INFORMATION MEMO

Sign Ordinances and the First Amendment

Learn how to design a sign ordinance for your city that meets the requirements of the First Amendment for protecting various forms of speech.

RELEVANT LINKS:

I. First Amendment principles

The First Amendment protects signs as speech, and courts will look very closely at any attempts to regulate signs. There are a few rules for regulating signs:

- Do not regulate based on content.
- Do not favor commercial speech (advertising) over noncommercial speech.
- Restrictions on signs must accomplish a substantial government interest and be no broader than necessary. The main substantial governmental interests recognized by courts are traffic safety and aesthetics.

II. Drafting a sign ordinance

With the First Amendment rules for regulating signs in mind there are several steps cities can take when drafting ordinances. There are things every sign ordinance should probably contain and provisions all sign ordinances should avoid.

A. Provisions to include

1. Statement of purpose

This section tells why the ordinance was drafted and how it should be applied. It should state clearly that it is not intended to have content-based restrictions and should not be applied that way. It provides a quick clear statement of government purposes and how the ordinance fulfills those purposes rather than needing to review your legislative record if challenged.

See sample sign ordinance, City of Hopkins.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.
2. **Substitution clause**

A substitution clause provides that for every sign that is allowed, any non-commercial message could be legally substituted. This ensures that non-commercial speech is never discriminated against based on content because it will always allow a noncommercial message on any sign. Many ordinances inadvertently define signs in terms of advertising and may incidentally seem to allow only commercial messages. A substitution clause may correct these mistakes by providing a catch-all allowance of noncommercial messages notwithstanding other provisions.

3. **Severability clause**

A severability clause provides that if any provision of the ordinance is found to be invalid, the remainder of the ordinance stands on its own and is still valid. This clause may prevent a flaw in part of the ordinance from invalidating all of it.

4. **Election season pre-emption**

Your ordinance should contain acknowledgement of election season preemption required by state law. Under this law municipalities must allow noncommercial signs of any size during election season, from 46 days before the state general primary until ten days after the state general election.

5. **Content-neutral regulations**

Regulations should be objectively based on time, place, and manner, not content. Examples include regulations based on size, brightness, zoning district, spacing, and movement.

B. **Provisions to avoid**

1. **Unfettered discretion**

Avoid discretionary approval by the city. Having discretion creates the potential for favoring some messages or messengers over others, whether or not that discretion is actually abused. Permit requirements should be transparent and objective.

2. **Exemptions or favoritism**

Avoid exempting certain groups or messages, such as church signs or official flags, from permit requirements. This could be content-based discrimination.
Exemptions also may “water down” the substantial government interest. For example, if an ordinance prohibits temporary signs but allows a long list of exemptions, it suggests the city is not really concerned about temporary signs.

Exemptions may be based on valid time, place, or manner restrictions, such as exempting all signs under a certain size from permitting requirements.

### 3. Over-defining signs
Cities may inadvertently treat non-commercial speech differently by defining “sign” as “advertising”. This occasional problem is the combination of a few steps:

- Signs are defined as advertising devices.
- The ordinance allows signs as defined.
- All other signs are prohibited.

This arguably prohibits noncommercial speech, which is unconstitutional.

### III. Common sign ordinance issues

#### A. Off-premises advertising (billboards)
Off-premise advertising consists of commercial signs that do not advertise for a business on the same premises as the sign. It is legal to forbid off-premise advertising, so long as the prohibition does not extend to noncommercial messages.

#### B. Flags
Be cautious of regulations that might favor some types of flags, particularly the United States Flag, over other flags. This is a good place for the substitution clause; if one type of noncommercial flag would be acceptable, any noncommercial flag should be allowed.

#### C. Yard signs
Some courts have held that yard signs are constitutionally protected and cannot be prohibited. Be especially cautious about provisions that favor some messages over others, such as exemptions for real estate or construction project signs.

---

D. Electronic signs

Electronic signs present new challenges, as the technology is capable of new levels of brightness, movement, flashing, and potential distraction. Most sign ordinances do not adequately address these issues. The League has commissioned a study on the traffic safety implications of the technology. Cities may wish to consider moratoriums while the study is conducted and then drafting ordinances that apply the information to each community. A moratorium may prevent electronic signs from becoming grandfathered.

IV. Further assistance

There are exceptions to these general rules about sign ordinances and the First Amendment but they should be approached cautiously and with legal advice. Cities should work closely with their city attorney to draft and review sign ordinances.

You may also contact League staff for assistance and sample ordinances.