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Report of the Committee on Land Use, Planning and Zoning Law - Report of the Subcommittee on Land Use and the First Amendment

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I. Introduction

THE PAST YEAR saw no cessation in cases reporting on the conflicts that arise when local land-use regulation is applied to uses claiming protection under the First Amendment. This report highlights the two major developments in this area—the courts' treatment of claims brought under the Religious Freedom Restoration Act of 1993[1] and the latest decision of the U.S. Supreme Court concerning sign regulation, *City of Ladue v. Gilleo*[2]—and discusses other cases involving regulation of religious institutions, adult businesses, and signs.

II. Regulation of Religious Institutions

A. *The Religious Freedom Restoration Act*

In 1993, congressional dissatisfaction with the decision in *Employment Division v. Smith*[3] decision led to the enactment of the Religious Free-

1. 42 U.S.C. §§ 2000b, 2000b-4 (1994).
2. 114 S. Ct. 2038 (1994).
3. Traditionally, free exercise challenges to government regulation of religion did not involve claims that government impermissibly singled-out religious activity for regulatory treatment, but rather, that an individual or religious institution should be exempted from an otherwise valid, neutral regulation of general applicability. In Employment Div. v. Smith, 494 U.S. 872 (1990), however, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
In *Smith*, the Court divided 5-to-4 in rejecting the Free Exercise claim of two Oregon

dom Restoration Act,[4] which provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability decision."[5] The statute permits exceptions to this rule only if there is a "compelling governmental interest" and the burden "is the least restrictive means of furthering that compelling governmental interest."[6] Because the purpose of the Act was to overturn a decision of the U.S. Supreme Court, both courts[7] and scholars[8] have questioned the Act's constitutionality on separation of powers grounds, a question that will, no doubt, ultimately be resolved by the Court. In the meantime, the protection of the Act is being claimed in an increasing number of land-use cases with mixed results.

In *Western Presbyterian Church v. District of Columbia*,[9] the church sought to enjoin the enforcement of a zoning ordinance that would have required it, after moving to a new location, to obtain a variance to continue operating its food-for-the-homeless program. In granting the injunction, the U.S. District Court for the District of Columbia held that the variance requirement constituted a substantial burden on the free exercise of religion and thus invoked the Act in granting the requested injunction. But in *Daytona Rescue Mission, Inc. v. City of Daytona Beach*,[10] a Florida federal district court not only rejected a similar claim—that the Act barred the application of locational restrictions to a homeless shelter and food bank proposed to be housed in a church—

state employees who had been denied unemployment benefits after they were fired as drug and alcohol counselors because the state viewed their religiously motivated peyote smoking as work-related misconduct. Three years after *Smith*, however, in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993), the Court unanimously agreed on the general principle that laws which are nonneutral, because their object is to infringe upon or restrict practices based on their religious motivation, may only be upheld if justified by a compelling governmental interest and the law is narrowly tailored to advance that interest. *Hialeah* thus sent a strong signal to the lower courts that the *Smith* decision should not be read to permit the targeting of religious practices under the guise of a purportedly general and religiously neutral ordinance.

4. 42 U.S.C. § 2000b-2000b-4.

5. 42 U.S.C. § 2000b-1(a).

6. 42 U.S.C. § 2000b-1(b).

7. *Compare* Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) (holding Act unconstitutional on grounds Congress did not act pursuant to an enumerated power), *with* Belgrad v. Hawaii, No. 93-00961 HG, 1995 WL 170221 (D. Haw. 1995) (holding Act constitutional pursuant to Congress' enforcement power under § 5 of the Fourteenth Amendment).

8. *See, e.g.*, Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994).

9. 849 F. Supp. 77 (D.D.C. 1994).

10. No. 94-0575, 1995 WL 289632 (M.D. Fla. 1994).

but went on to find that "the City's interest in regulating homeless shelters and food banks is a compelling interest and that [the zoning] code furthers that interest in the least restrictive means,"[11] thus upholding the city under the First Amendment analysis that predated *Smith*.[12] In other cases decided under the Act, courts have: denied a claim that the Act bars the application of parking requirements to religious institutions;[13] held that the Act does not apply to uses that constitute a nuisance, in this instance a massive display of Christmas lights that created traffic jams and other problems in a residential neighborhood;[14] and denied a preliminary injunction to plaintiffs claiming that the Act bars the need for a special permit for a Wiccan Church in a residential district.[15]

B. *Zoning Cases Involving Religious Institutions*

Although state courts have traditionally applied substantive due process analysis in cases dealing with zoning control over religious institutions,[16] in the past decade there has been a movement in some state courts toward applying an analysis based on the First Amendment. Recent cases that illustrate this trend include: *Grace Community Church v. Town of Bethel*,[17] *Macedonian Orthodox Church v. Planning Board of the Township of Randolph*,[18] and *Kali Bari Temple v. Board of Adjustment*.[19]

C. *Historic Preservation of Religious Institutions*

The courts are split regarding constitutional challenges to the application of historic preservation ordinances to religious institutions. In *Soci-*

11. *Id.* at *6.

12. *See also* First Assembly of God Inc. v. Collier County, 20 F.3d 419 (11th Cir. 1994), *opinion modified on denial of reh'g*, 27 F.3d 526 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 730 (1995). Here, the Eleventh Circuit, without reference to the Act, ruled that various zoning laws did not violate the First Amendment. Subsequently, the Eleventh Circuit modified its opinion, stating that "the Religious Freedom Restoration Act of 1993 may apply to this case. However, since it was not raised by either party, we decline to discuss it." *First Assembly*, 27 F.3d at 526.

13. Germantown Seventh Day Adventist Church v. Philadelphia, No. 94-1633, 1994 WL 470191 (E.D. Pa. 1994).

14. Osborne v. Power, 890 S.W.2d 570 (Ark. 1994) (citing dictum in *Western Presbyterian*).

15. Church of Iron Oak v. Palm Bay, 868 F. Supp. 1361 (M.D. Fla. 1994). The court also declined to enter an injunction due to the doctrine of abstention.

16. *See, e.g.*, BRIAN W. BLAESSER & ALAN C. WEINSTEIN, LAND USE AND THE CONSTITUTION 131-32 (1989).

17. 622 A.2d 591 (Conn. App. Ct. 1993).

18. 636 A.2d 96 (N.J. Sup. Ct. App. Div. 1994) (finding no First Amendment violation).

19. 638 A.2d 839 (N.J. Sup. Ct. App. Div. 1994) (ruling that denial of variance to permit occasional religious worship of small numbers of persons in private home was unjustified).

ety of Jesus v. Boston Landmarks Commission[20] and *First Covenant Church v. City of Seattle*,[21] the Massachusetts and Washington supreme courts, respectively, found that the designation of a church as a landmark violated the applicable state and/or federal constitution, while in *St. Bartholomew's Church v. City of New York*,[22] the Second Circuit held that the Free Exercise Clause did not require the New York City Landmarks Commission to permit a church to demolish a landmarked auxiliary building in order to erect an office tower in its place. Most recently, in *First United Methodist Church v. Seattle Landmarks Preservation Board*,[23] the Washington Court of Appeals held that the Free Exercise Clause did not prohibit the city from designating a church building as a landmark, but would prohibit the Landmarks Preservation Board from restricting any modifications to the building unless and until it was no longer used primarily for religious purposes. This is, of course, a distinction without a difference, since landmark designation of this sort is no more than honorific and provides no protection against actions that would alter or destroy the landmark.

III. Adult Business Regulations[24]

A. *Zoning Restrictions on Location*

In a series of cases decided between 1976 and 1986, the U.S. Supreme Court established that municipalities could single out adult businesses for special regulatory treatment in the form of locational restrictions if the municipality could show a substantial public interest in regulating such businesses unrelated to the suppression of speech and if the regulations allow for a reasonable number of alternative locations. However, an ordinance will be struck down when cities attempt to regulate on the basis that they object to the sexually explicit messages conveyed by adult businesses or seek to exclude, or severely restrict, adult businesses using an outright ban or excessive locational requirements.[25]

20. 564 N.W.2d 571 (Mass. 1990).

21. 787 P.2d 1352 (Wash. 1990) (en banc), *vacated and remanded*, 111 S. Ct. 1097 (1991), *holding reinstated*, 840 P.2d 174 (Wash. 1992).

22. 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

23. 887 P.2d 473 (Wash. Ct. App. 1995).

24. The terms "adult business" or "adult entertainment business" typically refer to bookstores, theaters, mini-theaters, video rental stores, bars, and cabarets that purvey "adult entertainment" consisting of performances or merchandise characterized by an emphasis on nudity and sexual acts. *See generally* J. GERARD, LOCAL REGULATION OF ADULT BUSINESS (1992); F. STROM, ZONING CONTROL OF SEX BUSINESS (1977).

25. Young v. American Mini-Theaters, 427 U.S. 50 (1976) (upholding constitutionality of amendments to Detroit's "Anti-Skid Row" ordinance that singled-out adult bookstores for special zoning treatment in the form of a "dispersion" requirement that prohibited such businesses from locating within 1,000 feet of any two other similarly regulated uses and also prohibited adult bookstores and theaters from locating within

Locational restrictions can easily be manipulated to severely restrict the number of permissible sites available for adult businesses and/or to require them to operate in undesirable locations. In particular, when combined with amortization provisions that force many, if not all, existing businesses to relocate within a relatively short period, severe locational restrictions can effectively terminate the operation of adult businesses in a community.[26] In *City of Renton v. Playtime Theaters, Inc.*, the Supreme Court stated that while government may not "effectively deny" adult businesses "a reasonable opportunity to open and operate," adult businesses "must fend for themselves in the real estate market on an equal footing with other prospective purchasers and lessees. . . ."[27] Since the *Renton* decision, courts have struggled to develop a standard for judging the reasonableness of locational restrictions. The standard emerging from recent cases focuses on whether there are an adequate number of potential sites for adult businesses within the relevant local real estate market.

The "real estate market" standard initially appeared in the Fifth Circuit's 1992 decision in *Woodall v. City of El Paso*,[28] where, after recognizing that *Renton* "contemplated that there was a 'market' in which [adult] businesses could purchase or lease real property on which business could be conducted," the court ruled that "land with physical characteristics that render it unavailable for any kind of development, or legal characteristics that exclude adult businesses, may not be considered 'available' for constitutional purposes under *Renton*." However, the court declined to address "the relationship between the economics of site location and the constitutionality of an adult business zoning ordinance."[29] In a later ruling in this same case,[30] the Fifth Circuit applied this standard to reverse and remand a district court decision on the ground that the jury had improperly taken commercial reasonableness into account when it determined that the adult business provi-

500 feet of a residential dwelling); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (holding that ordinance banning all live entertainment was invalid because it intruded too far on rights protected by the First Amendment); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (upholding a Seattle suburb's ordinance that concentrated adult businesses in an area comprising only 5% of the city).

26. *See, e.g.*, Woodall v. City of El Paso, 959 F.2d 1305, *modifying* 950 F.2d 255 (5th Cir.), *cert. denied*, 113 S. Ct. 304 (1992) (requiring all 39 adult businesses in city to relocate). *See also* Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991) (requiring at least 30 of 36 adult businesses to relocate to 0.54 percent of the total land area of the city.).

27. *Renton*, 475 U.S. at 42.

28. 959 F.2d 1305 (5th Cir. 1992).

29. *Id.* at 1306.

30. *Woodall*, 49 F.3d at 1120.

sions of the zoning ordinance left insufficient locations for adult businesses.[31]

In *Topanga Press, Inc. v. City of Los Angeles*,[32] the Ninth Circuit squarely faced the economics question which *Woodall* had avoided. Recognizing that the distinction between economic and other factors is difficult to maintain because physical and legal unavailability can be presented as economic unavailability—e.g., a site located five miles from the nearest public road could be seen either as physically unavailable or, given the cost of constructing an access route, as economically unavailable—the Ninth Circuit concluded that the economics of site location is a valid inquiry, so long as the economic analysis focuses on whether a site is part of the relevant real estate market.[33]

After reviewing several decisions involving locational restrictions, the Ninth Circuit noted the conditions that need to apply for a particular site to be considered part of the relevant real estate market. First, although *Renton* stressed that properties only had to be "potentially" available, the court argued that "a property is not 'potentially' available when it is unreasonable to believe that it would ever become available to any commercial enterprise." Second, sites in manufacturing or industrial zones are part of the market if they are: reasonably accessible to the general public; have a proper infrastructure of sidewalks, roads, and lighting; and generally suitable for some form of commercial enterprise. Third, and most obviously, commercially zoned locations are part of the real estate market. Once a site qualifies as part of the real estate market under these criteria, however, its "commercial viability" as an adult business location is irrelevant. Applying these criteria to the relocation sites offered under the challenged Los Angeles ordinance, the court concluded that much of the land "potentially available" for the relocation of adult businesses was not part of the real estate market and struck down the ordinance because it did not provide a sufficient number of "reasonably available" sites for the relocation of adult businesses.

31. *Id.* at 1120.

32. 989 F.2d 1524 (9th Cir. 1993).

33. *Id.* at 1530. The court stated:

> Accordingly, we do not think that *Renton* forbids a court to consider economics when evaluating whether a particular site is in fact part of the real estate market. For purposes of *Renton*, the distinction is between consideration of economic impact within an actual business real estate market and consideration of cost to determine whether a specific relocation site is part of the relevant market. A court may not consider the former, but it may consider the latter when determining whether a specific site is reasonably suitable for the operation of a business.

Id.

The *Topanga* approach, which allows consideration of economic factors to define the relevant real estate market but bars consideration of "commercial viability" for particular sites that are found to be within the relevant market, presents a workable standard for judging whether sites for adult businesses are "reasonably available." This approach allows local government to impose significant locational restrictions on adult businesses to avoid undesirable secondary effects, but prevents local government from effectively banning such businesses by limiting them to locations that present insuperable physical, legal, or economic barriers to development or operation.

The starting point for drafting locational restrictions to meet the *Topanga* test is to meet the three factors noted above. In addition, planners and elected officials need to be cautious about "distancing" requirements—i.e., no adult use may locate within 1,000 feet of another adult use or within 1,000 feet of a church, school, playground, etc.—since these dramatically reduce the land available for sites in any given area. To better understand the effect of a 1,000 foot distancing requirement, consider that the requirement erects an imaginary circular fence enclosing seventy-two acres[34] that are barred to adult uses. The more uses to which the requirement applies, of course, the more seventy-two acre circles that are barred to adult businesses.

B. *Licensing Ordinances*

In *FW/PBS, Inc. v. City of Dallas*,[35] the Court ruled for the first time on whether the licensing provisions of a comprehensive adult business ordinance constitute a prior restraint on freedom of expression. Six Justices agreed that the licensing provisions were an unconstitutional prior restraint because, rather than penalizing expression after the fact, they prevented the expression from occurring in the first place. While such prior restraints are not unconstitutional per se, there is a strong presumption that they are not constitutionally valid. However, the six Justices split evenly on exactly what procedural safeguards were required to validate an adult business licensing ordinance. All six agreed that such ordinances must not "place unbridled discretion in the hands of a government official or agency,"[36] must require a definite time limit within which the decision maker must issue or deny the license, during which time the status quo must be maintained, and must allow for

34. The 1,000 foot requirement creates a circle with a radius of 1,000 feet and thus an area of 3,141,600 square feet, which equals 72 acres.

35. 493 U.S. 215 (1990).

36. *Id.*

prompt judicial review if the license is erroneously denied. However, Justice Brennan, joined by Justices Marshall and Blackmun, argued that a licensing ordinance must require that the government bear both the burden of going to court to enforce the denial of a license application and the burden of proof in court.[37]

Recent decisions applying the *FW/PBS* ruling have struck down licensing ordinances that lacked effective time limitations,[38] failed to limit the discretion of city officials to grant or deny a license,[39] required adult businesses operating at the time a licensing ordinance was enacted to cease operations until they obtained a license,[40] or charged higher fees for adult businesses, because this regulated on the basis of the content of expression.[41] Likewise, in *JJR, Inc. v. City of Seattle*,[42] the Washington Supreme Court, without citing *FW/PBS*, held that a licensing scheme that allowed the city to revoke or suspend a license to operate an adult business without a mandatory stay of revocation or suspension pending judicial review was an invalid prior restraint under the state constitution. Conversely, where a licensing scheme provides adequate procedural safeguards, it will be upheld.[43]

C. *Regulating Nude Dancing Through Public Indecency Laws*

In *Barnes v. Glen Theatres, Inc.*,[44] a divided Supreme Court upheld the application of Indiana's public indecency statute to prohibit totally nude dancing in bars and cabarets. Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, delivered the opinion of the Court upholding the statute,[45] with Justices Scalia and Souter writing separate

37. Justice O'Connor wrote an opinion arguing for the lesser standard, which was joined by Justices Kennedy and Stevens. The procedural safeguards about which the Justices disagreed were first stated in Freedman v. Maryland, 380 U.S. 51 (1965).

38. *See, e.g.*, 11126 Baltimore Boulevard, Inc. v. Prince George's County, 32 F.3d 109 (4th Cir. 1994); Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994); MGA SUSU, Inc. v. County of Benton, 853 F. Supp. 1147 (D. Minn. 1994).

39. *See, e.g.*, East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995), *reh'g denied*; MGA SUSU, Inc. v. County of Benton, 853 F. Supp. 1147 (D. Minn. 1994).

40. *See* TK's Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994); Grand Brittain, Inc. v. City of Amarillo, 27 F.3d 1068 (5th Cir. 1994).

41. *See* AAK, Inc. v. City of Woonsocket, 830 F. Supp. 99 (D. R.I. 1993).

42. 891 P.2d 720 (1995).

43. See, e.g., City of Colorado Springs v. 2354, Inc., 896 P.2d 272 (Colo. 1995), *reh'g denied* June 1995.

44. 111 S. Ct. 2456 (1991).

45. Chief Justice Rehnquist's plurality opinion acknowledged that nude dancing is expressive conduct protected by the First Amendment, but found that it was only "marginally" within the Amendment's "outer perimeters."

concurring opinions.[46] Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented.[47] Although the Rehnquist and Scalia opinions gave a green light to state and local governments to bar nude dancing on public morality grounds, the fact that Justice Souter, who provided the crucial fifth vote to uphold the statute, based his concurring opinion on a secondary effects justification for the statute has strongly influenced subsequent court decisions.

Courts have routinely upheld ordinances prohibiting nude dancing in adult entertainment establishments based on a showing that the ordinance was aimed at avoiding undesirable secondary effects.[48] Courts will also invoke the Twenty-First Amendment to uphold local ordinances that prohibit nude dancing in bars, deny a liquor license to any establishment that features totally nude dancing,[49] or require more clothing to be worn by erotic dancers in an establishment serving alcohol than by citizens on the streets or beaches.[50]

By contrast, courts have struck down ordinances that extended the nude dancing ban to "mainstream" establishments,[51] or, conversely,

46. Justices Scalia and Souter concurred in the judgment of the Court upholding the Indiana statute, but each wrote separately to state his differing views on the reasons why it should be upheld. Justice Scalia, who viewed the public indecency law as a general law regulating conduct and not specifically directed at expression, argued that the statute should not be subject to First Amendment scrutiny at all. By contrast, Justice Souter provided a far more cautious fifth vote to uphold the statute. While he agreed with both the plurality and dissent that the nude dancing at issue in this case is subject to a degree of First Amendment protection, and agreed with the plurality's use of the *O'Brien* test, he wrote separately because he viewed the justification for the statute to be not public morality, the position taken by both the plurality and Justice Scalia, but the substantial governmental interest in establishments that offer nude dancing. Justice Souter's analysis under the *O'Brien* test thus finds support in both the *Young* and *Renton* decisions. 111 S. Ct. at 2469-2470.

47. The four dissenters, in an opinion authored by Justice White, argued that the statute directly regulates expressive activity and so may only be justified by a compelling state interest that is narrowly drawn. But rather than narrowly tailoring a statute to adres prostitution and associated evils, or using its authoity under the Twenty-First Amendment to regulate nude dancing in bars. *See* Newport v. Iacobucci, 479 U.S. 92 (1986) (per curiam), *reh'g denied*, 479 U.S. 1047 (1987); New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (per curiam); California v. LaRue, 409 U.S. 109 (1972), *reh'g denied*, 410 U.S. 948 (1973). Indiana impermissibly chose to ban an entire category of expressive activity.

48. *See, e.g.*, Cafe 270, Inc. v. St. Johns County, 856 F. Supp. 641 (M.D. Fla. 1994); Bright Lights, Inc. v. City of Newport, 830 F. Supp. 378 (E.D. Ky. 1993); Dodger's Bar & Grill v. Johnson County Bd. of Comm'rs, 815 F. Supp. 399 (D. Kan. 1993), *remanded on other grounds*, 32 F.3d 1436 (10th Cir. 1994); O'Malley v. City of Syracuse, 813 F. Supp. 133 (N.D.N.Y. 1993); Gravely v. Bacon, 429 S.E.2d 663 (Ga. 1993); S.J.T., Inc. v. Richmond County, 430 S.E.2d 726 (Ga. 1993).

49. *See* Proctor v. County of Penobscot, 651 A.2d 355 (Me. 1994); Knudtson v. City of Coates, 519 N.W.2d 166 (Minn. 1994).

50. *See Dodger's Bar & Grill*, 815 F. Supp. at 399.

51. *See, e.g.*, Pel Asso, Inc. v. Joseph, 427 S.E.2d 264 (Ga. 1993).

upheld exceptions to the ban that are limited to "mainstream" establishments,[52] because there is no evidence that nude dancing in such establishments produces undesirable secondary effects. Courts have also not hesitated to strike down ordinances targeting nude dancing when an intent to suppress protected expression, rather than the stated concerns about secondary effects, was the motivation for the ordinance,[53] or the ordinance was unconstitutionally vague or overbroad.[54]

IV. Regulation of Signs and Billboards

A. City of Ladue v. Gilleo[55]

In *Ladue*, a unanimous Supreme Court ruled that an ordinance banning all residential signs, except for those categories of signs falling within ten exemptions,[56] violated the First Amendment rights of homeowners because it totally foreclosed their opportunity to display political, religious, or personal messages on their own property.[57] Despite the numerous exceptions in the ordinance, the Court, for the sake of argument, accepted the city's contention that the ordinance was a content-neutral "time, place, and manner" regulation, but still struck down the ordinance because the city had foreclosed an important and distinct medium of expression—lawn signs—to political, personal, or religious messages,[58] and had failed to provide adequate substitutes for such an im-

52. *See, e.g.*, Top Shelf, Inc. v. Mayor of Savannah, 840 F. Supp. 903 (S.D. Ga. 1993); *S.J.T.*, 430 S.E.2d 726 (1993).

53. *See* Connor v. Town of Hilton Head Island, 442 S.E.2d 608 (S.C. 1994).

54. *Id. See also* Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994); *Pel Asso*, 427 S.E.2d at 264.

55. 114 S. Ct. 2038 (1994).

56. The 10 exempted types of signs were: "municipal signs"; "subdivision and residence identification signs"; "[r]oad signs and driveway signs for danger, direction, or identification"; "health inspection signs"; "[s]igns for churches, religious institutions, and schools"; "identification signs" for other not-for-profit organizations; signs "identifying the location of public transportation stops"; "[g]round signs advertising the sale or rental of real property"; "[c]ommerical signs in commercially zoned or industrial zoned districts"; and signs that "identif[y] safety hazards." Each of these exempted categories was subject to special size limitations and some were also subject to additional conditions set out elsewhere in the ordinance. *Id.* at 2040 n.6.

57. *Id.* In this case, Margaret Gilleo, a local resident had challenged the ordinance because it prohibited her from displaying a small sign in the window of her home that read "For Peace in the Gulf."

58. *Id.* at 2044-45. The Court described the importance of residential signs:

> Signs that react to a local happening or express a view on a controversial issue both reflect and animate change in the life of a community. Often placed on lawns or in windows, residential signs play an important part in political campaigns, during which they are displayed to signal the resident's support for particular candidates, parties or causes. They may not afford the same opportunities for conveying complex

portant medium.[59] Unfortunately, the Court then declined to provide any further guidance as to how government can draft residential, as well as other, sign regulations that will withstand legal challenges,[60] leaving government and the lower courts to "fill in the details" as can be seen from the cases discussed below.

B. *Political Signs*

While *Ladue* ruled that government could not prohibit the display of political lawn signs at one's residence, other courts have struck down prohibitions on political signs that applied in both residential and other

ideas as do other media, but residential signs have long been an important and distinct medium of expression.

City of Ladue v. Gilleo, 114 S. Ct. 2038, 2045 (1994) (footnote omitted).

59. *Id.* at 2046-47. The Court stated:

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade. A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.
>
> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. . . . Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.
>
> A special respect for individual liberty in the home has long been part of our culture and law, . . . that principle has special resonance when the government seeks to constrain a person's ability to speak there. . . . Most Americans would be understandably dismayed, given that tradition, to learn that it was illegal to display from their window an 8- by 11-inch sign expressing their political views. Whereas the government's need to mediate among various competing uses, including expressive ones, for public streets and facilities is constant and unaviodable, . . . its need to regulate temperate speech from the home is surely much less pressing.

Id. (footnotes and citations omitted).

60. *Id.* at 2047. The Court stated that its decision "by no means leaves the City powerless to address the ills that may be associated with residential signs," but then could offer no more guidance than to opine that: (1) "individual residents themselves have strong incentives to keep their own property values up and to prevent 'visual clutter' in their own yards and neighborhoods;" (2) signs displayed by residents for a fee or off-site commerical signs or residential property do not raise the same considerations as "political, religious and personal" expression; and (3) "more temperate measures could in large part satisfy Laude's stated regulatory needs without harm to First Amendment rights of its citizens." *Id.*

districts.[61] Courts have also struck down ordinances that place unreasonable limits on the number of political signs that may be displayed[62] or that impose time limits only on political signs,[63] but have upheld an ordinance that allowed one noncommercial sign to be displayed all year long and additional political signs—up to one sign per ballot issue and one sign per ballot candidate—during the political campaign season.[64]

C. *Locational Restrictions*

As *Ladue* indicates, courts are increasingly sensitive to the location of signs as a primary justification for their differing regulatory treatment of signs.[65] For example, the Eleventh Circuit found that a municipal sign ordinance, barring off-premises billboards in historic districts, was viewpoint neutral and did not prefer commercial over noncommercial speech. The court recognized that the ordinance regulated off-premise signs solely because of their location in the historic district, and found there was no basis for the claim put forth by those challenging the ordinance that on-premises signs should be equated with commercial

61. *See, e.g.*, Runyon v. Fasi, 762 F. Supp. 280 (D. Haw. 1991); Fisher v. City of Charleston, 425 S.E.2d 194 (W. Va. 1992).

62. *See, e.g.*, Arlington County Republican Comm. v. Arlington County, 983 F.2d 587 (4th Cir. 1993) (striking down ordinance imposing two-sign limit).

63. *See, e.g.*, Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 199), *aff'd* in part, *rev'd* in part, 832 F. Supp. 1329 (W.D. Mo. 1993) (invalidating ordinance limiting the display of political signs to 30 days before and seven days after an election); McCormack v. Township of Clinton, 872 F. Supp. 1320 (D. N.J. 1994) (granting preliminary injunction against enforcement of sign ordinance that limited display of political signs to 10 days prior to and three days after the election); Collier v. City of Tacoma, 854 P.2d 1046 (D. Wash. 1993) (invalidating ordinance that only permitted the display of political signs in residential areas for 60 days before and seven days after an election, but imposed no time restrictions on other temporary signs, on the grounds that the city could not impose time restrictions on political speech to advance aesthetic interests until it could show that it was seriously and comprehensively addressing aesthetic concerns).

64. Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. Ct. App. 1994).

65. 114 S. Ct. 2038 (1994). Justice Stevens, writing for a unanimous Court in striking down Ladue's ban on residential signs that carry personal, political, or religious messages, acknowledged that the location of a sign may play a critical role in analyzing the validity of its regulatory treatment.

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade. A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

Id. at 2046.

speech and off-premises signs with noncommercial speech.[66] By contrast, the Third Circuit struck down a Delaware statute and county ordinance, which banned all signs in, and within twenty-five feet of a right-of-way, with certain exceptions, because the exceptions were not significantly related to the location of the signs and thus violated content-neutrality.[67]

66. Messer v. City of Douglasville, Ga., 975 F.2d 1505 (11th Cir. 1992).

67. Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994). The court offered the following explanation for the relationship between the location of a sign and its regulatory treatment:

> A sign that says "Speed Limit 55" or "Rest Stop" is more important on a highway than is a sign that says "Rappa for Congress." A sign identifying a commerical establishment is more important on its premises than is a sign advertising an unrelated product. If the former signs are banned from the highway or the place of business, there is no other means of communication that can provide equivalent information. In contrast, placing a sign that says "Rappa for Congress" or "Drink Pepsi" on a highway, while it may be an important means of communication because of the number of travelers [sic] on the highway, has no relationship to the property on which it is placed or to the fact that it is next to a highway. Banning these signs potentially leaves many alternative means of communicating the same information.
>
> Thus, we conclude that when there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban [on] speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate and so long as the exception also survives the test proposed by the Metromedia concurrence; i.e., the state must show that the exception is substantially related to advancing an important state interest that is at least as important as the interest advanced by the underlying regulation, that the exception is no broader than necessary to advance the special goal, and that the exception is narrowly drawn so as to impinge as little as possible on the overall goal.
>
> The requirement that a sign be significantly related to the property can be met in either of two ways. First, the state can show that a sign is particularly important to travelers [sic] on the nearby road—for example, a directional sign, or a sign conveying the nearest location of food. Second, the state can show that a sign better conveys its information in its particular location than it could anywhere else—for example, an address sign performs its function better when it is actually on the property with that address than if it is anywhere else.
>
> By requiring exceptions to be significantly related to a particular locality, we provide a concrete criterion by which legislatures and courts can evaluate particular exceptions. Courts will not be making an abstract assessment of the relative worth of various types of speech. Yet the test we have adopted still allows government some flexibility to limit speech when it has a significant interest in doing so without eliminating all speech.
>
> Such flexibility does come at a price—because government is no longer faced with a choice between banning all speech or none, it is more likely to opt to restrict speech. But we do not think that government should be forced to refrain from restricting speech in a place whenever it thinks that particular speech is so important a component of the place that it will be unwilling to restrict any speech if it has to restrict that speech. Thus, restating the major components of the test we have adopted, we hold that when there is a significant relationship between the content of particular speech and a specific location, the state can exempt speech having that content from a general ban so long as the exemption is substantially related to serving an interest that is at least as important as that served by the ban.

Id. at 1064-66 (footnotes omitted).

D. *Regulation of Real Estate Signs*

In *Linmark Assocs., Inc. v. Township of Willingboro*,[68] the U.S. Supreme Court 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. In recent cases involving the regulation of real estate signs, courts have upheld the imposition of reasonable restrictions on the size, number, and location of real estate signs in furtherance of legitimate interests such as aesthetics.[69] Such restrictions are suspect, however, because they are content-based, and courts have also recently invalidated restrictions on real estate signs where the government has failed to convince the court that its regulations were necessary to achieve a legitimate governmental interest[70] or were not aimed at curtailing information.[71] However, ordinances that allow temporary real estate signs in residential areas, while prohibiting political and other noncommercial temporary signs, are invalid, both because they restrict the free speech rights of property owners without providing an alternative channel of communication[72] and grant more favorable treatment to commercial than to noncommercial messages.[73]

E. *Amortization of Nonconforming Signs*

In *Naegele Outdoor Advertising, Inc. v. City of Durham*,[74] the Fourth Circuit upheld the City of Durham, North Carolina's virtually complete ban on billboards with commercial messages on them, affirming the

68. 431 U.S. 85 (1977).

69. *See, e.g.*, South-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991), *cert. denied sub nom.*, Greater S. Suburban Bd. of Realtors v. Blue Island, 112 S. Ct. 971 (1992) (upholding restrictions on the size, placement, and number of realty signs to protect the aesthetic interests of a wooded semi-rural village).

70. *See, e.g.*, Citizens United for Free Speech v. Long Beach Township Bd. of Comm'rs, 802 F. Supp. 1223 (D. N.J. 1992) (invalidating ordinance in resort community that permitted "for sale" signs and barred "for rent" signs during certain periods on the ground that community presented no evidence to justify that the ordinance would achieve its claimed interest in aesthetics). *See also* City of Dellwood v. Lattimore, 857 S.W.2d 513 (Mo. Ct. App. 1993) (city failed to show that $50 fee charged for display of realty signs was reasonably related to the cost of enforcement).

71. *See, e.g.*, Cleveland Area Bd. of Realtors v. City of Euclid, 833 F. Supp. 1253 (N.D. Ohio 1993) (invalidating ordinance restricting realty and other lawn signs, which, although ostensibly content-neutral, was found to be aimed at the message of "white flight" conveyed by realty signs, and the window signs that were permitted did not provide an adequate alternative channel of communication).

72. *City of Ladue*, 114 S. Ct. at 2038.

73. *See, e.g.*, National Advertising Co. v. Town of Babylon, 703 F. Supp. 228 (E.D.N.Y. 1989), *aff'd in part, rev'd in part*, 900 F.2d 551 (2d Cir. 1990).

74. 19 F.3d 11 (4th Cir. 1994); 803 F. Supp. 1068 (M.D.N.C. 1992).

reasoning of the district court which found, after making a detailed factual inquiry, that the city's five and one-half year amortization period did not deny Naegele the economically viable use of its property. The most significant aspect of this case was the district court's determination that individual billboards are not the appropriate unit of property for the takings analysis. Rather, because Naegele's advertising sales are a combination of signs in the Durham metro area, and not sales of individual signs, the appropriate unit of property for purposes of the takings analysis had to be based on this marketing factor. Thus, the court found that the appropriate measuring unit for the takings analysis was the company's combined group of Durham metropolitan area signs.[75] Having determined the appropriate unit of property, the district court then undertook an extensive analysis of the factors which were determinative of whether the ordinance's interference with Naegele's property constituted a taking.[76] The court concluded that while Naegele had, without question, suffered a significant loss in the value of its property as a result of the ordinance, the nature and degree of that loss did not constitute a taking.[77]

F. *Unique Types of Sign Regulation*

1. BALTIMORE'S PROHIBITION OF ALCOHOL AND CIGARETTE ADVERTISING ON BILLBOARDS

In 1994, federal district courts upheld each of the Baltimore ordinances enacted to restrict outdoor advertising of cigarettes and alcoholic beverages. In *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore*,[78] a brewer and an outdoor advertising company challenged the ordinance banning billboard advertising of alcoholic beverages,[79] while *Penn Advertising v. Mayor and City Council of Baltimore*, involved an advertising company's challenge to the ordinance prohibiting cigarette advertising on billboards located in certain designated zones. In both

75. *Naegele Outdoor Advertising, Inc.*, 803 F. Supp. at 1073.

76. *Id.* at 1074-79.

77. *Id.* at 1080. The court noted, however, that in light of the U.S. Supreme Court's ruling in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), its determination that each individual sign does not constitute a separate unit of property was significant, because, had there been a finding that each sign did constitute a separate unit of property, "the Lucas inquiry into the nature of Naegele's title could be determinative." *Id* n.7.

78. 855 F. Supp. 811 (D. Md. 1994).

79. In 1993, the Maryland legislature had enacted a statute that delegated authority to the City of Baltimore to adopt an ordinance restricting outdoor advertising of alcoholic beverages if the city determined the ordinance is "necessary for the promotion of the welfare and temperance of minors." *Id.*

cases, the courts analyzed the restrictions under the *Central Hudson* test for commercial speech,[80] and upheld the ordinances.

2. ATLANTA'S OLYMPIC SIGN ORDINANCE

In *Outdoor Systems, Inc. v. City of Atlanta*,[81] a federal district court invalidated Atlanta's 1994 "Olympic Sign Ordinance," which created a five member committee to recommend "Concentrated Sign Districts" within the city where *only* those signs which promote an Olympic or Olympic-related event of some kind will be permitted. Applying the *Central Hudson* test, the court found that while the ordinance directly served a substantial governmental interest in promoting Atlanta's hosting of the 1996 Olympic Games, it was more extensive than necessary to serve that interest because it imposed a "blatant content-based restriction"[82] as a prior restraint to all forms of commercial speech other than those advertising the Olympics.

80. Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980), sets forth a four-part test for restrictions on commercial speech: (1) Is the speech lawful and not misleading? If so, it is protected by the First Amendment, and the court must ask: (2) whether the asserted government interest is substantial. If it is, the court must determine (3) wheter the regulation directly advances the governmental interest asserted and (4) whether it is not more extensive than necessary to serve that interest.

81. 885 F. Supp. 1572 (N.D. Ga. 1995).

82. *Id.*