

SIGN ORDINANCES



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Municipalities in the State of Texas act by and through their ordinances and resolutions.¹ No big surprise there. A city council, in passing an ordinance, is acting as a legislative body making laws which govern the citizens of its city. As with any law, an ordinance must know its place. The hierarchy of laws in Texas goes: 1) a. United States Constitution as applied to the states through the 14th amendment and b. Texas Constitution, 2) State Statute and 3) Municipal Ordinance.

A city's ordinance is at the bottom of the totem pole, so to speak. This position exists irrespective of whether the city is a home-rule or general law municipality. The ordinance must yield to the legislative powers above it and cannot be inconsistent with the mandates of its superiors.²

Whenever a citizen does not particularly appreciate the way a specific ordinance is applied to him or her, one common reaction is to attempt to hold the ordinance void or invalid. Application of a sign ordinance is no different. As rude as that may seem to many city attorneys, it is

¹ *Stirman v. City of Tyler*, 443 S.W.2d 354, 358 (Tex. Civ. App.--Tyler 1969, writ ref'd n.r.e.).

² *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982), cert. denied, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982) (stating that an ordinance of a city that conflicts or is inconsistent with state legislation is impermissible); TEX. LOC. GOV'T CODE ANN. § 51.012.

nonetheless very common. There are numerous ways to go about this method of attack and, dependent upon the specific nature of the individual ordinance, different legal tests apply. To do a comprehensive analysis of every single way to challenge a municipal ordinance and the proper counters to thwart such challenges would require an article comparable in size to *War and Peace*.³ As I am sure no one is particularly interested at the moment in reading *War and Peace: a battle between the U.S. Constitution and your ordinance*, I will refrain from publishing it at this time. Instead, let us try the Cliffs-Note version limited to sign ordinances.⁴

Constitutional Basics

The standard constitutional tests (i.e. rational basis, intermediate scrutiny, and strict scrutiny) all balance, at different levels, the purpose of the ordinance, the words of the ordinance, and the actual impact of the ordinance on the plaintiffs' purported constitutional right. Depending on the type of sign ordinance being challenged (i.e. off-premise prohibitions, structural standards, location driven, and content driven) will depend on which constitutional standard applies.

The most common themes to remember when drafting constitutional ordinances, sign ordinances or otherwise, is

³ Leo Tolstoy, *War and Peace* (1865)

⁴ The scope of this paper is designed with a city attorney in mind. It assumes you already know the standard elements of ordinances and are already familiar with the most common types of constitutional challenges.

to accomplish a fit between the stated purpose of the ordinance and its application. Some helpful hints to keep in mind are:

- Remember to include legislative findings (both factual determinations and policy decisions)
- Remember to support your legislative findings with some back-up
- Remember to tailor your ordinance to accomplish its stated purpose
- Use common terms to avoid vagueness issues
- Avoid granting unbridled discretion to city staff or enforcement personnel

While the above bullets are by no means all inclusive, they give a good starting point to avoid constitutional challenges to your ordinances.

The city has the ability to control the intent, purpose and scope of an ordinance. This is the foundation of the regulation and the basis of the comparison with all other prongs of any constitutional challenge.⁵ Take advantage of the deference given to this foundation.⁶ This foundation includes

⁵ Defining the purpose is the building block. This is your “legitimate” or “compelling” governmental interest. It is what everything else is compared to. Since the City has the ability to define the purpose, do so in a manner which allows for the best fit to accomplish that purpose.

⁶ One of the most important things to remember when drafting any municipal ordinance is that the ordinance itself is an act of legislation and a law. The city must have the power to enact such legislation either via general grant from a home-rule

both legislative determinations of fact as well as legislative determinations of policy.

A great amount of deference is given to a legislative body when making legislative fact findings and determinations as to the need or legitimacy of a particular ordinance.⁷ As a result, one of the most powerful methods of strengthening any ordinance is to make sure the ordinance is supported by legislative fact findings. Legislative findings are presumed valid by the courts unless they are arbitrary or capricious.⁸ In fact, deference is so substantial that to successfully challenge legislative judgment, a plaintiff “must convince the court that the legislative facts on which the [decision] is apparently based could not reasonably be conceived to be true by the governmental decision-maker.”⁹

The legitimate governmental purposes behind sign regulations should be expressly included within any sign ordinance. Some examples of supported purposes include:

charter or from power granted by the Texas Legislature or Constitution. However, even with a grant of power, the legislative body must be able to demonstrate a legitimate governmental interest in creating the legislation.

⁷ *Hunt v. City of San Antonio*, 462 S.W.2d 536, 538 (Tex. 1971).

⁸ *Hunt*, 462 S.W.2d at 538; *FM Properties Operating Co. v. City of Austin*, 93 F.3d 167, 175 (5th Cir. 1996).

⁹ *FM Properties Operating Co.*, 93 F.3d at 175 (quoting *Shelton v. City of College Station*, 780 F.2d 475, 49 (5th Cir.) (en banc), cert. denied, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 and 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986); see also *Vance v. Bradley*, 440 U.S. 93, 110-11, 99 S.Ct. 939, 949-50, 59 L.Ed.2d 171 (1979)).

- Traffic Control;¹⁰
- Aesthetics;¹¹
- Breaches of the Peace;¹²
- Quality of Life (including a balancing of the ability to speak with the ability not to speak);¹³
- The dissemination of truthful information.¹⁴

First Amendment Basics

The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others, with limited exceptions.¹⁵

¹⁰ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507, 101 S.Ct. 2882, 69 L.Ed.2d 800, (1981); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949).

¹¹ See, e.g., *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-508 (1981) (State may legitimately exercise its police powers to advance the substantial governmental goals of aesthetics and traffic safety).

¹² The need to prevent breaches of the peace that would occur if individuals were permitted to place offensive and derogatory messages in front of a neighbor's — or enemy's — home, and to protect private property values. See *Operation Rescue v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546, 568-569 (Tex. 1998).

¹³ "[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S., at 71, 96 S.Ct., at 2453 (plurality opinion).

¹⁴ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 564, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)

¹⁵ *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 2124, 80 L.Ed.2d 772 (1984).

In *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), the Court set forth the appropriate framework for reviewing a viewpoint-neutral regulation which the *Vincent* court adopted for sign regulation:

“[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Vincent* at 804-05 (citing *O'Brien*, at 377.)

As a result, sign regulation is constitutional permissible in most cases when it is content-neutral and the regulation is narrowly tied to the regulatory purpose. A regulation is generally “content neutral” if its restrictions on speech are not based on disagreement with the message it conveys.¹⁶ In short, don’t regulate the message if you can help it; just the structure and location and you should be fine.

The *Vincent* court held that the state may legitimately exercise its police powers to advance esthetic values and this includes proper regulation of sign structures and

¹⁶ *Brazos Valley Coalition for Life, Inc. v. City of Bryan, Tex.*, 421 F.3d 314 (5th Cir. 2005); See *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989); *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 2491, 147 L.Ed.2d 597 (2000).

locations. In *Metromedia, Inc.* the U.S. Supreme Court dealt with San Diego's prohibition of certain forms of outdoor billboards. There the Court considered the city's interest in avoiding visual clutter, and seven Justices explicitly concluded that this interest was sufficient to justify a complete prohibition of billboards, city wide.¹⁷

However, while the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.¹⁸ In other words, a fact specific balancing analysis will be performed by the court in most instances to determine if the regulation at issue properly and narrowly advances the stated purposes.

The balancing test for First Amendment sign regulations can be rather complex. Again, this is not a *War and Peace* treaty so I will not go into the various levels and sublevels of sign regulation First Amendment implications. However, a municipal prosecutor should understand a few key points:

1. Sign regulation triggers First Amendment protection at some level.

¹⁷ see *id.*, at 507-508, 510, 101 S.Ct., at 2892-2893, 2894 (opinion of WHITE, J., joined by Stewart, MARSHALL, and POWELL, JJ.); *id.*, at 552, 101 S.Ct., at 2915 (STEVENS, J., dissenting in part); *id.*, at 559-561, 101 S.Ct., at 2919-2921 (BURGER, C.J., dissenting); *id.*, at 570, 101 S.Ct., at 2924-2925 (REHNQUIST, J., dissenting).

¹⁸ *Vincent* at 812.

2. Sign regulation should be tied to a content-neutral purpose, such as structural safety, traffic safety/distraction, etc.
3. Sign regulation should allow some alternate means of communication (even if not sign oriented such as allowing hand-held signs in protests, allowing flyers, or allowing other forms of advertisement).
4. Don't look like a heartless jerk when enforcing a sign regulation.

Texas Local Government Code Chapter 216

Chapter 216 of the Texas Local Government Code controls general municipal sign regulation. While a majority of the chapter deals with the ability to force amortization of unwanted signs, several portions of the chapter are of interest to municipal prosecutors. See just a few references below.

Extraterritorial Jurisdiction ("ETJ") Authority

While a city usually does not have the authority to enact laws applicable within its ETJ, sign regulation is one of the few which is permissible to extent. However, be warned that this limited statutory extension of power applies only to outdoor sign regulations, not your entire sign ordinance.

Tex. Loc. Gov't Code Ann. §216.902 states:

(a) A municipality may extend the provisions of its outdoor sign regulatory ordinance and enforce the ordinance within its area of extraterritorial jurisdiction as defined by Chapter 42. However, any municipality, in lieu of the regulatory ordinances, may allow the Texas Transportation Commission to regulate outdoor signs in the municipality's extraterritorial jurisdiction by filing a written notice with the commission.

Political Speech

Political speech and political affiliation are afforded the greatest protection under the First Amendment.¹⁹ The protection of political speech pops up not simply in the First Amendment but in a variety of other statutes as well.

Under the First Amendment, regulation of political signs was possible, such as in requiring only truthful advertising for office or the designation of a treasurer, but was subject to a more limited scope. Numerous Texas cities passed very specific sign regulations applicable only during elections, such as a prohibition on placing political signs out prior to thirty (30) days before an election and requiring any political signs removed within ten (10) days after an election. However, unknown to many city officials, the Texas Legislature, in 2003, passed its own regulation which places a total ban on the regulation of political signs on private property.

Specifically, Texas Local Government Code §216.903 states:

(b) A municipal charter provision or ordinance that regulates signs may not, for a sign that contains primarily a political message and that is located on private real property with the consent of the property owner:

- (1) prohibit the sign from being placed;
- (2) require a permit or approval of the municipality or impose a fee for the sign to be placed;
- (3) restrict the size of the sign; or
- (4) provide for a charge for the removal of a political sign that is greater than the charge for removal of other signs regulated by ordinance.

This equates to a near total ban of typically campaign signs on private property. As such, it supersedes many municipal ordinances which attempt to regulate placement and the timing of such signs. This ban, however, does not apply to signs in the right-of-way, on public property, signs which are normally rented with changeable face, signs that have an effective area greater than thirty-six (36) feet, are more than eight (8) feet high, are illuminated, or have any moving elements.

Right-of-Way Issues

Both a city and the State of Texas have legitimate reasons to prevent the placement of any object, including a sign, in

¹⁹ See generally, *Elrod v Burns* 427 U.S. 347 (1976).

the public right-of-way. In fact, the State already has a prohibition in place.

Specifically Tex. Transp. Code Ann. § 393.0025 states:

(a) A person may not place a sign on the right-of-way of a road or highway maintained by a municipality unless the placement is authorized by the municipality.

(b) This section does not apply to the right-of-way of a road or highway in the state highway system.

As a result, by default, no sign can be placed in a city's public right-of-way absent its consent. A city may, through ordinance, give consent to placement of certain signs in the public right-of-way but should enact specific permitting provisions to limit the size, location, structure, etc.

However, be warned that by permitting signs in the public right-of-way, a city opens itself up to attach by anyone who is excluded from the ability to file for a permit.

An excellent example is the *Brazos Valley Coalition for Life, Inc. v. City of Bryan, Tex.*, cited above. In *Brazos*, the City of Bryan permitted flags of any nature to be placed in the public right of way with the permission of the property owner and certain size restrictions. A local anti-abortion group, which was holding protests in front of Planned Parenthood, sued arguing that allowing certain messages to be placed in front of the public's right of way and not others violated their First Amendment rights. Luckily for the City, the 5th Circuit

Court of Appeals agreed with the City in holding:

“the rule reasonably recognizes that emplacing a flag in the unimproved public right-of-way in front of a person or entity's private property will almost certainly result in the expressive message of the flag being attributed to the property owner instead of the flag's owner. ... The flag rule requires the consent of the abutting property owner to obviate the obvious problems that would arise if, for example, a political group hammered its flag into the lawn of someone who did not agree with that group's views. (footnote omitted) Further, an adjoining property owner may withhold consent to a given “flag” for reasons wholly unrelated to the content or viewpoint expressed by any “message” on it. But, if the adjoining owner's decision is based on his or her disagreement with the message, that does not make the owner's motive or purpose that of the City. ... The regulation restricts *where any* “flag” may be placed, and the restriction imposed does not to any extent turn or depend on the content of what is displayed on the “flag.” It is hence deemed “content neutral” for purpose of the rule that content neutral reasonable time, place and manner requirements are valid

notwithstanding that their effect may in certain instances effectively limit speech.

While the City of Bryan was successful in the defense of its sign ordinance, the battle was hard fought.

Conclusion

So, what does all this mean to a municipal prosecutor? Short answer, be careful. Sign enforcement has numerous traps as well as constitutional implications. The best rule of thumb for a prosecutor is to make sure to avoid any arguments tied to the content and address reasonable regulations based upon the content-neutral factors such as structural and traffic safety. Know your physical area, know where the power is for the regulation, and know the purpose being regulated. If you have any questions on whether your sign ordinance is open to attack, call me.