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Making Great Communities Happen

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STREET GRAPHICS AND THE LAW

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Daniel R. Mandelker, John M. Baker, and Richard Crawford

A NOTE ON DESIGN REVIEW FOR STREET GRAPHICS

The design review of street graphics is an important option because it can provide an opportunity for individually tailored designs that improve visual quality. It is a discretionary procedure, however, that courts view as a prior restraint applied to the exercise of free speech. For this reason, a design review program in a street graphics ordinance must include procedures and criteria that avoid prior restraint problems. Chapter 11 discusses these requirements. They should include procedures that provide for the timely review of applications and the inclusion of specifically detailed criteria for design review. For additional guidance on design review, see *Design Review* (Hinshaw 1995).

The inclusion of detailed review criteria that are acceptable under the free speech clause is especially critical. A court will hold an ordinance unconstitutional if it does not include criteria that provide adequate guidance for decision makers. The section on Programs for Graphics that follows includes criteria that are likely to get judicial approval, but approval is not certain. There are not many court decisions, and they have disapproved criteria for design review that are typical in street graphics and other land use ordinances. Courts that approved detailed review criteria did not consider the inclusion of these criteria in design review ordinances, but they provide helpful guidance.

The street graphics ordinance must also select the appropriate local body to make decisions on design review. This authority can be delegated to the planning commission or a design review board. Whether these delegations are authorized by state legislation or by constitutional home rule depends on

state law. In some states the planning commission cannot be given decision-making powers. See § 6.55 of Land Use Law, Fifth Edition (Mandelker 2003).

Appropriate procedures are required for decision making in design review because these decisions are quasi-judicial. The model ordinance does not include procedural requirements for design review, which will usually be included in the ordinance for the body that conducts these reviews, such as a design review board. These procedures should be examined carefully to determine whether they comply with free speech requirements. The permit approval procedures included in the model ordinance are an example of procedural requirements that should avoid prior restraint problems. Model legislation proposed in APA's Growing Smart Legislative Guidebook contains recommendations for administrative review procedures. These recommendations can be useful at the local level. They include recommendations for determining the completeness of an application and the conduct of quasi-judicial hearings. See Chapter 10 of the *Growing Smart Legislative Guidebook* (Meck 2002). However, these procedures do not contain time limits that meet prior restraint requirements.

for Graphics in these areas. Design criteria for Programs for Graphics require consideration of their impact on the surrounding area.

SECTION 1.12. PROGRAMS FOR GRAPHICS

Statement of purpose. A Program for Graphics is a written and visual statement that provides for the creative design of street graphics, and that integrates this design with the design of the building on which the street graphics will be displayed, with surrounding buildings, and with the surrounding area (Adapted from West Hollywood, California).

Commentary: *This subsection states the purpose to be served by Programs for Graphics. Approval of these programs is done in a design review process similar to an architectural design review process. A statement of purpose is important because it explains why design review is needed and helps support its constitutionality. This section does not include review procedures, which must meet free speech requirements.*

When allowed. The owners of one or more adjacent premises, or one or more occupants of a shopping center or multiuse building [not located in an Area of Special Character] may submit a Program for Graphics to the [name approval body] that need not comply with the requirements of this ordinance.

What a Program for Graphics must contain. The Program for Graphics shall contain a visual representation of the [lettering, illumination, color,] size, height, placement, and location of the street graphics proposed for display. It shall also contain a textual statement of the requirements that apply to the street graphics included in the program that may incorporate by reference the visual representation of street graphics in the street graphics plan.

Commentary: *The Program for Graphics introduces additional flexibility in the street graphics system by authorizing the design review of street graphics. This section is based in part on the Bridgeton, Missouri, street graphics ordinance. Areas of Special Character should be excluded if the community wants to limit Programs for Graphics to street graphics not located in these areas. The inclusion of lettering, illumination, and color is optional. Its inclusion depends on whether a community believes these design elements should be considered. See the commentary above on a requirement for lettering, illumination, and color.*

A Program for Graphics provides for the display of a “street graphic,” which means it may include any street graphic as that term is defined in the ordinance. This option is intended for special situations where a coordinated street graphics program can produce a more visually attractive graphics display than the regulations in the ordinance would allow.

Section 1.15 of the model ordinance contains a variance provision. Some communities may wish to omit the variance provision and rely on Programs for Graphics to provide flexibility in the street graphics system.

Criteria for approval. The [name approval body] may approve a Program for Graphics if it finds, after notice and hearing, that the Program for Graphics:

1. is consistent with the Statement of Purpose of this ordinance; and
2. meets the following design criteria:
 - a. Design quality. The sign shall:
 - i. Constitute a creative and substantial aesthetic improvement to the site, and shall have a positive visual impact on the surrounding area;
 - ii. Be of unique design, and exhibit a high degree of thoughtfulness, imagination, inventiveness, and spirit; and
 - iii. Provide strong and imaginative graphic character.
 - b. Architectural criteria. The sign shall:
 - i. Be appropriately related in form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering to the function and architectural character of the building or premise on which they will be displayed; and
 - ii. Be placed in a logical location in relation to the overall composition of the building’s facade and not cover any key architectural features or details of the facade.

Factors to consider. When deciding whether a Program for Graphics meets the design criteria included in this subsection, the [name approval body] shall consider the form, proportion, scale, [color], materials, surface treatment, overall sign size, and the size and style of the lettering of the street graphics included in the Program for Graphics.

Commentary: *This subsection contains the criteria for approving Programs for Graphics. Design criteria included in this sec-*

tion are based on criteria, with some modifications, that are included in the West Hollywood, California, sign ordinance. They should satisfy free speech law requirements for prior restraints on free speech, which are discussed in Chapter 11. The factors to consider included in this section have received judicial approval (*G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1083 (9th Cir. 2006)). It is possible that a requirement to consider color will be held content based.

Effect of approved Program for Graphics. An approved Program for Graphics shall supersede and may be either more or less restrictive than the requirements in this ordinance for street graphics included in the program.

Register. The [name of official or agency] shall maintain and continually revise a register in which the [name of official or agency] shall record all approved Programs for Graphics.

Commentary: *This is an important recordkeeping requirement that is similar to recordkeeping requirements for Areas of Special Character.*

Graphics plans. As an alternative to Programs for Graphics, the ordinance can contain a provision for Graphics Plans. These are described in the commentary to Section 1.11.

Design guidelines. Some communities have adopted design guidelines for street graphics that are not part of the street graphics ordinance, but supplement the ordinance and provide guidance in the administration of design programs like Programs for Graphics. Guidelines can include illustrations. The adoption of guidelines, though not part of the ordinance, should help support the design review process against objections that it is a prior restraint on free speech. For a discussion of design guidelines and manuals, see *Designing Planned Communities*, pp. 53–58 (Mandelker 2010).

Compatibility as a design criterion. Street graphics ordinances may include “compatibility” as a design criterion for design review. This criterion is suspect, as some courts have held a compatibility requirement unconstitutional as a prior restraint on free speech when it is not further defined. The design review criteria for Programs for Graphics do not have a compatibility requirement, but they require consideration of the positive visual impact of a program on the surrounding area. A compatibility criterion may be use-

ful in Areas of Special Character, however, if a community decides to require the approval of individual street graphics in these areas. This criterion can ensure that new street graphics will be consistent with the character of the area. The Belleville, Illinois, street graphics ordinance contains a compatibility requirement for individual street graphics in Areas of Special Character that should avoid free speech objections:

In determining whether a street graphic is compatible with the theme and overall character to be achieved in the [Area of Special Character], the [name approval body] shall base its compatibility determination on the following criteria:

1. The relationship of the scale and placement of the street graphic to the building or premise on which it is to be displayed.
2. The relationship of the colors of the street graphic to the colors of adjacent buildings and nearby street graphics.
3. The similarity or dissimilarity of the street graphic’s size and shape to the size and shape of other street graphics in the area.
4. The similarity or dissimilarity of the style of lettering on the street graphic to the style of lettering of nearby street graphics.
5. The compatibility of the type of illumination, if any, with the type of illumination in the area.
6. The compatibility of the materials used in the construction of the street graphic with the materials used in the construction of other street graphics in the area.

A community may also wish to adopt factors to consider as the basis for making the compatibility determination. The following factors are judicially approved:

Compatibility shall be determined by the relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size, and the size and style of lettering.

Display of street graphics. A premise or occupancy for which the Program for Graphics has been approved by the [name approval body] may only display street graphics that comply with the approved program, which shall supersede and replace the regulations for street graphics in this ordinance.

Commentary: This subsection requires all street graphics that are displayed to comply with an approved Program for Graphics. The street graphics included in a program need not comply with the regulations included in the ordinance. This exemption includes the limitation on items of information.

SECTION 1.13. STREET GRAPHICS PROHIBITED

The following street graphics are prohibited:

1. Street graphics attached to light poles or standards
2. Portable street graphics
3. Above-roof graphics

Commentary: Street graphics ordinances usually contain a section that prohibits the display of designated street graphics. The list of street graphics prohibited by this section is an example. Some street graphics ordinances contain much longer lists. Prohibiting the display of a designated list of street graphics may create constitutional problems if the prohibitions discriminate on the basis of content or otherwise fail the tests described in Chapter 11 (“Free Speech Issues”) of this report.

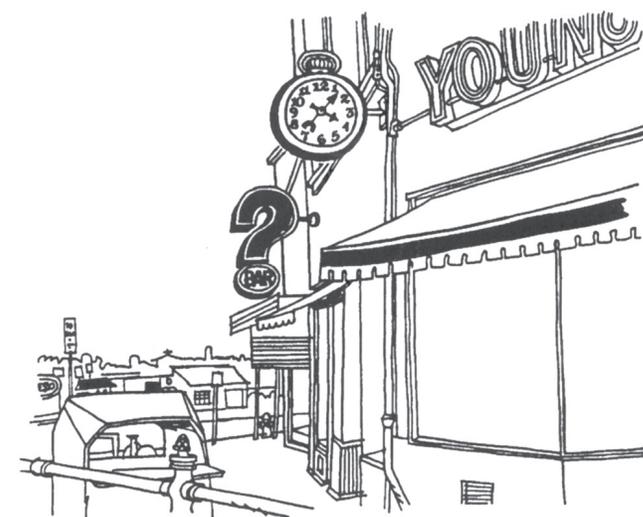
This section prohibits the street graphics designated in the first subsection because of the manner in which they are displayed. These prohibitions should not violate the free speech clause because they are content neutral. The model ordinance prohibits portable graphics because their display would seriously undermine the street graphics control system.

Many communities also prohibit billboards. This is a difficult term to define in a way that will avoid free speech objections. The model ordinance avoids this problem by regulating the way in which street graphics are displayed without making a distinction between off-premise and on-premise street graphics. Billboards are easier to prohibit if an ordinance provides that “all street graphics containing only noncommercial messages are deemed to be on premise street graphics.” This provision codifies a holding in *Southlake Property Assocs., Ltd. v. City of Morrow*, 112 F.3d 1114 (11th Cir. 1997), and makes all offsite signs commercial signs that can be prohibited under the free speech clause.

Alternate provisions for the display of portable street graphics. A community that does decide to permit portable graphics should consider a number of additional restrictions. For example, the ordinance can limit the display of portable graphics to a specified period of time in any



Before



After

Figure 8.4. Optional variances

one year. It can also provide that portable graphics must be constructed of safe materials, that they be securely anchored, that they utilize only approved electrical systems, that they not obstruct pedestrian movement, and that they not obstruct or be dangerous to motor vehicle traffic. These regulations should not present problems under the free speech clause.