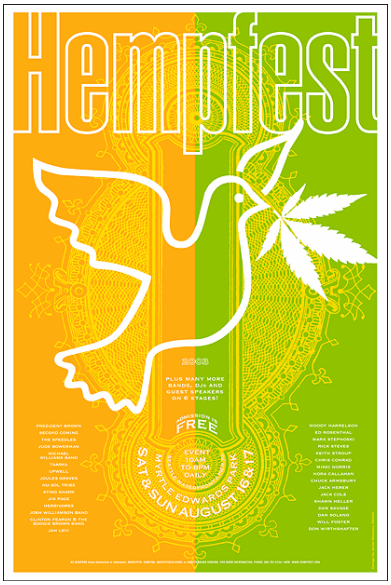

Figure 6 Allowing public officials to determine what events are "special" enough to get signs is politically and Constitutionally problematic.

would refer to such noncommercial activities as county fairs, community festivals and even service club pancake breakfasts or barbecues. This very lack of definition creates problems discussed below. But if the phrase is given its ordinary construction, even limited to noncommercial activities, it appears to state a preference for a sign that promotes the county fair over one that says "impeach the judge executive." Regardless of whether that provision would be enforced in such a way that it would bar advocacy messages, it raises serious facial issues about the validity of at least that portion of the ordinance; if the language were construed by the court to include commercial special events, the problem would be worse. Note that courts are often reluctant to sever such provisions under severability clauses, because to do so, the court would have to make a finding that the local elected officials would have adopted the ordinance even without provisions for special event signs. As the Supreme Court explained in *Metromedia* and other courts have explained in other cases cited in this report, courts are reluctant to substitute their judgment for that of local officials.

Recommendations

The new "findings" to support the ordinance should clearly explain the reasons for special treatment of traffic control signs, official notices and any other noncommercial signs that are carved out for special treatment.

The provision for special signs for "duly authorized special events" should be eliminated or substantially revised (see recommendations under Principle 6, on page 28).

Principle 3 – Content-based distinctions among types of commercial speech are subject to increased scrutiny

Overview of the Law

The Supreme Court has generally held that truthful advertising of lawful products (see the first part of the *Central Hudson* test, discussed at the beginning of this memo) is protected by the First Amendment. It has thus struck down state laws banning the advertising of liquor prices. *44 Liquormart, Inc., v. Rhode Island,* 517 U.S. 484, 508 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). Subsequently it struck down a state law limiting the advertisement of tobacco products on billboards. *Lorillard Tobacco Co. v. Reilly,* 150 L. Ed. 2d 532, 121 S. Ct. 2404 (U.S. 2001). Although the limitations as they were applied to cigarettes were found to be preempted by federal laws and regulations, as applied to "little cigars," the Court held that the ban applied to the particular product violated the First Amendment. To the same effect in the Sixth Circuit, see *Eller Media Co. v. City of Cleveland*, 326 F.3d 720, (6th Cir. Ohio 2003), striking down a ban on liquor and tobacco advertising on billboards, relying in part on Constitutional principles and in part on apparent preemption of the issue by the State of Ohio.

Consider this example from the Eleventh Circuit -- *Florida Outdoor Adver., L.L.C., v. City of Boynton Beach*, 182 F.Supp.2d 1201 (S.D. Fla. 2001). The court cited these content-based distinctions:

> The 1997 Sign Code also contains numerous exceptions to the broad rule prohibiting off premises signs by allowing: (1) temporary project development signs for large areas

> under development (up to two per development parcel with the aggregate sign area not exceeding two hundred fifty (250) square feet); (2) temporary construction signs (one (1) non-illuminated sign per construction premise) not exceeding thirty-two (32) square feet; (3) directional signs limited in number to six (6) per civic organization, church, recreational facility not exceeding one hundred forty four (144) square inches per sign for the "convenience of the traveling public," (4) special civic event, recreational or expositional signs of a temporary nature not exceeding seventy-five (75) square feet in area which are "of a general benefit to the community," "individually approved by the director of development," and subject to removal within five (5) days of the completion of the event; (6) street signs naming subdivisions subject to restrictions placed on all other city street signs; (7) temporary directional signs not exceeding three (3) square feet in area or height or six (6) in number, to "guide traffic to building models at intersections in the city rights-of-way" subject to approval by the City; (8) identification signs for large residential subdivisions, developments or neighborhood associations consisting of no more than two (2) faces and not exceeding sixteen (16) square feet per face, so long as "traffic visibility is unobstructed and the location is approved [by the City]"; (9) temporary political signs during the "sixty (60) day period preceding any local, state, or national election, with the consent of the property owner"; (10) bus-shelter signs pursuant to action by the City Commission in conformity with Fla. Stat. 337.407(2); and (11) temporary banners on private commercial or industrially zoned property within the city.

182 F. Supp.2d 1201, 1206-07, [many internal notes, referring to ordinance, omitted].

And see *Outdoor Systems, Inc., v. City of Atlanta,* 885 F. Supp. 1572 (N.D.Ga. 1995), in which the court upheld the city's basic sign ordinance but struck down a separately enacted ordinance that provide broad exemptions for signs bearing the Olympic logo and erected within a specified geographic area.[2]

An anomaly in this area of the law relates to real estate signs. The Supreme Court has arguably mandated special treatment for commercial real estate signs in residential areas in *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977), where it held that a local government may not prohibit the use of temporary real estate signs in residential areas because such a prohibition unduly restricts the flow of information. The case was cited as precedent for carving out certain required exceptions in *Granite State Outdoor Adver., Inc. v. City of Clearwater,* 213 F. Supp. 2d 1312, 1327, n. 24 (M.D. Fla. 2002), reversed

[2] As a historical footnote, I report the following, which is not set out in the case. We drafted the Atlanta sign ordinance, with funding from the Atlanta Committee for the Olympic Games, but essentially working for the city. Late in the process, the Committee asked that we add the exemption to the draft ordinance. The Committee had the licensing rights for the Olympic logo for the Atlanta games and intended to use the licensing of signs with the logo as an additional revenue-generating measure. I refused to include that language, opining that it would be unconstitutional. The Committee then had another attorney draft a separate ordinance addressing this issue, and the City Council adopted both ordinances; the district court upheld the ordinance that we prepared and struck down the ordinance providing special treatment for signs with the Olympic logo.

in part on other grounds, 351 F.3d 1112 (11th Circ. 2003). Note that the district court in *Clearwater* also suggested that drafting a Constitutional ordinance regulating real estate signs may be impossible:

> This almost-conclusory mandate that an ordinance with a category or exception for a sign based on its content automatically makes the ordinance unconstitutional per se is the proverbial "catch-22" confronting many cities and municipalities when they attempt to regulate signs in their communities. See Metromedia, 453 U.S. at 560 (Burger, J. dissenting,) ("having acknowledged the legitimacy of local government authority, the plurality largely ignores it"). Granite State's argument clearly demonstrates this "catch-22": (1) it is permissible for the government to regulate, or prohibit, signs to further legitimate governmental interests (Metromedia); (2) any sign prohibition must provide an exception for "For Sale" signs (Linmark); (3) exceptions or regulations of signs requiring a reading of their message are content-based (Nat'l Advertising Co. v. Town of Niagara, 942 F.2d 145 (2nd Cir. 1991); (4) content-based sign regulations are generally unconstitutional when subject to strict scrutiny review (Burson v. Freeman, 504 U.S. 191, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992)); and (5) since an exemption allowing "For Sale" signs necessarily requires one to read the words "for sale" on the sign, it is impossible to draft a sign ordinance that is constitutional.

213 F. Supp. 2d at 1328 (note 25 omitted).

The court appears to have overstated the problem. We believe that it is possible to provide special treatment for real estate signs in residential areas on two different theories:

> Because the courts have accepted distinctions between commercial messages and noncommercial messages, limitations on commercial messages generally, and distinctions between on-site and off-site commercial messages, a local ordinance can ban off-premise commercial messages in residential districts while allowing on-premise commercial messages in those districts; on-premise messages can then be defined to cover any commercial activity lawfully conducted on the property, including sale or lease of the property, lawful home occupations, and occasional sales such as yard sales.
>
> Alternatively, there is a good argument (to which the district court in the *Clearwater* case appeared to allude in material quoted above), that *Linmark* creates a compelling interest for a local government to carve out special treatment for real estate signs in residential areas, even as it bans most other commercial signs in such areas; a "compelling interest" is all that is required to support content-based distinctions.

No court has fully reconciled either of these theories with the contemporary state of sign law, however, and the opinion of the federal court in *Clearwater* is thus noted for consideration.

Current Issues in NKAPC Model Ordinance

The NKAPC Model Ordinance has few problems in this area. One has been clearly identified above, because it also affects noncommercial messages. With slight variation among classes, each class of signs addressed under Section 14.13 of the Fort Mitchell and Erlanger ordinances (§14.9 in the Crescent Springs and Kenton County versions) includes introductory language to

the effect that such signs "shall be only business or identification signs." The definitions article includes these related definitions:

> SIGN, BUSINESS: A sign which directs attention to a business, profession, industry, to type of products sold, manufactured, or assembled, and/or to service or entertainment offered upon said premises and located upon the premises where such sign is displayed.
>
> SIGN IDENTIFICATION: A sign used to identify: the name of the individual, family, organization, or enterprise occupying the premises; the profession of the occupant; the name of the building on which the sign is displayed.

Specific definitions taken from Article VII, Section 7.0, Fort Mitchell Zoning Ordinance; appear to be identical in all ordinances The concept of an "identification sign" was once used in sign ordinances to allow businesses to have some signs on which they could identify their businesses but on which they could not name products or prices. The logic behind such limitations was always problematic, because some businesses identify products in their names ("Joe's Hamburgers" or "Papa John's Pizza"). This distinction serves no purpose in the current NKAPC model ordinance. It should be eliminated as unnecessary and Constitutionally suspect.

Figure 7 The new ordinance must make it clear that any or all of a permitted sign may be used for noncommercial messages; it may not happen, but it must be permitted.

As noted in the discussion above, there is case support for giving special treatment to real estate signs in residential neighborhoods. That should be reinforced with appropriate findings (see discussion at page 32).

For real estate signs in nonresidential districts, however, there is no comparable law. Yet the current NKAPC Model Ordinance allows, in nonresidential districts, the placement of a 20 square foot temporary sign advertising the lease or sale of a property for an indefinite period of time; with the exception of the provision for signs on construction sites, there is no other provision for temporary signs in nonresidential districts. Thus, a shopping center with eight or 10 bays may be able to have a "temporary" "for lease" sign out at all times, because of the turn-over of tenants, while the owner of a shoe shop next door can never have an "anniversary sale" or other temporary sign advertising his business. While such distinctions are not the stuff of which great legal precedents are made, it is the kind of content-based distinction that has troubled the courts.

At the risk of belaboring an issue, the preference for signs on construction sites comes close to this category. As presently drafted, the provision for special signs on these sites is not content-based:

> Signs on construction projects: On parcels where construction projects are underway, temporary signs may be displayed, subject to: Size: not over twenty (20) square feet in outside area; single or double faced; maximum height: eight (8) feet; display time: beginning with the issuance of the last permit necessary before the construction may begin, and ending not more than ten calendar days after notice of completion, notice of acceptance, or the functional equivalent of either.

Section 14.7.D. of the Fort Mitchell and Erlanger Zoning Ordinances (§14.3.D. for Crescent Springs and Kenton County). Because it does not limit the content of the sign, the provision would be subject only to rational basis review. Its purpose should, nonetheless, be made clear.

Recommendations

The revised ordinance must include findings explaining the special treatment of real estate signs in residential districts.

In commercial districts, there are several possible approaches to the issue of real estate signs:

- Specify that a sign on a property advertising that property for sale, lease or rent is not an off-site message and thus is allowed on any commercial sign allowed in the districts (there is a persuasive case to be made that this should be the only way that owners of large shopping center, apartment complexes or office buildings should be allowed to advertise vacancies, but that is a public-policy issue for local elected officials); and
- Allow the use of temporary banners to cover allowed permanent signage with a temporary “for sale” or “for lease” message (this approach makes particular sense where one bay of a shopping center is available); and/or
- Allow one temporary sign per property, per street frontage or per permitted use in nonresidential districts; or
- Continue the present regulatory scheme but provide detailed findings explaining the reasons for the special treatment of real estate signs in commercial districts.

Construction signs have essentially been allowed under special interest legislation to serve a particular industry. The solution to this issue seems relatively simple:

- Make no provision for such signs on individual sites in residential districts, but construe permitted “real estate” signs broadly, so that the sign may say “A New Drees Home for sale through ReMax;”
- Add a category of commercial signs for new residential developments, with time limits tied to the issuance of permits, and allow such signs “as accessory signs to the permitted temporary commercial activity of land development”; again, provisions for such signs should be supported by findings;

- For commercial sites, allow one or more temporary detached signs that can be any size up to the size of the permanent sign allowed on the site and that can bear any lawful message except an off-site commercial message. If a property owner wants to list contractors, architects, bankers and material suppliers rather than to advertise its new business, that falls within the permissible scope of commercial messages that are not off-site;
- Address the need for "construction entry" and temporary address signs by including broader provisions for small signs with noncommercial messages in all zoning districts (see the next chapter of this report).

Principle 4 (A Corollary to Principles 1 through 3) – Exemptions are Problematic

In one of the first decisions that mark the modern era of sign jurisprudence, the federal court for the Northern District of Ohio struck down as unconstitutional the North Olmsted sign ordinance, in large part because it contained a number of content based restrictions. As the court there said:

> Further, the City's exemptions for favored speakers undercuts its rationales of safety and aesthetics. Official public notices, despite their number, size, or aesthetic beauty are exempt, as are the flags, emblems, and insignia of all governmental bodies. Ord.§§ 1163.03. Holiday decorations, despite their size, aesthetic sensibility, and use of flashing or moving parts, are exempt ``for customary periods of time." Ord.§§ 1163.23(e). Signs in connection with a charity drive and those political signs advocating election of a candidate or passage or disapproval of an issue are exempt from theordinance, while others are not. Ord. §§ 1163.27.

North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F. Supp. 2d 755, 768-69 (N.D. Ohio 2000). The court continued, later in the opinion:

> An exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side an advantage in expressing its views and may diminish the credibility of the government's rationale for restricting speech in the first place. See City of Ladue, 512 U.S. 43, 51-53, 129 L. Ed. 2d 36, 114 S. Ct. 2038. As the Magistrate Judge correctly determined, a content-based exemption from a ban is no less a content-based distinction because it is phrased as exempting certain speech from a ban rather than as imposing the restriction only on the burdened class of speech. See City of Ladue, 512 U.S. 43, 48-53, 129 L. Ed. 2d 36, 114 S. Ct. 2038; Discovery Network, 507 U.S. at 429. Content-based restrictions of fully protected speech receive strict scrutiny.

86 F.Supp.2d at 773. The regulation of pole signs in North Olmsted consisted of a ban subject to a number of exemptions. The court described the exemptions this way:

> The ordinance exempts a number of signs from the pole sign prohibition. All official public notices, and the flag, emblem, or insignia of all governmental bodies are exempted from the ordinance. Ord. §§ 1163.02. Temporary displays or signs in connection with a charity drive or to advocate the election of a candidate or the passage or disapproval of an issue are exempted for explicit time periods. Ord. §§ 1163.27.

86 F. Supp. 2d at 774. The court noted the most substantial concern with exemptions:

> An exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side an advantage in expressing its views and may diminish the credibility of the government's rationale for restricting speech in the first place.

86 F.Supp.2d at 773.

The most significant of the recent cases dealing with the issue of exemptions is *Solantic v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. Fla. 2005). There, after listing a number of exemptions in the sign ordinance, the court provided this discussion:

> [T]he sign code recites only the general purposes of aesthetics and traffic safety, offering no reason for applying its requirements to some types of signs but not others. As to traffic safety, the ordinance states that motorists' safety ``is affected by the number, size, location, lighting and movement of signs that divert the attention of drivers." § 27-574(2). The sign code therefore permits signs that are ``designed, constructed, installed and maintained in a manner which does not endanger public safety or unduly distract motorists." § 27-575(2). The code does not, however, explain how these factors affect motorists' safety, or why a moving or illuminated sign of the permissible variety -- for example, a sign depicting a religious figure in flashing lights, which would be permissible under § 27-580(17)'s exemption for ``religious displays" -- would be any less distracting or hazardous to motorists than a moving or illuminated sign of the impermissible variety -- for example, one depicting the President in flashing lights, which falls within no exemption and is therefore categorically barred by § 27-581(5)'s prohibition on signs containing ``lights or illuminations that flash." Likewise, a homeowner could not erect a yard sign emitting an audio message saying, ``Support Our Troops," since § 27-581(9) generally bans signs that ``emit any sound that is intended to attract attention," but the government would be free to erect an equally distracting -- and presumably unsafe -- sign emitting the audio message, ``Support Your City Council," since governmental signs are completely exempt from regulation under § 27-580(4).
>
> Regarding aesthetics, the sign code states that ``uncontrolled and unlimited signs may degrade the aesthetic attractiveness of the natural and manmade attributes of the community." § 27-574(5). This provision similarly fails to explain how the sign code's content-based differentiation among categories of signs furthers the City's asserted aesthetic interests. For example, we are unpersuaded that a flag bearing an individual's logo (which is not exempt from regulation), is any less aesthetically pleasing than, say, a flag bearing the logo of a fraternal organization (which is exempt from regulation under § 27-580(3)). Nor is it clear to us that a government-authorized sign reading, ``Support Your City Council" in flashing lights (which is exempt from regulation under § 27-580(4)), or a religious sign reading, ``Support Your Church" (which is exempt under § 27-580(17)), degrades the City's aesthetic attractiveness any less than a yard sign reading, ``Support Our Troops" in flashing lights.
>
> Although the sign code's regulations may generally promote aesthetics and traffic safety, the City has simply failed to demonstrate how these interests are served by the distinction it has drawn in the treatment of exempt and nonexempt categories of signs. Simply put,

> the sign code's exemptions are not narrowly tailored to accomplish either the City's traffic safety or aesthetic goals.
>
> * * *
>
> The City has provided no justification, other than its general interests in aesthetics and traffic safety -- which are offered only at the highest order of abstraction and applied inconsistently -- for exempting certain types of signs but not others. We do not foreclose the possibility that traffic safety may in some circumstances constitute a compelling government interest, but Neptune Beach has not even begun to demonstrate that it rises to that level in this case. Accordingly, we are constrained to conclude that Neptune Beach's sign code is not justified by a compelling government purpose.
>
> Because its enumerated exemptions create a content-based scheme of speech regulation that is not narrowly tailored to serve a compelling government purpose, Neptune Beach's sign code necessarily fails to survive strict scrutiny. Moreover, these exemptions are not severable from the remainder of the ordinance; we are therefore required to find the sign code unconstitutional.

450 F.3d at 1267-69. And see *Outdoor Systems, Inc., v. City of Atlanta,* 885 F. Supp. 1572 (N.D.Ga. 1995), in which the court upheld the city's basic sign ordinance but struck down a separately enacted ordinance that provided broad exemptions for signs bearing the Olympic logo and erected within a specified geographic area.[3]

Current Issues in NKAPC Model Ordinance

The NKAPC Model Ordinance has two groupings of signs that fall into this category. Under the definition of "sign," 19 different types of signs are excluded from the definition and thus made exempt from the effect of the ordinance:

1. Architectural features. Decorative or ornamental elements of buildings, not including letters, trademarks or moving parts which have a communicative function;
2. Cornerstones and foundation stones;
3. Cultural decorations. Displays of noncommercial nature, mounted on private residential property, which pertain to cultural observances;

[3] As a historical footnote, I report the following, which is not set out in the case. We drafted the Atlanta sign ordinance, with funding from the Atlanta Committee for the Olympic Games, but essentially working for the city. Late in the process, the Committee asked that we add the exemption to the draft ordinance. The Committee had the licensing rights for the Olympic logo for the Atlanta games and intended to use the licensing of signs with the logo as an additional revenue-generating measure. I refused to include that language, opining that it would be unconstitutional. The Committee then had another attorney draft a separate ordinance addressing this issue, and the City Council adopted both ordinances; the district court upheld the ordinance that we prepared and struck down the ordinance providing special treatment for signs with the Olympic logo.

4. Fireworks;
5. Grave markers, insignia on tombs, crypts, mausoleums and other insignia of the deceased, which such are part of a burial, interment, mausoleum or memorial site which is otherwise legal;
6. Hot air balloons. Inflated balloons which carry persons and do not display general advertising images;
7. Interior signs. Signs and graphic images which are not visible from the public right of way;
8. Manufacturers marks. Marks on tangible products, such as trademarks and logos, which identify the maker, seller, provider or product, and which customarily remain attached to the product or its packaging even after sale;
9. Mass transit. Graphic images trains, buses or other mass transit vehicles which legally pass through the city;
10. News racks. Any self-service or coin-operated box, container, storage unit, fixture or other dispenser placed, installed or maintained for display and sale or other distribution of one or more newspapers, periodicals or other publications;
11. Noncommercial symbols integrated into architecture. Symbols of noncommercial organizations or concepts including, but not limited to, religious or political symbols, when such are permanently integrated into the structure of a permanent building which is otherwise legal;
12. Official notices. Any public or legal notice required or authorized by law, a court order or public agency;
13. Personal appearance. Items or devices of personal apparel, decoration or appearance, including apparel, tattoos, makeup, masks and costumes, but not including hand-held commercial signs or commercial mascots;
14. (reserved);
15. Vehicle and vessel signs. On vehicles and water craft: license plates, license plate frames, registration insignia, noncommercial messages, messages relating to the business or service of which the vehicle or vessel is an instrument or tool (not including general advertising) and messages relating to the proposed sale, lease or exchange of the vehicle or vessel;
16. Vending machines and public phone facilities;
17. Shopping carts, go carts, golf carts, and similar devices;
18. Floor mats, door mats, and similar devices;
19. Graphic images which are visible only from aircraft flying above;
20. Historical plaques and memorials.

Section 14.11.B. of the Fort Mitchell and Erlanger Zoning Ordinances (§14.6.B. in Crescent Springs and Kenton County versions).

Note that there are essentially five categories of items listed here:

a. Items that are clearly signs, distinguished by their messages (official notices, historical plaques, manufacturer's marks; cornerstones arguably fall in this category);

b. Items that might or might not be considered signs, on which the definition provides appropriate guidance (architectural features, noncommercial symbols integrated into architecture, personal appearance, cultural decorations, fireworks, grave markers);

c. Items that are almost undoubtedly signs but that, because of their portable nature, would be impractical to regulate under a zoning ordinance (vehicle and vessel signs, signs on mass transit vehicles, shopping carts and so on, floor mats and door mats);

d. Two categories of sign that cannot be seen from the street, sidewalk or most adjoining property and that thus need not be regulated to accomplish the public purposes that underlie most sign ordinances (interior signs and signs that are only visible from aircraft);

e. Two categories of signs for which the purpose of the exemption is unclear (the graphics on vending machines can be as large as some permitted signs; many tethered hot air balloons used for promotions have no commercial message whatsoever but are simply used as attention-attracting devices.

Note that the categories grouped in the our item a and item e above raise exactly the same kinds of concerns that the courts in *Solantic* and other cases have found objectionable, because they are not subject to the general prohibitions of the ordinance on flashing signs, animation, distracting lights, and confusing signs or even to the height and size limits. In theory, under the current ordinance someone could erect a historical plaque that is 50 feet tall and that flashes – just as an example.

Separately, Section 14.7 of the Fort Mitchell and Erlanger ordinances (§14.3 in Crescent Springs and Kenton County versions) creates a class of "special signs" that are allowed in addition to all other permitted signs on a property (although the ordinance does not expressly say that) and that do not require payment of a fee. Almost all of these raise issues that have led to their discussion elsewhere in this report, but it is important to set them out so that local officials can compare these and the exemptions above to the lists of exemptions that have caused courts in a number of federal circuits, including the Sixth, to strike down local ordinances as unconstitutional:

> A. Real Estate Signs: One (1) real estate sign per street frontage adjoining the lot or parcel for sale, lease, or rent. A real estate sign shall not exceed six (6) square feet in outside area in a residential zone and shall not exceed twenty (20) square feet in a commercial or industrial zone; single or double faced; maximum height of four (4) feet in a residential zone and eight (8) feet in a commercial or industrial zone, when the sign advertises the sale, rental, or lease of premises on which said sign is located; minimum setback of twenty-five (25) feet when not attached flat against a building. Said signs shall be removed by owners or agent within ten calendar days after the sale, rental, or lease of the premises.

B. Professional nameplates, not exceeding one (1) square foot in outside area, single or double faced. Shall not be animated nor illuminated.

C. Bulletin boards: Size limit: not over twelve (12) square feet in outside area; single or double faced, maximum setback of fifteen (15) feet, maximum height of six (6) feet, for public, charitable, religious institutions or any other non-commercial, non-residential land use, when the same is located on the premises of said institution. Such signs shall not animated, and may be illuminated only by concealed lighting, and only until 10:00 PM.

D. Signs on construction projects: On parcels where construction projects are underway, temporary signs may be displayed, subject to: Size: not over twenty (20) square feet in outside area; single or double faced; maximum height: eight (8) feet; display time: beginning with the issuance of the last permit necessary before the construction may begin, and ending not more than ten calendar days after notice of completion, notice of acceptance, or the functional equivalent of either.

E. Traffic signs, provided that said signs are designed and located in accordance with the "Manual on Uniform Traffic Control Devices for Streets and Highways", U.S. Department of Transportation, Federal Highway Administration.

F. Temporary Signs for Special Events: When a special event is duly authorized, and signs are to be part of the event or the publicity for it, then such signs must be hand held or, if mounted, must be setback at least 20 feet from any right of way line, and may be displayed not more than 30 days prior to the event and not more than 3 calendar days after the close of the event. Ground mounted temporary signs shall be mounted not more than six (6) feet above level, and shall not be illuminated. During the event, a sign not larger than thirty-two (32) square feet may be erected on the same premises as the event. The sign must be set back a minimum distance of twenty (20) feet from any right-of-way or property line. The sign may be illuminated, but only by concealed lighting.

G. Flags or buntings: In residential districts, flags may not display commercial images. When flags are mounted on poles, the maximum pole height is determined by the maximum structure height for that district. Maximum number of flag poles: on residential properties, one; on non-residential properties: two.

H. Repainting or cleaning of an advertising structure, or the changing of the advertising copy or message thereon, unless a structural change is made.

The special signs do not raise such serious issues, because they are subject to the general prohibitions set out in Section 14.6 of the Fort Mitchell and Erlanger ordinances (§14.2 in Crescent Springs and Fort Mitchell), and each of these sign types is subject to some sort of dimensional or other design standard.

Recommendations

Signs that do not distract drivers or pedestrians and that do not clutter the built environment (like interior signs and signs aimed at aircraft) can remain exempt from regulation.

Note that many signs inside stores are "visible" from the public right-of-way; the reader is invited to observe convenience stores on the drive home or to work after reading this report. In many ordinances, we base the distinction on whether a sign is "legible" from the public right-of-way (or from other private property); we can base the definition of "legibility" on the ability of a person who can obtain a Kentucky driver's license to read the sign from such a location. This is not a Constitutionally required change, but it relates to other issues in this section and is worth considering.

> We typically use the following definition for legibility:
>
> *Legible*. means that a message can be comprehended by a person with eyesight adequate to obtain a current Kentucky driver's license standing in the public way or other location from which legibility is to be determined. Where such facts are material, it shall be presumed that the observation takes place in daylight hours, and that the person making the observation is standing and is between 5 feet 2 inches and 6 feet tall.

The provisions of the definition of "sign" that clarify that certain sign-like items are not considered signs should be moved to "applicability" and out of the definitions, but the substance can be retained.

Signs that are not regulated because it is impractical or because they are regulated by other bodies (the vehicle signs and so on) should also be addressed in the applicability section.

Exemptions for signs or sign-like devices that may distract drivers or clutter the community should be eliminated.

Some of the exempt categories can be moved to a revised version of the "special signs" section, making them subject to the general prohibitions of the ordinance.

There should be a new category of "special signs" allowed in all zoning districts – small, incidental signs that contain no commercial message. As discussed in the next chapter of this report, the current ordinance makes provision for on-site traffic control signs but not for "no dumping," "restrooms" and similar signs useful on many sites. The size and height of such signs (if detached) can vary by zoning district but should remain small.

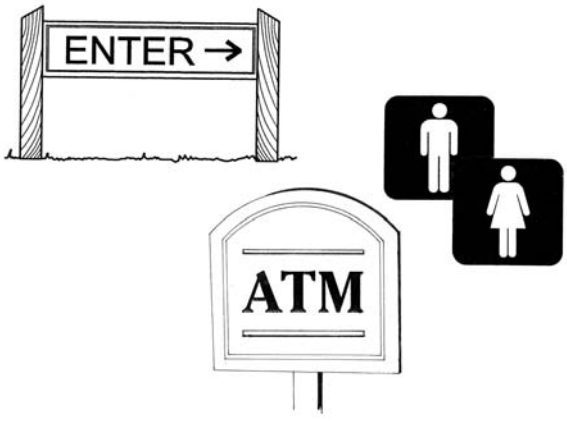

Figure 8 These signs are small and provide useful information, but they contain no commercial message.

Special treatment of official notices should be allowed only to the extent necessary to conform with a valid state or federal law or a valid court order; many official notices can be accommodated through new provisions for small, incidental signs.

It may be useful to move "flags" to its own section, with slightly expanded standards on pole height and flag sizes.

Principle 5 – Conversely, related principles allow certain content-based distinctions

Overview of the Law

A principle that evolves from the analyses in several of the cases cited above is that local governments may generally treat noncommercial speech more favorably than commercial speech. See cases cited above.

In addition, the on-site/off-site distinction was accepted by a plurality of the Supreme Court in *Metromedia* and has continued to be accepted by other courts where the ordinance contains adequate provisions to ensure that on-site advertising is not treated more favorably than noncommercial messages. See, for example, *Southlake Property Assocs, Ltd. v. City of Morrow*, 112 F.3d 1114 (11th Cir. 1997), *cert. denied*, 525 U.S. 820, 142 L. Ed. 2d 47, 119 S. Ct. 60 (1998).

Current Issues in the NKAPC Model Ordinance

The two distinctions that provide the basic framework for the current model ordinance are entirely defensible:

- On-site versus off-site
- Commercial messages versus noncommercial ones.

Recommendations

The County can clearly maintain the ban on new off-site signs and billboards; see discussion elsewhere regarding agricultural signs.

The prohibition of "commercial messages" on certain signs, particularly in residential areas, will remain an important element of the revised ordinance.

Thus, the essential regulatory structure of the ordinance can be retained. Most of the problems with the model involve incomplete or awkward implementation of the concept, not flaws in the basic concept.

Principle 6 – Review of sign applications should be based on objective standards

Overview of the Law

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 759, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988)., was a challenge to a permitting system for news racks on the public sidewalks. Under the permitting system, there was a $10 application fee and the mayor then had essentially unfettered discretion to issue, or not to issue, the license and to impose additional conditions on any such license. In its discussion of the issues, the plurality opinion stated this basic principle:

> At the root of [a cited] long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute lacing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.[4]

108 S.Ct. at 2144.

The Court held:

> We hold those portions of the Lakewood ordinance giving the mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems "necessary and reasonable," to be unconstitutional.[5]

The Sixth Circuit has applied these principles in striking down a permitting system for those wanting to protest or otherwise convey messages at the Ohio State Capitol, finding that the system gave state police "unfettered discretion" to grant or deny such permits. *Parks v. Finan*, 385 F.3d 694 (6th Cir. Ohio 2004). But the Sixth Circuit has held that typical height and size limits imposed on signs are the types of objective standards required for sign ordinances. *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814 (6th Cir. Tenn. 2005). On this issue, the court said in part:

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[4] 108 S.Ct. at 2144.

The 11th Circuit has applied the time-limit principle established in FW/PBS to ordinances establishing a permitting system for "events" held in public parks and a separate ordinance dealing with permits for use of sound systems; neither ordinance had time limits or clear standards and both were struck down in a challenge brought by an advocacy group for the legalization of marijuana. Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761 (11th Cir. Fla. 2000).

[5] 108 S. Ct. at 2152, opinion written by Brennan, joined by Marshall, Blackmun and Scalia. In a dissenting opinion written by White, and joined by Stevens and O'Connor, they dissented on the theory that dispensing newspapers was not subject to First Amendment protection, because it was an activity of vending, similar to that of vending sodas. Rehnquist and Kennedy did not participate. This principle was applied in a different context in Hopper v. City of Pasco, 241 F.3d 1067 (9th Cir. 2001), where the court found that a city's requirement that art exhibited in a space in a public building be "non-controversial" was an unconstitutional suppression of speech.

> The size and height restrictions of the Brentwood ordinance steer clear of several of the obstacles that have claimed other regulators of speech. The restrictions have no censorial purpose, as they are both viewpoint- and content-neutral and regulate only the non-expressive components of billboards. Cf. Taxpayers for Vincent, 466 U.S. at 804 ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."). The regulations advance legitimate governmental interests--aesthetics and traffic safety. See id. at 806 ("Municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression."); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981) (plurality) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further--traffic safety and the appearance of the city--are substantial governmental goals. It is far too late to contend otherwise.") (footnote omitted); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109, 93 L. Ed. 533, 69 S. Ct. 463 (1949) ("We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City.").

398 F.3d at 819.

Current Issues in the NKAPC Model Ordinance

Most of the NKAPC Model Ordinance contains detailed standards. One provision that does not is the portion of Section 14.7 of the Erlanger and Fort Mitchell ordinances (§14.3 in the Crescent Springs and Kenton County versions) that provides for special signs for “duly authorized special events.” Although the provision contains standards for signs, it does not define “special event,” and the “duly authorized” language suggests that some individual or body will exercise discretion in “authorizing” such events. This provision is facially unconstitutional and may not be severable, for reasons explained on page 32.

For other signs that may be subject to some form of discretionary review, a policy statement in Section 14.5 of the Fort Mitchell ordinance limits the scope of that review:

> Discretionary Review: When one or more signs are part of a project or development, or a variance, conditional use permit, exception or special use permit is sought for sign(s), which requires discretionary review, then the sign shall be reviewed without regard to the graphic design or visual image on the display face of the sign, and discretion shall be restricted to structural, location and other non-communicative aspects of the sign. This provision does not override the billboard policy.

Sect. 14.5.D. of the Erlanger and Fort Mitchell Zoning Ordinances, §14.1.D. of Crescent Springs and Kenton County Zoning Ordinances. That language on its face addresses the major Constitutional concerns. However, any discretionary review involving a sign results in a risk of the imposition of conditions or denial of the review as a form of censorship. Even under this language, it would be possible for a review body to deny approval of the design of a sign because it did not like the sign or the entity that would use the sign. It is far preferable to limit significantly the cases in which there is any form of discretionary review.

The language in paragraph N of that section provides a basis for a more conservative approach:

> Mixed Use Zones or Overlay Districts: In any zone where both residential and non residential uses are allowed, the sign-related rights and responsibilities applicable to any particular parcel or land use shall be determined as follows: residential uses shall be treated as if they were located in a zone where a use of that type would be allowed as a matter of right, and nonresidential uses shall be treated as if they were located in a zone where that particular use would be allowed, either as a matter of right or subject to a conditional use permit or similar discretionary process.

Section 14.5.N,, Erlanger and Fort Mitchell Zoning Ordinances, §14.1.N. in Crescent Springs and Kenton County Zoning Ordinances That provides clear and objective standards for unusual situations that may arise. As suggested below, that concept can be extended to conditional uses, by allowing a conditional use in a zone to have the same signage as other uses in the zone or the same signage that the use would be allowed in the most restrictive zone, in which it is allowed by right.

Figure 9 With proper findings, it is possible to justify special review procedures for signs in historic districts.

Recommendations

The provision for special event signs must be eliminated or substantially modified. If there are particular types of events for which officials may want to allow signage – such as the county fair – those can be defined by type of event (open to the public), sponsorship (governmental or non-profit organization), minimum average attendance in previous three (five?) years and so on. There is case law in jurisdictions upholding special treatment of such signs based on the speaker (community organizations), but not on the message (see discussion beginning on page 11). Because special event signs under the current model ordinance are allowed only on the premises where the event is offered, however, it may be possible to provide for these signs as temporary signs that are allowed in the zoning district.

The concept set forth in Section 14.5.N. above, refers to other sections of the ordinance to establish standards for signs for uses allowed in districts, characterized in part by other types of

uses. This section could be expanded to provide standards by reference for commercial uses in residential zones (funeral homes and day care centers sometimes fall in this category). Alternatively, the ordinance can include specific standards for signs for such uses, just as it now includes specific standards for signs for institutional uses in residential districts.

Covington and perhaps some of the other municipalities, have historic districts. It is possible to craft language allowing somewhat more discretion on the review of design of signs in historic districts. Note that the court in *Outdoor Systems, Inc., v. City of Atlanta*, 885 F. Supp. 1572, at 1579 (N.D.Ga. 1995), upheld limited design review with somewhat general standards in historic districts. The courts have, in general, been willing to support regulations in historic districts that would not stand up in other contexts. Thus, the county can eliminate the design review of major issues with signs in the existing design review districts, with reasonable comfort that, when it adopts historic district regulations, it can include reasonable, structured design review in those districts.

Principle 7 – Sign review procedures must have basic procedural safeguards

Overview of the Law

There are three important Supreme Court decisions related to this issue: *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988), applied to a sign case in *Lawson v. City of Kankakee*, 81 F.Supp.2d 930 (C.D. Ill. 2000); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993); and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). *Plain Dealer* is discussed under the issue immediately above. The other cases were discussed in some depth in our analysis of adult business regulations for the County; that discussion will not be repeated here, except to recap the major requirements of a licensing scheme that affects First Amendment rights:

- There must be strict time limits on the decision-making process;
- The applicant must have direct and prompt access to the state courts, without local procedural obstacles, to obtain judicial review of a decision.

Note that the second bullet here reflects a modification of the law that occurred in 2004, after the preparation of our original analysis on adult business regulations. In a 2004 decision, *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, the Court modified *FW/PBS* by holding that:

> Colorado's ordinary rules of judicial review are adequate--at least for purposes of this facial challenge to the ordinance. Where (as here and as in FW/PBS) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria, * * * and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the Freedman type. Colorado's rules provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require.

159 L. Ed. 2d at 94, 124 S. Ct. at 2226.

Most of the law on this issue has evolved in cases involving licensing ordinances or discretionary local permitting systems. See, for example, *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), *cert. den.*

In a significant 2002 decision, the Supreme Court has limited the application of these principles to content-neutral permitting systems such as those that typically apply to signs. In *Thomas v. Chicago Park Dist*., 534 U.S. 316, 151 L. Ed. 2d 783, 122 S. Ct. 775 (2002), a unanimous Court held that the strict procedural rules established in *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965), which is the root authority for the cases discussed in this sub-section, do not apply to a content-neutral permitting system. *Thomas* involved a requirement of the park district that anyone wishing to hold a public demonstration of a particular size or involving a sound system in the park obtain a permit to do so. 151 L.Ed.2d at 788, 122 S.Ct. at 777. The Court provided this summary and extract of the local rule:

> Pursuant to its authority to "establish by ordinance all needful rules and regulations for the government and protection of parks ... and other property under its jurisdiction," § 1505/7.02, the Park District adopted an ordinance that requires a person to obtain a permit in order to "conduct a public assembly, parade, picnic, or other event involving more than fifty individuals," or engage in an activity such as "creating or emitting any Amplified Sound."
>
> The group challenging the regulation held rallies supporting the legalization of marijuana and had, in the past, had some permits approved and some denied. 151 L.Ed.2d at 789, 122 S.Ct. at 778. The local regulation contained a list of a dozen criteria for issuance of the permit, none of which related to the subject matter of the event. Id. at note 1. *Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum. The Park District's ordinance does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say. Indeed, the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to all activity conducted in a public park. The picnicker and soccer-player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. And the object of the permit system (as plainly indicated by the permissible grounds for permit denial) is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event.

151 L.Ed.2d at 790-91, 122 S.Ct. at 779-80.

Most local sign ordinances contain lists of objective criteria related to the size, location and number of signs. Those criteria are exactly the sort *Chicago Park District* seems to require. Courts in the Sixth Circuit do not appear to have had the opportunity to consider the effect of *Thomas* on local sign ordinances. However, a panel of the Eleventh Circuit applied this reasoning in holding that the procedural safeguards required by this line of cases did not apply to

a sign ordinance in *Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. Fla. 2003), *reh. en banc den.* (11th Circ. 2003), *cert. den.* 159 L. Ed. 2d 247, 124 S. Ct. 2816 (2004). The court, however, has been conservative in its application of *Chicago Park District.* It distinguished an Augusta, Georgia, ordinance that required permits only for political demonstrations, holding that it was content-based and thus subject to strict scrutiny. *Burk v. Augusta-Richmond County*, 2004 U.S. App. LEXIS 7261 (11th Cir. Ga. 2004). In a separate case, the Eleventh Circuit has held that a mere reference to the Southern Building Code for standards for signs does not establish sufficient standards to guide the permitting process and that the holding of *Thomas v. Chicago Park District* did not apply. *Cafe Erotica of Fla., Inc. v. St. Johns County*, 360 F.3d 1274, 1284-85 (11th Cir. Fla. 2004).

Current Issues in NKAPC Model Ordinance

The procedural provisions now in the Code appear to be generally sound. The recommendations below would involve only a minor change to those provisions.

One aspect of the current ordinance creates both practical problems and Constitutional risks. The language in Section 14.7 in the Fort Mitchell ordinance that exempts "special signs" from fees but requires application for sign permits applied to real estate signs; it also presumably applies to noncommercial signs in residential districts, since such signs are apparently allowed under the current ordinance only as message substitutions for permitted real estate signs. The idea of requiring sign permits for residential real estate, garage sale and political signs raises specters of enormous administrative burdens both on staff and on unsuspecting residents. Further, the concept of requiring a permit for the expression of an opinion at one's residence is likely to find significant resistance in the courts. See discussion of cases under Principal 1, beginning on page 5.

Recommendations

To the maximum extent practicable, for reasons discussed here and under the previous Principle, the NKAPC model sign ordinance should contain objective standards. Although such standards should obviate the necessity of including procedural safeguards in the sign ordinance, we would recommend that the ordinance contain three safeguards: 1) a time limit for action on complete applications for sign permits or for rejection of a permit as incomplete; 2) a provision allowing an applicant for a variance or appeal to request, after a specified period of time (probably 60 days) without action on an appeal or variance application, a certificate of deemed rejection; and 3) a clear provision allowing direct appeal to the circuit court.

Figure 10 We do not recommend requiring permits for small, temporary signs.

Context Recommendations

Findings

Today, we recommend that local governments adopting sign ordinances include findings, explicitly stating the purposes of the regulations and carefully relating the various provisions of the regulations to those purposes – much as communities have done for several years with ordinances regulating sexually oriented businesses. Although to date the courts have not explicitly required such findings, questions raised by thoughtful courts in decisions like *Solantic v. City of Neptune Beach,* 410 F.3d 1250 (11th Cir. Fla. 2005). (discussed in some detail in the section beginning on page 18) suggest the need for such findings to build a legislative record. We found it interesting a year or so ago to learn that William Brinton, a Florida attorney who is also widely active in drafting and defending sign regulations, independently reached the conclusion that local sign ordinances should have findings. As part of our service in providing the draft ordinance, we will provide background studies on safety issues related to signs, a summary of those studies, and proposed findings for adoption by the NKAPC and by local governing bodies that adopt the ordinance.

Severability

Courts have construed severability clauses rather narrowly in sign cases, often refusing to apply them and thus declaring entire ordinances unconstitutional based on a handful of unconstitutional provisions. We have thus moved to belaboring the obvious in severability clauses. Building on our own work and that of Mr. Brinton of Florida, we will recommend more detailed and expository severability provisions for the new ordinance.

Other Comments

Time Limits on Noncommercial Signs

The sign ordinance does not currently contain a time limit on the use of any signs, including noncommercial signs. We have recommended adding time limits for temporary commercial signs. Although the law is not settled in the area, we believe that it is possible to require removal of signs with noncommercial messages following any election or other event to which such a sign refers. We can supplement this report to address that issue if you want to raise it.

Changeable Copy Signs

Figure 11 Modern electronic signs are a generally more aesthetically pleasing form of changeable copy sign than signs like this.

Most of the ordinance is silent on changeable copy signs; the use of the term "bulletin board" for institutional uses in residential areas suggests that they may be changed, although there is no definition for "bulletin board" either in Article XIV (Signs) or Article VII (Definitions) of the ordinances reviewed. We have found elsewhere that allowing some changeable copy area in commercial districts and on institutional signs reduces the demand for temporary signs. Changeable copy regulations, however, should address the issue of electronically changeable signs – and the frequency with which they may be changed. In general, we recommend electronic changeable copy signs as preferable to those changed by hand both because they are generally neater and because the electronic ones pose less risk to workers. That may, however, open the door to scrolling and other rapidly changing signs. We believe that we can limit the frequency of change and that there is adequate evidence to do so (one court referred to a study used by the industry to try to prove to the contrary essentially as junk science). We would suggest not more than one change per minute along busy roadways, which allows the use of time and temperature signs. In downtown Covington and some other intense commercial areas, it may be reasonable to consider additional motion on signs.

Structure of Sign Regulations

Current Structure

Overview

The current sign regulations are defined by a classification system, with two separate provisions that, in effect, create additional classifications of signs, resulting in a total of 20 classes of regulated signs. The basic classification system, presented in the table immediately below, consists of 13 classes of signs, numbered Class 1 through Class 13 signs; the other seven classifications of signs are ones that are "permitted in any zone without a fee," apparently in addition to all other signs. The following sections group and discuss these 12 classes of signs.

Class	Structural Style	Maximum Size	Maximum Height	Number of Signs Allowed
1	Flat or window, single faced only	One square foot	Attached directly to building	One sign per separate use permitted
2	Flat, window or projecting, single or double faced	Two square feet	Projecting not more than 18 inches from building	One sign per separate use permitted
3	Flat, ground, or pole, single or double faced	Six square feet in outside area	Twelve feet	One sign per curb cut, plus off street parking area
4	Flat, window, or ground, single or double faced	12 square feet in outside area	Ground sign – 20 feet	Dependent upon acreage and development
5	Individual letters only, single faced only	1.5 square feet of area for each linear foot of building, letter size 36 inches	Not extend above the height of the wall	One sign per street frontage
6	Flat, single faced only	1.5 square feet of area for each linear foot of building height	Not extend above the height of the wall	One sign per street frontage
7	Pole or ground, single or double faced	60 square feet	Pole – 20 feet Ground – 10 feet	One sign per street frontage
8	Ground, single or double faced	50 square feet	Ten feet	One sign per street frontage
9	Pole or ground, single or double faced	150 square feet	Pole – 30 feet Ground – 10 feet	One sign per street for more than three

Class	Structural Style	Maximum Size	Maximum Height	Number of Signs Allowed
				buildings together
10	Ground, single or double faced	300 square feet	30 feet	One per lot, 200 from residential
11	Pole or ground, single or double faced	150 square feet for up to 5 acres, add 50 square feet for each acre greater than 5, maximum up to 350 square feet	Pole – 30 feet Ground – 10 feet	One sign per street for more than three buildings together
12	Ground, single or double faced	25 square feet	10 feet	One sign per entrance when two or more businesses share an entrance
13	Pole or ground, single or double faced	270 square feet, (increases for different locations)	Pole – 70 feet Ground – 10 feet	One sign per site under single ownership

Source: *Table based on Section 14.13 of the Zoning Ordinance of the City of Erlanger; other ordinances examined were similar, although not all local governments need or allow all 13 classes of signs; several do not include Class 10.*

Temporary Signs

Current Classifications

Class 4 provides for temporary signs advertising development or redevelopment, sale or lease of a property, a period of 182 days, renewable for one additional period; such signs may be 12 square feet or 35 square feet or even 75 square feet, and there is a circuit-breaker on the total amount of such signage on a site; these signs may be freestanding or installed on a wall or in a window; if freestanding, there is a height limit of 10 feet

Construction Signs. One of the classes of "special signs" that are fee exempt provides for signs on construction sites. These signs are limited to 20 square feet and 8 feet high with no stated limit on the number of signs; the durational limit for these signs is tied to the issuance of the permit and the completion of construction; on a large or complex project, this would allow signs to remain up longer than the previous provision; on a small project, this would require removal of signs earlier.

Real Estate Signs. Another of the classes of "special signs" that are fee exempt is also related to Class 4 signs are "real estate signs," which may be 20 square feet in size and up to 8 feet high in nonresidential districts and six square feet and up to 4 feet high in residential districts; these signs must be removed within 10 days after the sale or lease of the premises;

Special Event Signs. One of the classes of fee-exempt signs is for signs for "duly authorized special events"; it allows one sign of 32 square feet for 30 days before the event and 3 days after; the sign must be located on the site of the special event.

Types of Signs Not Clearly Addressed

Political Signs. There is no clear classification for signs expressing opinions on matters of public interest. At least in residential areas, there must be clear provision to allow such signs.

Public Interest Signs. The current "special event" sign provisions are limited to the site of the event. People often want to support their school candy sales, church bazaars or even the United Way with yard signs; the provisions for political signs should be broad enough to include such signs.

Garage and Yard Sale Signs. These are commonly found in residential neighborhoods; if they are to be allowed, the provision should be explicit and should include size, height and time limits.

Discussion

The current set of classifications of temporary signs is confusing, unnecessarily complex and Constitutionally problematic. The special provisions for development, redevelopment and construction signs are extremely problematic in residential districts, unless it is the intent of each local government to allow political signs of similar sizes; applying Class 4 signs to political signs, however, would be problematic in itself, because the confusing size limits would arguably grant the permitting officer undue discretion in the process; see discussion in Principle 6 on page 26.

The fact that there are two separate sets of provisions for construction and real estate signs (Class 4 plus the "special signs" provisions) suggests a legislative preference for such signs in an ordinance that shows no such preference for noncommercial speech. Further, the provisions overlap but have different size, height and durational limits. The "special event" language as currently constructed raises serious Constitutional issues; see discussion in Principle 2 on page 11.

The treatment of temporary window signs as interchangeable with other temporary signs is unusual; most communities allow a reasonable amount of window signage in commercial districts independently of other signs allowed, and without the time limits typically imposed on other temporary signs.

Small or Incidental Signs

Current Classifications

Class 1 provides for signs that are one square foot each, with one sign per permitted use.

Class 3 allows one sign per curb cut plus an apparently unlimited number of signs in parking areas; such signs are limited to 6 square feet in size and 10 feet in height; the message is limited to "off-street parking directions and instructions."

Professional Nameplates. One of the classes of special signs is similar to provisions for "professional nameplates", one square foot each (although these may be double-sided); this

provision does not require that the sign be attached to a building, but the small size suggests that it typically would be.

Traffic Signs. Another of the classes of "special signs" allows for "traffic signs," a term that is not defined, "provided that said signs are designed and located in accordance with the "Manual on Uniform Traffic Control Devices for Streets and Highways", U.S. Department of Transportation, Federal Highway Administration."

Exemptions. Among the 20 exemptions from the definition of "sign" are several that would fall in this category, including:

2. Cornerstones and foundation stones
5. Grave markers
8. Manufacturer's marks
12. Official notices
16. Vending machines and public phone facilities
18. Doormats and floor mats
20. Historical markers and memorials.

Types of Signs Not Clearly Addressed

"No dumping"

"ATM" or "Phone" with an arrow

"Restrooms"

"Smith Residence" (this would appear to be allowed on a "professional nameplate")

"1100 West Kenton Boulevard" (not clear whether this would be allowed as a "professional nameplate")

"Beware of dog"

Prices on gas pumps

"Persons on this premises will be videotaped"

Discussion

This category of sign appears far more restrictive than it needs to be, although in some respects it is arguably too liberal.

The classifications that permit this type of sign are too restrictive because they allow for only two general categories of non-commercial messages: professional nameplates and other signs of one square foot each; and parking directions of six square feet each and up to 10 feet tall.

Unless there are local conditions that we do not understand, the size restrictions do not make a lot of sense. One square foot, which is the sign size that seems to have the fewest restrictions on its use, is perhaps adequate for a door plate in a pedestrian oriented area, but it is very small for most other purposes. Six square feet makes sense for entry and exit signs at curb cuts but is unusually large for use for "no parking" and for designating particular parking spaces for persons

with disabilities, for carpools or for other limited purposes. It is difficult to imagine why anyone would want to erect such non-commercial signs to a height of 10 feet.

As indicated above, however, there are a number of reasons why a property owner might want to use noncommercial, on-site signs, and many of those do not involve "off-street parking directions or instructions" and do not fit within the apparent concept of a "professional nameplate" (a concept which is not defined in the current ordinance).

Under the terms of the ordinance, all of these signs require permits. Although it may be reasonable to require a permit from someone who wants to place a six square foot sign atop a 10-foot pole, it hardly seems necessary or even practicable to require permits for every "Dr. Gordon," "No Parking," and "Keep Off the Grass" sign in the county.

In two respects, the provisions in this section appear to be unusually liberal. The exemption for signs on vending machines, while logical up to a point, misses the mark; large vending machines today may have a message that is 35 square feet or more, which is larger than the ground signs allowed in some districts. Although that is not a reason to ban such machines, it may be a reason to include them within the over-all sign allocations for a site.

The message limitation on Class 3 signs is awkward and appears to contain a loophole. It prohibits "merchandise, manufacturing or service advertising." Because the language does not prohibit all commercial messages on such signs, it apparently is intended to allow the name of the business. Thus, if a franchisee were so inclined, it would appear to allow the franchisee to erect an unlimited number of 10-foot tall signs within the parking area that say "McDonald's Parking Here," or "Walgreen's Parking Here." Part of the purpose of a sign ordinance is to limit clutter. If commercial messages are banned entirely on such incidental signs, most property owners will place the number of signs necessary to accomplish the purpose. Without such a ban, however, there is the potential for serious clutter.

Permanent Signs Attached to Buildings

Current Classifications

Note: *Small, incidental signs, which are often permanent, are addressed under the previous classification.*

Class 2 signs are "flat, window or projecting" signs; a Class 2 sign is limited to two square feet in area (although it may be double-sided, a provision that is useful only for a projecting sign); the sign may project 18 inches from the building wall. In districts where such signs are allowed, only one such sign is allowed "per individual use."

Class 5 signs are "individual letter" signs, often called "channel letters;" the ordinance allows one such sign per street frontage with one square foot of sign for each linear foot of building wall on which the sign is installed; there is a separate limit of 36 inches for the height of any letter. For multi-tenant properties, one sign is allowed for each "business building," which appears to be broadly defined to include separate bays within a shopping center.

Class 6 signs are subject to essentially the same standards as Class 5 signs, but the Class 6 signs do not involve individual letters and are not subject to the 36-inch height standard. Sign

regulations for particular districts require that the sign user choose between Class 5 and Class 6 signs.

Types of Signs Not Clearly Addressed

Because there are minimal content-based limits on signs in this district, most types of attached signs typically used are allowed within one of the classifications. One useful category of signs that would not easily be allowed under these standards, however, is a directory sign for tenants in an office building or multi-family building. Similarly, there is no provision for permanent signs larger than one square foot on the walls of churches, synagogues, schools and other institutional uses in residential districts.

Discussion

These classifications appear to work reasonably well, although it is entirely unclear why Class 5 and Class 6 are treated separately. It is also unclear here, as noted in the previous classification, why window signs are treated interchangeably with exterior wall or projecting signs.

Permanent Signs Not Attached to Buildings

Current Classifications

Note: *Small, incidental signs, which are often permanent, are addressed under a previous category.*

Class 7 allows detached signs of up to 60 square feet in area; such signs may be up to 20 feet tall if they are on poles and up to 10 feet tall if they meet the definition of "ground signs;" that definition provides for a "maximum permitted ground clearance of three feet." One such sign is allowed for each street frontage.

Class 8 allows ground signs, single or double faced, up to 25 square feet, with a height limit of 10 square feet. One such sign is allowed for each street frontage or for "each major entrance" for a residential development.

Class 9 allows pole or ground signs, single- or double-faced, up to 150 square feet, with a maximum height of 30 feet for a pole sign and 10 feet for a ground sign. These signs are limited to installation along a "major street" to identify a "shopping complex" of three or more businesses.

Class 10 allows ground signs of up to 300 square feet and 30 feet in height.

Class 11 allows a pole sign of up to 200 square feet, single- or double-faced, with a maximum height of 40 feet. One such sign is allowed "on any site."

Class 12 allows a ground sign "in combination with a planter, shrubbery or other aesthetic design;" such sign may be up to 36 square feet, single- or double-sided, with a maximum height of 6 feet. One such sign is allowed "on any lot."

Class 13 allows a ground sign of up to 30 square feet, single- or double-faced, with a maximum height of 10 feet. One such sign is allowed for "the point of entry into the zone district…." And "the entrance into a commercial or industrial development from an arterial or collector street."

Bulletin boards. For institutional uses in residential districts, the "special signs" category allows "bulletin boards" of not more than 12 square feet, single- or double-sided, and not more than 6 feet in height.

Types of Signs Not Clearly Addressed

Menu boards at drive-through restaurants.

On-site way-finding signs, with names of stores or other commercial messages, on larger sites; if directions to stores are construed to be "parking directions," then they might be allowed six square feet in size, if not more.

Maps and directory signs in free-standing kiosks at the entrances to campuses, industrial parks, health-care complexes, and multiple-building multi-family complexes.

Discussion

The only two, clearly distinguishable types of signs in the category of "detached signs" are pole signs and ground signs; because the Kenton County definition of ground signs essentially includes low-profile signs installed on poles, which is not a real distinction. Thus, all of these sign classes for commercial districts can be condensed into one or two classes, with the height and size varying by district.

The omission of provisions for way-finding signs on large sites and for menu boards is not unusual, but should be addressed in the revision.

Flags

Current Provisions

Flags fall under the category of "special signs" that are subject to permit requirements but do not involve a permit fee. The current provisions for flags read in full:

> Flags or buntings: In residential districts, flags may not display commercial images. When flags are mounted on poles, the maximum pole height is determined by the maximum structure height for that district. Maximum number of flag poles: on residential properties, one; on non-residential properties: two.

Discussion

This is a standard classification and the existing provisions appear generally reasonable. It may be desirable to reduce the maximum pole height in residential areas; 20 or 24 feet would be a standard height limit in such districts, in contrast to the 35 foot height limit allowed for residential dwellings.

Changing Signs and Electronic Signs

Current Provisions

There are no provisions in the ordinance expressly allowing or not allowing changeable copy signs, such as those used to display gasoline prices and movie schedules.

Flashing and animated signs are characteristics prohibited for all classes of signs except Class 4, which prohibits only animation; the definitions of "flashing" and "animated," however, are identical. There is also a general prohibition on "moving" signs.

Discussion

Many communities limit the total sign area that can be used for changeable copy, either as an absolute size limit or as a percentage of size of a particular sign. Time and temperature signs arguably fall under the definition of "moving" signs, which are currently banned, so it may be desirable to modify the ban. The issue of electronically changeable signs should be specifically addressed.

Recommended Classifications

Overview

There are several Constitutional ways of distinguishing signs by type:

Signs with commercial messages and signs without commercial messages

Permanent signs and temporary signs

Signs attached to buildings and signs not attached to buildings

Other characteristics of individual signs include size, height, materials, lighting, mode of installation, and relationship to shrubbery or fencing are reasonable subjects for regulation but not particularly rational subjects for classification.

Temporary Signs

There are six potential sub-classes of temporary signs, each of which would be subject to height, size, lighting, setback and other standards that could vary by district or other context:

Temporary signs with limited commercial messages allowed throughout residential districts. We would key the size for these signs from the current standard for real estate signs, which is six square feet in area with a height limit of four feet.

Temporary signs without commercial messages; these would include, without specification or limitation "political" signs but also include "support the United Way," "Buy Girl Scout Cookies," and "Enter the County Fair." The sizes must be at least as large as the previous (commercial) category but could be larger. Unless instructed otherwise through the process, we will also key the size of these to the current size allowed for real estate signs.

Temporary signs allowed in lieu of permanent signs during construction period. These could be larger temporary signs, to be removed at the time of installation of the permanent sign (alternative provisions in the current code allow similar signs to be in place for 182 days or until issuance of a certificate of occupancy or completion).

Temporary signs allowed for a specific period; these would include "grand opening," special sale" and similar signs.

Temporary window signs, which might be allowed in some commercial districts without time limits but with a size limit based on sign area or percentage of the window covered.

Temporary signs allowed in residential districts as accessory to the permitted temporary use of land development, to provide for signs advertising entire developments. These would be allowed for a limited time, expiring either after a specified period or upon the sale of a specified percentage of lots in the development.

Permanent Signs in Residential Districts

There are two clear sub-classes of permanent signs in residential districts:

Attached signs

Detached signs

The size, height, lighting and other characteristics of such signs should vary by zoning district and, in the case of residential zoning districts, by use.

For single-family residential districts, we typically recommend allowing one permanent attached (wall) sign and one permanent detached sign. One or two square feet is workable for the wall sign, and four square feet is a workable number for a yard sign, with a height limit of four or five feet. Some communities allow the small permanent wall sign to contain a "commercial message related to an activity lawfully conducted on the premises" (a home occupation). Otherwise, such signs would contain only noncommercial messages. Most will say "Smith Family," or "1717 West St. Patrick Drive," but some may say "Support our Troops" or "Worship this Week" or something similar.

Figure 12 Signs at apartment complexes can easily contain leasing information, with no need for separate "for rent" signs.

For multi-family districts, the signs should be larger, with provision for additional signage in parking areas. In addition, the regulations should allow and perhaps require that leasing information on rental properties be included in the permanent signs (to discourage the use of temporary signs). here should be special provision for directory signs on individual buildings and for drive-up directory signs for large complexes. We recommend that regulations for directory signs allow them only if not legible from the right-of-way, thus eliminating the distraction of drivers trying to read a long list while still making the information available to someone in a car after it has pulled off the road. Wall signs as well as freestanding signs may be appropriate in some multi-family districts.

Institutional uses permitted in residential districts should be allowed reasonable signage, both detached and attached. The current "bulletin board" provisions under "special signs" can be used as the basis for the detached signs. Policy-makers should give some consideration to allowing additional detached signs for large institutional properties. There should be clear provisions allowing reasonable wall signs at all public entrances to the institutional use. Changeable copy space on institutional signs is particularly important, although it need not be electronic.

Figure 13 Where institutional uses are allowed in residential zoning districts, they need special signage; the term "bulletin board" does not adequately describe the sign needs of these modern uses.

Permanent Signs in Nonresidential Districts

In these districts, also, there are two basic sub-classes of signs:

Attached

Detached

Assuming that policy-makers accept the recommendation that window-signs be treated separately, there is only one additional distinction among attached signs in the current sign ordinance, and that is the distinction between signs that are mounted flat against the wall and signs that project from the wall. Some communities also provide distinctions for roof signs and for wall signs that extend above the parapet, but the current ordinance bans both of those and there seems to be little reason to change that.

The provisions for signs for multiple tenant buildings are not as clear as they might be. That issue will be examined in more depth in a subsequent report or memo.

Among detached signs, there are two basic types:

Elevated or pole-mounted

Monument

The current NKAPC model ordinance distinguishes between pole signs and "ground signs," but the definition of "ground sign" includes signs mounted on supports so that the sign may be as much as three feet off the ground, with a total sign height of 10 feet. That is essentially a distinction without a difference. Further, for Class 7 or Class 9, the sign user may choose between having a ground or a pole sign resulting in an effective "choice" of height limit of 10 feet or 20 feet (Class 7) or 10 feet or 30 feet (Class 9). It might make more sense to have a single height limit of 20 feet or 30 feet, allowing some variation in the design of signs within the district. If one of the goals of the drafters of the ordinance was to encourage the use of more

monument signs, it may make sense to offer incentives, by allowing two monument signs or one pole sign or by allowing a larger monument sign than pole sign on the same site.

The current height standards generally appear reasonable for the various contexts of streets and highways within Kenton County, so there seems to be little reason to deviate substantially from those. The one exception would be a possible reduction in the lower height limit applicable to "ground signs" if the real goal is to encourage monument signs. Similarly, the current size standards appear to be reasonable for the contexts in Kenton County.

What should be reexamined is the number of signs allowed in particular contexts. Menu boards are important in districts that allow drive-through commercial establishments. Way-finding signs and directories are important on larger sites. As noted above, it will also be important to address directly the use of changeable copy elements in signs and the use of electronic technology to change that copy.

Figure 14 Most dimensional standards in the current ordinance appear to be appropriate to specific contexts.

A Proposed Regulatory Structure

Overview

The following material presents a conceptual structure for a new sign ordinance. It is far from complete and makes no attempt to address issues like setbacks or to make fine distinctions among multiple districts. Sample ordinance language is included where it seems useful to illustrate a concept, but the proposed language lacks context and thus is not complete.

Signs Allowed without Permits in All Zoning Districts

On Any Site

Signs required by a state or federal statute. *Although the county cannot regulate most signs on state property or on federal property, various federal and state laws require notice and other signs on private property under specific circumstances; this provision is intended to deal with those situations.*

Signs required by an order of a court of competent jurisdiction.

Detached signs smaller than four square feet in area and less than four feet in height, and containing no commercial message if not legible from the right-of-way, or smaller than two square feet if legible from the right-of-way. *This provides for "no parking," "telephone," "no dumping," "beware of dog" and similar signs.*

Wall signs containing no commercial message: such signs shall not be larger than four square feet in area. *This also provides for "no parking," "telephone," "no dumping," "beware of dog" and similar signs, as well as building signs that say "entrance," "employees only," "open 10 a.m. to 6 p.m." and so on. .*

The last two categories could be reduced to two square feet in single-family residential areas.

It is important to distinguish between commercial signs and other signs. For that purpose, we recommend the following definition:

> *Commercial Message.* A sign, wording, logo, or other representation that, directly or indirectly, names, advertises, or calls attention to a business, product, service or other commercial activity.

On Any Site with Off-Street Parking or Drive-through Facilities

Signs with no commercial message and conforming with the Manual of Uniform Traffic Control Devices.

> The Manual of Uniform Traffic Control Devices is available for free download from the Federal Highway Administration:
>
> http://mutcd.fhwa.dot.gov/kno-millennium.htm

Menuboards and directories on which nothing other than the word "menu" or "directory" or some other identification is legible from the right-of-way. Such signs shall be no larger than 24 square feet in area and eight feet in height.

Single-Family Residential Zoning Districts

Applicability

The proposed ordinance will apply these provisions to specific districts. The generic term "single-family residential districts" is used here simply to illustrate the concepts.

For All Uses

- Signs listed above as allowed in all zoning districts.
- Cultural decorations bearing no commercial messages.

> In this context, "cultural decorations" should be broadly defined to include decorations representing secular and religious holidays; showing support for nation, state, community, or school; reflecting ethnic or other heritage; noting historic interests; and celebrating local events.

For Individual Residences

	Number of Signs	Maximum Size (s.f.)	Maximum Height (feet)	Lighting
Permanent wall	1	2	Shall not extend above top of wall.	No separate lighting allowed
Permanent Detached	1	6	4	
Temporary	6	6	4	

The permanent signs may not contain a commercial message (could be modified to allow a commercial message on the wall sign, to deal with home occupations), and no more than two such signs on any lot at one time may contain a commercial message. The only commercial messages permitted on such signs are messages related to commercial activity lawfully and temporarily conducted on the premises, including the lawful, occasional sale of personal property (such as through a garage sale or a yard sale) or the sale, rental or lease of the premises.

These dimensions are based on the current dimensions allowed for real estate signs in the residential districts of the municipalities; the numbers can be adjusted up (or down) to meet the needs of particular communities.

For Institutional Uses

	Number of Signs	Maximum Size (s.f.)	Maximum Height (feet)	Lighting
Permanent wall	1 per public entrance	6	Shall not extend above top of wall	No separate lighting allowed
Permanent Detached	1 (or 1 per street frontage)	12	6	Direct white light only
Temporary	??	6	4	No separate lighting allowed

The permanent signs may not contain a commercial message, and no more than two such signs on any lot at one time may contain a commercial message. The only commercial messages permitted on such signs are messages related to commercial activity lawfully and temporarily conducted on the premises, including the lawful, occasional sale of personal property (such as through a garage sale or a yard sale) or the sale, rental or lease of the premises.

It may be appropriate to allow up to 25 percent (50 percent) of the area of each detached sign to consist of changeable copy area.

The dimensions for the detached signs are based on the dimensions currently allowed for "special signs" for such uses.

For Land Development

As a temporary use accessory to the permitted activity of lawful subdivision development, one temporary sign at each principal entrance to the subdivision; there shall in no case be more than one such sign for a subdivision or development with 50 or fewer lots included in the subdivision or development and no more than two such signs for any subdivision or development. Such sign shall not be illuminated and shall not exceed 12 square feet in area or six feet in height; such sign(s) shall be removed upon the earlier of the following: installation of a permanent neighborhood identification sign; sale of more than 90 percent of the lots in the subdivision; or the expiration of one year from the date of installation.

The 12 square foot dimension is based on the Class 4 sign now allowed in residential zoning districts under the model ordinances, although the 20 foot height allowed for Class 4 signs is excessive for this context.

For Neighborhood Identification

We recommend using the Class 4 sign as the model, with the same reduced height limit specified above. Additional issues must be addressed, however, including:

- Where such signs are installed? On individual lots? In the right-of-way? Only on common property?
- Can they be integrated into walls or other architectural features? If so, what portion counts as the sign? Are there height limits for the walls?
- What defines a "neighborhood"? Using the concept of an individual subdivision or development gives this type of sign a commercial overtone that should be avoided.

For Nonresidential Uses Permitted by Right or as Conditional Uses

There are two basic alternatives:

- Allow the same signage as allowed for institutional uses in these districts; or
- Establish reduced size standards for signs for these commercial uses.

Allowing larger signs for commercial uses than for institutional uses is not an option, and the current concept of allowing approval of the sign as part of a discretionary review process is not recommended.

Conservation, Rural and Agricultural Zoning District

Applicability

Kentucky law limits the authority of local governments to regulate agricultural uses through zoning (see Kentucky Rev. Stats. §100.203(4)). The extent to which this affects the authority of the county to regulate signs on agricultural property is not clear and will require review with the County Attorney. Recommendations in this section may not be fully implemented for

agricultural districts if the County Attorney believes that such implementation is limited by state law.

On Any Site

Same as for Single-Family Zoning Districts.

On Any Site with Off-Street Parking or Drive-through Facilities

Signs with no commercial message and conforming with the Manual of Uniform Traffic Control Devices.

For Individual Residences

	Number of Signs	Maximum Size (s.f.)	Maximum Height (feet)	Lighting
Permanent wall	1	2	N.A.	No separate lighting allowed
Permanent Detached	1 or 1 per street or road frontage	12	8	Direct white light only
Temporary	4	12	8	No separate lighting allowed

The permanent signs may contain a commercial message, and no more than two such signs on any lot at one time may contain a commercial message. The only commercial messages permitted on such signs are messages related to commercial activity lawfully and temporarily conducted on the premises, including the lawful, occasional sale of personal property (such as through a garage sale or a yard sale) or the sale, rental or lease of the premises.

These dimensions are based on the current dimensions allowed for real estate signs in the residential districts of the municipalities; the numbers can be adjusted up (or down) to meet the needs of particular communities. The 12-square-foot size now used seems very large; if that dimension is retained, it must be the dimension for political and other noncommercial messages as well. It may make sense to consider a reduced size, with some increase in the number of signs allowed; six square feet is a common limitation used for the size of freestanding signs in residential districts in other communities.

For Institutional Uses

Same as for single-family.

For Land Development

Same as for single-family.

For Neighborhood Identification

None; inconsistent with character of area.

For Nonresidential Uses Permitted by Right or as Conditional Uses

There are two basic alternatives:

- Allow the same signage as allowed for institutional uses in these districts; or
- Establish reduced size standards for signs for these commercial uses.

Allowing larger signs for commercial uses than for institutional uses is not an option, and the current concept of allowing approval of the sign as part of a discretionary review process is not recommended.

Multi-Family Residential Zoning Districts

On Any Site

Same as for Single-Family Zoning Districts.

On Any Site with Off-Street Parking or Drive-through Facilities

Signs with no commercial message and conforming with the Kentucky Manual of Uniform Traffic Control Devices.

For Individual Residences with Principal Separate Outdoor Entrances

	Number of Signs	Maximum Size (s.f.)	Maximum Height (feet)	Lighting
Permanent wall	1 per exterior entrance	2	N.A.	No separate lighting allowed
Temporary	2	4	N.A.	No separate lighting allowed

The permanent signs may contain a commercial message, and no more than two such signs on any lot at one time may contain a commercial message. The only commercial messages permitted on such signs are messages related to commercial activity lawfully and temporarily conducted on the premises, including the lawful, occasional sale of personal property (such as through a garage sale or a yard sale) or the sale, rental or lease of the premises.

For Complexes

	Number of Signs	Maximum Size (s.f.)	Maximum Height (feet)	Lighting
Permanent wall	1 per street frontage	Based on wall length	N.A.	Direct white light only
Permanent detached	1 per street frontage	20	8	Direct white light only
	1 per driveway	6	4	Direct white light only
Directory (wall)	1 per public entrance	6	N.A.	Direct white light only
Directory (freestanding)	1 per driveway entrance	6	6	Direct white light only

Directory signs shall not be legible from the public right-of-way or private street; freestanding directory signs shall be set back at least 25 feet from the right-of-way.

The current ordinances typically allow Class 4 signs in the multi-family districts; the 12 square foot size for such signs seems small for such complexes, but the 20 foot height is excessive for residential areas; even the 10 foot height for "ground" signs seems excessive for residential areas.

For Institutional Uses

Same as for single-family or same as allowed for complexes in the same district, whichever is greater.

For Land Development

Same as for single-family.

For Neighborhood Identification

Addressed above.

For Nonresidential Uses Permitted by Right or as Special Uses or Special Exceptions

There are three basic alternatives:

- Allow the same signage as allowed for institutional uses in these districts;
- Allow the same signage as allowed for complexes in these districts; or
- Establish reduced size standards for signs for these commercial uses.

Allowing larger signs for commercial uses than for institutional uses is not an option, and the current concept of allowing approval of the sign as part of a discretionary review process is not recommended.

Office Zoning Districts

On Any Site

Signs required by a state or federal statute;

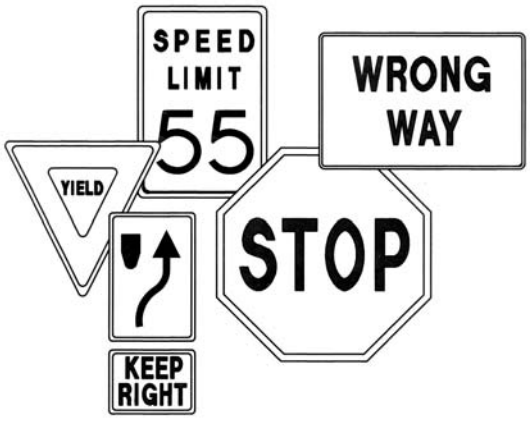
Signs required by an order of a court of competent jurisdiction;

Detached signs smaller than four square feet in area and less than four feet in height, and containing no commercial message;

Wall signs containing no commercial message: such signs shall not be larger than four square feet in area.

On Any Site with Off-Street Parking or Drive-through Facilities

Signs with no commercial message and conforming with the Manual of Uniform Traffic Control Devices.



For Individual Buildings or Complexes

	Number of Signs	Maximum Size (s.f.)	Maximum Height (feet)	Lighting
Permanent wall	1 per building or 1 per street frontage	Based on wall area or wall length	N.A.	Direct white light only
Window	Considered a wall sign	See above	N.A.	Direct white light only
Permanent detached	1 per street frontage	20	8	Direct white light only
	1 per driveway	6	4	Direct white light only
Directory (wall)	1 per public entrance	6	N.A.	Direct white light only
Directory (freestanding)	1 per driveway entrance	6	6	Direct white light only

Directory signs shall not be legible from the public right-of-way; freestanding directory signs shall be set back at least 25 feet from the right-of-way.

The current ordinances typically allow Class 4 signs in the office districts; the 12 square foot size for such signs seems small for such complexes, but the 20 foot height is excessive for residential areas; even the 10 foot height for "ground" signs seems excessive for residential areas.

For Institutional Uses

Same as for single-family or same as allowed for complexes in the same district, whichever is greater.

For Commercial and Business Districts

On Any Site

Signs required by a state or federal statute;

Signs required by an order of a court of competent jurisdiction;

Detached signs smaller than four square feet in area and less than four feet in height, and containing no commercial message;

Wall signs containing no commercial message: such signs shall not be larger than four square feet in area.

On Any Site with Off-Street Parking or Drive-through Facilities

Signs with no commercial message and conforming with the Manual of Uniform Traffic Control Devices.

Window Signs

NOTE: *The concept here is for discussion only; this is not a specific recommendation.*

Temporary window signs covering up to 25 percent of window area allowed for all commercial uses located on the ground floor of buildings.

Dimensions and Numbers of Commercial Signs Allowed

NOTE: *The numbers shown in this section are for discussion only and to illustrate a concept.*

Material continues in landscape format, beginning on next page.

The following pages show proposed standards for major signs that are often used for commercial purposes; the ordinance, however, will allow the use of any such signs for the display of noncommercial messages.

Neighborhood Commercial Districts (NC, NSC)

Type	Number	Max. Size (sq. ft.)	Max. Height (feet)	Min. Setback (feet)			Lighting	Changeable Copy
				R-O-W	Other Prop. Line	Res. Dist.		
Wall	1 per establishment	12	May not extend above wall	NA	NA	NA	Concealed source	Not permitted
Pole or principal ground sign	1 per building	12	20	10	5	50	Concealed source	Not permitted
Other ground signs	NSC: 1 per driveway NC: Not permitted	NSC: 4	NSC: 4	5	5	20	Concealed source	Not permitted
Detached signs not legible from R-O-W	Not permitted	NA	NA	NA	NA	NA	NA	NA

Highway Commercial Districts (HC, HC2, HC3)

Type	Number	Max. Size (sq. ft.)	Max. Height (feet)	Min. Setback (feet)			Lighting	Changeable Copy
				R-O-W	Other Prop. Line	Res. Dist.		
Wall	1 per street frontage	Factor of length of wall	May not extend above wall	NA	NA	NA	Note 1	Note 2
Pole or principal ground sign	1 per street frontage	HC: 40 HC2: 100 HC3: 240	HC, HC2: 30 HC3: 40	10	5	50	Note 1	Note 2
Other ground signs	1 per driveway	4	6	5	5	20	Concealed source	Not permitted
Detached signs not legible from R-O-W	1 for each 10 separate uses or each driveway, whichever is less, plus 1 for each 2 drive-thru lanes.	20	6	50	30	50	Concealed source	Not permitted

Note 1: Current standard is "concealed source only; may want to consider other options, including L.E.D., subject to appropriate brightness controls.

Note 2: May want to consider allowing changeable copy, subject to some limits – such as 25 percent of sign area or 50 square feet, whichever is less.

Limited Commercial Districts (LHS, LSC)

Type	Number	Max. Size (sq. ft.)	Max. Height (feet)	Min. Setback (feet)			Lighting	Changeable Copy
				R-O-W	Other Prop. Line	Resid. Dist.		
Wall	1 per establishment	12	May not extend above top of wall	NA	NA	NA	Note 1	Note 2
Pole or principal ground sign	1 per establishment	40	20	10	5	50	Note 1	Note 2
Other ground signs	LHS: Not permitted LSC: 1 per driveway	4	6	5	5	30	Concealed source	Not permitted
Detached signs not legible from R-O-W	1 for each 10 separate uses or each driveway, whichever is less, plus 1 for each 2 drive-thru lanes.	6	6	50	30	50	Concealed source	Not permitted

Note 1: Current standard is "concealed source only; may want to consider other options, including L.E.D., subject to appropriate brightness controls.

Note 2: May want to consider allowing changeable copy, subject to some limits – such as 25 percent of sign area or 10 square feet, whichever is less.

Shopping Center District (SC)

Type	Number	Max. Size (sq. ft.)	Max. Height (feet)	Min. Setback (feet)			Lighting	Changeable Copy
				R-O-W	Other Prop. Line	Resid. Dist.		
Wall	1 per street frontage	XX% of wall area	May not extend above wall	NA	NA	NA	Note 1	Note 2
Pole or principal ground sign	1 per street frontage	Formula based on G.L.A., max 300		15	20	100	Note 1	Note 2
Other ground signs	1 per driveway	8	40	10	5	20	Note 1	Not permitted
Detached signs not legible from R-O-W	1 for each 10 separate uses or each driveway, whichever is less, plus 1 for each 2 drive-thru lanes.	20	6	50	30	50	Note 1	Not permitted

Note 1: Current standard is "concealed source only; may want to consider other options, including L.E.D., subject to appropriate brightness controls. Interior lighting is not unusual on the smaller, way-finding signs that fall under the last two categories.

Note 2: May want to consider allowing changeable copy, subject to some limits – such as 25 percent of sign area or 30 square feet, whichever is less.

Downtown Districts

Type	Number	Max. Size	Max. Height	Min. Setback	Lighting	Changeable Copy
Wall	1 per establishment	XX% of wall area	May not extend above top of wall	NA	Note 1	Note 2
Pole or principal ground sign	Not permitted	NA	NA	NA	NA	NA
Other ground signs	Not permitted	NA	NA	NA	NA	NA
Detached signs not legible from R-O-W	Not permitted	NA	NA	NA	NA	NA

Note 1: Current standard is "concealed source only; may want to consider other options, including L.E.D., exposed neon and other creative options.

Note 2: May want to consider allowing changeable copy, subject to some limits – such as 25 percent of sign area or 30 square feet, whichever is less.

Industrial Districts (IP, I-1, I-2)

Type	Number	Max. Size (sq. ft.)	Max. Height (feet)	Min. Setback (feet)			Lighting	Changeable Copy
				R-O-W	Other Prop. Line	Resid. Dist.		
Wall	1 per establishment	XX% of wall area	May not extend above top of wall	NA	NA	NA	Concealed source	Not permitted
Pole or principal ground sign	1 per establishment	IP: 40 I-1, I-1: 80	IP: 10 I-1, I-2: 20	15	20	100	Concealed source	Note 1
Other ground signs	1 per driveway	8	6	10	5	30	Concealed source	Not permitted
Detached signs not legible from R-O-W	Not permitted	NA	NA	NA	NA	NA	NA	NA

Note 1: May want to consider allowing some changeable copy on freestanding sign; many industrial establishments like to advertise "help wanted" on-site, and the only other alternative is the use of temporary signs.

NP = Not Permitted.

Lighting Types:

1. Concealed source only (current standard)
2. Could allow direct lighting and/or internal lighting
3. Could consider allowing neon or exposed bulbs in more intensive zoning districts

Notes

1. Changeable copy area shall not exceed XX square feet in area or 25 percent of the area of any individual sign; no more than one sign per street frontage shall have changeable copy elements
2. Could allow animated signs in selected downtown districts.

Flags

Suggested Dimensional Standards

NOTE: *The numbers in this table represent revisions from and additions to the current sign regulations; they are presented as illustrations and for discussion only. The limit on the number of poles is unchanged from the current ordinance.*

	Max. Pole Height (feet)	Max. No. of Poles	Max. Flags per Pole	Max Flag Size
Single-family residential districts	24	1	2	24 s.f.
Neighborhood commercial districts	24	2	2	24 s.f.
All other nonresidential districts	30 or building height in district, whichever is lower	2	2	40 s.f.

Flags or buntings: In residential districts, flags may not display commercial images. When flags are mounted on poles, the maximum pole height is determined by the maximum structure height for that district. Maximum number of flag poles: on residential properties, one; on non-residential properties: two.

Appendix – Overview of Existing Sign Regulations

Unincorporated Area

Summary of Zoning Districts

Zone Code	Zone	Zone Code	Zone
CO	Conservation	A-1	Agricultural
R-RE	Residential Rural Estate	R-1A	Residential One A
R-1B	Residential One B	R-1BB	Residential One BB
R-1C	Residential One C	R-1D	Residential One D
R-1DD	Residential One DD	R-1E	Residential One E
R-1EE	Residential One EE	R-1F	Residential One F
R-1G	Residential One G	R-2	Residential Two
R-3	Residential Three	PUD	Planned Unit Development Overlay
RCD	Residential Cluster Development Overlay	MHP	Mobile Home Park Overlay
HC	Highway Commercial	NC	Neighborhood Commercial
NSC	Neighborhood Shopping Center	PO	Professional Office Building
SC	Shopping Center	RC	Rural Commercial
IP	Industrial Park	I-1	Industrial One
I-2	Industrial Two	I-4	Industrial Four River
I-5	Industrial River Five	I-6	Rural Industrial
MLU	Mixed Land Use		

Signs Allowed by Zoning District

Zones	Class
CO	1, 2, & 4
A-1, A-2, R-RE	4
R-1A, R-1B, R-1C, R-1D, R-1DD, R-1E, R-1EE, R-1F, R-1G	4

R-2, R-3	4
PUD, RCD, MHP	As approved according to development plan
NSC & SC	1, 2, 4
NC	1, 2, 4
HC & RC	1, 2, 4
IP, I-1, I-2, I-4, I-5	1, 2, 4
PO	1, 2, 4

Sign Classes

Class	Structural Style	Maximum Size	Maximum Height	Number of Signs Allowed
1	Flat or window, single faced only	One square foot	Attached directly to building, parallel to wall face	One sign for each separate use permitted
2	Flat, window, or projecting, single or double faced	Two square feet	Attached to a building and projecting no more than 18 inches	One sign for each separate use permitted
3	Flat, ground, or pole sign, single or double faced	Six square feet in outside area	12 feet	One sign per curb cut plus any number within off street parking areas
4	Flat, window, ground sign, single or double faced, one per individual use	12 square feet in outside area	20 feet	Dependent on total acres and development of land
5	Individual letters only, single faced	Two square feet of area for each linear foot of the wall, max letter size is 36 inches	Not to extend above the top of the building	One sign per street front, other stipulations as well
6	Flat sign, single faced only	Two square feet of area for each	Not to extend above the top or	One sign per street front

		linear foot of wall	side of wall	
7	Pole or ground sign, single or double faced	60 square feet	Pole – 20 feet Ground – 10 feet	One sign per street front
8	Ground sign, single or double faced	25 square feet	10 feet	One sign per street front
9	Pole or ground sign, single or double faced	150 square feet	Pole – 30 feet Ground – 10 feet	One sign (for three major businesses)

Fort Mitchell

Summary of Zoning Districts

Zone Code	Zone	Zone Code	Zone
CO	Conservation	R-RE	Residential Rural Estate
R-1C	Residential One C	R-1D	Residential One D
R-1E	Residential One E	R-1F	Residential One F
R-1G	Residential One G	R-2	Residential Two
R-3a	Residential Three a	PUD	Planned Unit Development Overlay
RCD	Residential Cluster Development Overlay	MHP	Mobile Home Park Overlay
LHS	Limited Highway Service	LSC	Limited Service Commercial
NC	Neighborhood Commercial	PO	Professional Office Building
SC	Shopping Center	CPUD	Commercial Planned Unit Development Overlay
MLU	Mixed Use Land Use		

Signs Allowed by Zoning District

Zone	Class
CO	1, 2, 4
A-1, A-2, R-RE	4
R-1A, R-1B, R-1C, R-1D, R-1E, R-1F, R-1G, R-1DD, R-1EE	4
R-2, & R-3A	4
PUD, RCD, MHP, CPUD, MLU	As approved according to the approved development plan
NSC	1, 2, 4
SC	1, 2, 4
NC	1, 2, 4
LHS, LSC	1, 2, 4
PO	1, 2, 4
IP, I-1, I-2, I-4, I-5	1, 2, 4

Sign Classes

Class	Structural Style	Maximum Size	Maximum Height	Number of Signs Allowed
1	Flat or window, single faced only	One square foot	Attached directly to building	One sign for each separate use permitted
2	Flat, window, or projecting, single or double faced	Two square feet	Projecting not more than 18 inches from building	One sign for each separate use permitted
3	Flat, ground, pole, single or double faced	Six square feet in outside area	12 feet	One sign per curb cut, plus off street parking area
4	Flat, window, ground, single or double faced	12 square feet in outside area	Ground sign – 20 feet	Dependent upon acreage and development
5	Individual letters only, single	1.5 square feet of area for each linear foot of	Not to extend above the height	One sign per street front

	faced only	building, letter size 36 inches	of the wall	
6	Flat, single faced only	1.5 square feet of area for each linear foot of building height	Not to extend above the height of the wall	One sign per street front
7	Pole or ground, single or double faced	60 square feet	Pole – 20 feet Ground – 10 feet	One sign per street front
8	Ground, single or double faced	50 square feet	10 feet	One sign per street front
9	Pole or ground signs, single or double faced	150 square feet	Pole – 30 feet Ground – 10 feet	One sign per street for more than 3 buildings together
11	Pole or ground, single or double faced	150 square feet for up to 5 acres, add 50 square feet for each acre greater than 5, maximum up to 350 square feet	Pole – 30 feet Ground – 10 feet	One sign per street for more than 3 buildings together
12	Ground, single or double faced	25 square feet	10 feet	One sign per entrance when two or more businesses share an entrance
13	Pole or ground, single or double faced	270 square feet, (increases for different locations)	Pole – 70 feet Ground – 10 feet	One per site under single ownership

Erlanger

Summary of Zoning Districts

Zone Code	Zone	Zone Code	Zone
CO	Conservation	R-1B	Residential One B
R-1C	Residential One C	R-1D	Residential One D
R-1E	Residential One E	R-1F	Residential One F
R-1G	Residential One G	R-1M	Residential Mobile Home Park (Phased)
R-2	Residential Two	R-3	Residential Three
PUD	Planned Unit Development Overlay	RCD	Residential Cluster Development Overlay
PO	Professional Office Building	PO-1	Professional Office – One
NSC	Neighborhood Shopping Center	SC	Shopping Center
NC	Neighborhood Commercial	NC-2	Neighborhood Commercial Two
HC	Highway Commercial	HC-2	Highway Commercial Two
HC-3	Highway Commercial Three	INST	Institutional
IP-1	Industrial Park One	IP-2	Industrial Park Two
IP-3	Industrial Park Three	IP-4	Industrial Park Four
I-1	Industrial One	AP	Area Protection Overlay
RP	Renaissance Protection Area		

Signs Allowed by Zoning District

Zones	Class
CO	1, 2, & 4
R-1B, R-1C, R-1D, R-1E, R-1F, R-1G, R-1M (P)	4
R-2, R-3	4
PUD, RCD, AP	As approved according to development plan
NSC & SC	1, 2, 4
HC, HC-2, INST	1, 2, 4

HC-3	1, 2, 4
NC and NC-2	1, 2, 4
PO	1, 2, 4
PO-1	1, 2
IP-1, IP-2, IP-3, I-1	1, 2, 4

Sign Classes

Class	Structural Style	Maximum Size	Maximum Height	Number of Signs Allowed
1	Flat or window, single faced only	One square foot	Attached directly to building, parallel to wall face	One sign for each separate use permitted
2	Flat, window, or projecting, single or double faced	Two square feet	Attached to a building and projecting no more than 18 inches	One sign for each separate use permitted
3	Flat, ground, or pole sign, single or double faced	Six square feet in outside area	12 feet	One sign per curb cut plus any number within off street parking areas
4	Flat, window, ground, single or double faced, one per each individual use	12 square feet in outside area	20 feet	Dependent on total acres and development of land
5	Individual letters only, single faced	1.5 square feet of area for each linear foot of the wall, max letter size is 36 inches	Not to extend above the top of the building	One per street front, other stipulations as well
6	Flat sign, single faced only	1.5 square feet of area for each horizontal linear foot of wall	Not to extend above the top or side of wall	One per street front

7	Pole or ground sign, single or double faced	1.5 square feet of area for each horizontal linear foot of wall, not exceed 90 square feet	Pole – 20 feet Ground – 10 feet	One sign per street front
8	Ground sign, single or double faced	25 square feet	10 feet	One sign per street front
9	Pole or ground sign, single or double faced	240 square feet	Pole – 35 feet Ground – 10 feet	One sign (for three major businesses)
10	Ground, single or double faced	300 square feet	30 feet	One per lot, 200 feet from residential
11	Pole or ground, single or double faced	270 square feet	Pole – 40 Ground – 10	1 per permitted use
12	Ground sign, single or double faced	15 square feet	5 feet	1 per building site
13	Ground sign, single or double faced	50 square feet	10 feet	One sign per major entrance into industrial park