



Public Policy Considerations *in* SIGN REGULATION

Introduction and Basic Assumptions

Of all land use management efforts, probably the most com-

plex and far-reaching is that of writing a sign code to regulate commercial and political place-based speech. Sign regulation impacts public policy in count-

less ways. The sign code can directly and negatively impact fundamental constitutional rights, including freedom of speech, private property rights, due process and equal protection, as well as affecting economic vitality, municipal funding, urban sprawl and urban deterioration, job creation, resource allocation, market entry, and ultimately the prices consumers pay. But because signage is a ubiquitous phenomenon, its complex role is often under-appreciated, and little thought is directed toward the negative consequences that may occur as a result of a hasty or

partial analysis of a proposed set of regulations.

Signage is of such vital importance to the proper functioning of our market-oriented economy that a highly restrictive code can compel otherwise law-abiding citizens to defy the law, resulting in a flood of illegal signs installed without permits.¹ Unfortunately, some governing bodies have adopted sign codes that simply cannot be enforced, resulting in frustration and, in many cases, even further unenforceable restrictions. Whether intentional or not, these codes are written as if censorship and violation of due process of law do not matter and do not have political consequences. But when cities try to enforce highly restrictive codes, they often find that they cannot gain the political backing necessary to do so. Worse, the parties involved are

increasingly taking cities to court and successfully challenging such codes, at great cost to the cities that imposed the speech restrictions.

Because of the First Amendment protection afforded signs, and the damages and attorneys' fees provisions contained in the federal Civil Rights Act, Title 42 U.S.C. § 1983, several landmark court cases involving successful challenges to signage regulation have resulted in substantial costs to the cities involved. In the case of *Cleveland Area Board of Realtors v. City of Euclid*,² Euclid, Ohio was required to pay nearly \$400,000 in plaintiff's legal fees. In *North Olmsted Chamber of Commerce v. City of North Olmsted*,³ North Olmsted, Ohio was required to pay over \$200,000. In *City of Ladue v. Gilleo*,⁴ Ladue, Missouri was forced to pay

nearly one million dollars in plaintiff's legal fees. These figures do not include the amounts the cities spent on their own legal fees while defending their codes.

The unfortunate result when cities enact overly-restrictive codes is that a great deal of time and revenue have been lost in pursuing misguided objectives. Perhaps more importantly, communities are missing the opportunity to utilize what is one of the most effective forms of communication for the public good. So what is a city to do? How can it successfully regulate signage, and how does signage fit in with the enhancement of a community? How can this form of speech be used to advance good public policy?

A benefit-cost analysis can be extremely helpful in answering



1. Dr. Robert J. Claus relates that in a 2002 meeting of the California Electric Sign Association in Los Angeles, California, a City building inspector estimated Los Angeles was home to 360,000 illegal signs, but the City has no funding to address the problem.
 2. 88 F.3d 382 (6th Cir., 1996).
 3. 86 F.Supp 2d 755 (N.D. Ohio 2000).
 4. 512 U.S. 43 (1994).

these questions and determining which of several options is most advantageous. But, as with any benefit-cost analysis, the outcome can be greatly influenced by the particular information that is provided or withheld, as well as by the underlying assumptions on which the analysis is based.⁵

A broad exposure to various sign regulations reveals one common but unstated assumption (which may or may not work its way into the consciousness of those who act upon it): that by reducing the size and/or number of signs that may be displayed on private property, and subjecting sign users to the oversight (and too frequently, prior restraint) of government employees with little, if any, economic or business knowledge, the economy will be stimulated and businesses will be supported. This misguided assumption, combined with a belief that if the reasoning behind a regulation makes “common sense” and is “ration-



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ally related” to the proposed regulation, then the regulation is justified and it is up to the sign user to prove otherwise in court,⁶ has led cities to enact sign regulations that are detrimental both to the sign users they regulate and the community as a whole.

In contrast, the following examination of public policy issues related to sign regulation rests on the assumption that freedom of speech and equal opportunity in a free market system are principle reasons American retailing is the most productive and efficient retail system in the world.

The American retail marketplace is a rough-and-tumble arena, and if someone enters it with a better strategy, a better idea, or a lower price, the consumer is free to choose it.

This competition works to benefit all consumers. Goods typically sell for 15% to 50% less in the United States than they do in northwestern Europe or Japan (see Sidebar, “Public Policy Choices Affect Consumer Prices and Availability”), where strict government controls interfere with market response to consumer preferences. With that in mind, this analysis seeks incremental improvement to the functioning of the American free enterprise system.

The examination of public policy issues in this section is also based on the assumption that the need for signs, which are speech, is derived from demands put forward by the consumer, rather than demands put forward by the government. Neither commercial speech nor political

Public Policy Choices Affect Prices and Availability

Both in Japan and in countries throughout Europe, government regulations imposed to accomplish particular public policy goals have resulted in dramatically higher consumer prices and inconvenience.

In Ireland, for example, a 1902 temperance law intended to reduce drinking froze the number of pubs and barred the transfer of pub licenses across county lines. The law remains, due largely to pressure from Ireland’s powerful pub lobby, which argues more competition would hurt pub quality (contrary to prevailing thought in the United States, they claim restraints on competition give pub owners more incentive to improve their bars). Some analysts, however, say the pub owners resist change because the shortage of pubs drives up their value – and the cost of pints. Many people view pubs as central to Irish culture, and are becoming concerned over the fact that the pub shortage and resultant high prices are forcing more people to drink at home (quite unusual in Ireland), which, they believe, is beginning to undermine Ireland’s civic life.⁷

Another example of public policy interference with the interests of consumers also shows the market response to consumer needs in spite of government restrictions. Prior to 1994, England and Wales prohibited stores from conducting business on the Sabbath (Sunday). Loopholes in the law allowed a number of absurdities; for instance, gin and pornographic magazines could lawfully be sold on Sunday, but not powdered milk or the Bible. Service stations, which were allowed to be open on Sunday, discovered they could sell many household goods by calling them “motoring accessories” (they were allowed to sell nylon stockings on the grounds that in an emergency they could be used to replace a broken fan belt). New laws – written to placate small shopkeepers (who feared competition), trade unions (which were worried sales clerks would have to work Sundays), and religious groups – have strict retailing limitations, too. For example, large stores, which can take advantage of economies of scale for the benefit of consumers, are not allowed to stay open longer than six continuous hours between 10 a.m. and 6 p.m. on Sunday; if they do, they face fines of as much as 50,000 pounds.⁸ Additionally, due to regulations intended to protect manufacturers from competition, consumers pay as much as 40% more for cars, video cameras, and other consumer goods in the UK than elsewhere in Europe or the United States.⁹

Germany also imposes considerable restrictions on retailers in order to implement public policy goals. One of these is intended to ensure all customers are offered the same price. Thus, German merchants are prohibited from giving customers a break of more than 3% on retail goods (supporters also claim the law prevents irritating consumers in their buying decisions, and that it would be too difficult for consumers if they were expected to compare prices with good value). Airlines are prevented from selling empty seats at bargain prices at the last minute, and on-line auctions face numerous difficulties. German antitrust authorities even recently ordered Wal-Mart to increase its prices on certain products, such as milk, sugar, and flour, because its rivals could not match the prices. Germany is also one of several European states that, in an attempt to protect small bookstores, allow publishing cartels through which publishers can dictate prices, resulting in as much as 40% increase in cost to the consumer. Shoppers in Germany are further frustrated by restricted hours of retail operation (stores must close by 8:00 pm on weekdays). As a result of high prices and restricted shopping hours, Germans typically spend more on mail order than people anywhere else in the world.¹⁰

Japan’s automobile policies are designed to protect and fuel its huge car parts after market. When an automobile is three years old, and every two years thereafter, it must go through the government’s expensive – \$1600 – inspection system. This includes mandatory replacement of its transmission and engine – needed or not.¹¹

5. One of the more documented examples of this principle is offered by California’s Central Valley Project, an irrigation project that encompassed thirty-five counties in an area about 500 miles long and 60 to 100 miles wide. It was the largest project developed under the 1902 Reclamation Act. Controversial from its inception, it quickly became a political and environmental disaster. According to Dr. Robert J. Claus, who filed suit over the damage to wildlife at the Kesterson National Wildlife Refuge, the benefit-cost analysis for the project was based on a number of assumptions, including that the ecological system in the desert was of no beneficial use other than “occasional sheep grazing.” As a result, when irrigation water rose back to the surface after hitting the clay layers, it flushed toxic heavy metals and salts into both private and public lands, including national wildlife refuges, severely damaging the environment. The benefit-cost analysis disregarded or failed to present the known possibility of environmental disaster. That omission prevented the loss of key supporters that were needed to ensure the project went forward.

6. See the “Rational Relationships” discussion found in the [Legal Considerations in Sign Regulation](#) section of this book.

7. *Wall Street Journal*, “Barring Entry: Ireland Faces a Shortage of Pubs, and the Blame Falls on Some Old Rules”, by G. Pascal Zachary, P. A1, 3/17/99.

8. *Wall Street Journal*, “Sunday Shopping in England and Wales is Liberalized, but Rules Create a Maze,” by James Pressley, p. B5, 8/30/94.

9. *Wall Street Journal*, “In Europe, Surfing a Web of Red Tape”, by Neal E. Boudette, p. B4, 10/29/99.

10. *Wall Street Journal*, “Kohl’s Bill to Allow Price Bargaining Isn’t in Store for German Consumers”, by Daniel Benjamin, p. A18, 9/20/94; *Wall Street Journal*, “Stores Told to Lift Prices In Germany”, by Ernest Beck, p. A27, 9/11/00; *Wall Street Journal*, “In Europe, Surfing a Web of Red Tape”, by Neal E. Boudette, p. B4, 10/29/99; *Wall Street Journal*, “Memo to Marketers: Germany Wants to Import American Junk Mail”, by David Wessel, p. B1, 12/10/99.

11. *Wall Street Journal*, “Toyota Calling: In Japan’s Car Market, Big Three Face Rivals Who Go Door-to-Door”, by Valerie Reitman, p. A1, 9/28/94.



Commercial speech and political speech do not occur in a vacuum; where no underlying need for them exists, they do not occur.

speech occurs in a vacuum; where no underlying need for them exists, they do not occur. The consumer who is looking for a product or service will seek a sign indicating where that product or service is available. The business providing the product or service will erect a sign to communicate in the way that will best convince that consumer to stop and shop. In America's competitive retail environment, the government neither creates the demand for the product or service, nor the need to communicate with that demand.

The government does play a role in the transaction, however. Certain land use designations, such as zoning for retail commercial use, direct the expression of commercial speech to designated areas where that

activity is allowed to occur. The market, located according to plan in these zones, subsequently responds to the needs and desires of consumers, in terms of their lifestyle and land use choices. It is unfortunate that the planning process, through overly restrictive sign regulation, has tended to repress the derived demand of speech in the very land use setting in which it was specifically designated to occur.

Finally, some Americans do not realize the scope and extent of the use of police powers in their own communities, or the role that planners play in this system. They understand that police enforce traffic laws and generally have some idea of what electrical and building inspectors do.

Those who own businesses understand that the police powers are extensively used to regulate business activity. Most people, however, live in a home or apartment on property they did not develop and do not have to contend with business regulations. They have not ever been through the development process and are unfamiliar with the vast majority of land use regulations. As a result, many people believe that planners, as municipal officials, are primarily researchers and designers. Planners also in many instances function as law writers, law interpreters, and law enforcement officials. It is generally only the development community that grasps the

extent to which some planners are increasingly exerting control over the development of private property. Model statutes such as many suggested in the American Planning Association's *Growing Smart*® *Legislative Guidebook*¹² provide examples of regulations that seek to revise and extend local controls of property.

This policy section about sig-

nage will discuss the stakeholders, discuss the value of signs as an economic and marketing tool, assess the traffic safety effects of signs, and establish a new basis for determining the most beneficial manner in which to regulate on-premise signs.

Although land use planning and zoning are inherently subject to the potential for socially biased

manipulation (land use planning has long provided a ready vehicle for implementation of social goals, both questionable and legitimate),¹⁵ this analysis attempts to provide an unbiased examination of public policy issues and is not an effort to promote the agenda of any particular group. In some cases, land use decisions are made to advance personal interests rather

The Subtle, Complex Evolution of Enabling Statutes

Under the U.S. Constitution, as well as many state constitutions, public agencies and local governments may only be created and empowered to perform various functions through the enactment of legislation by the state or federal government. These acts, which create agencies and/or grant them power, are called Enabling Statutes.

The Enabling Statutes used throughout the country today to grant land use regulatory power to local governments, as well as to define the boundaries of those regulatory powers, were first drafted in the 1920s by the Department of Commerce, under the leadership of Herbert Hoover. Over the past eighty years, these statutes have been periodically been modified by subsequent state and federal statutes, and by court and agency interpretation.

Some proposed broad enabling statutes, such as those suggested in *The Legislative Guidebook*, have been widely distributed to regulators. Unfortunately, some of these model statutes come up short: they offer little guidance that would help municipalities avoid the pitfalls inherent in the regulation of fundamental rights; at times they recommend unequal treatment; they give incomplete guidance through the area of preemption of local laws by federal law; they offer little guidance for opting into federal programs; and they occasionally suggest substandard levels of due process criteria. While some enabling statutes may need to be modified to more clearly delineate for local governments the boundaries for their use of the powers which have been granted to them, a broadly drawn set of enabling statutes may grant more power than is constitutionally permissible and should be thoroughly reviewed and analyzed by reputable counsel. Local governments acting under the full scope of the power granted could quickly follow the cities of Ladue or East Cleveland in going too far and violating individuals' constitutional rights.¹⁴

When new local regulations that will impact small businesses are being considered, it is important to meaningfully involve as many regulatees in the municipal process as possible, as well as other stakeholders. At times it may also be appropriate to commission cost-benefit studies to identify the scope of associated costs and benefits of the proposed regulation(s).

12. Klein, William and Meck, Stuart, *Growing Smart*® *Legislative Guidebook: Model Statutes for Planning and the Management of Change*, American Planning Association, Chicago, IL, 2002.

13. *Id.*

14. See *City of Ladue v. Gilleo*, 51 U.S. 43 (1994) and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

15. See the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. §§ 2000cc – to 5 (West Supp. 2001). The Act resulted from Congressional distress over the tendency of local governments to use spot zoning and other regulatory tools to keep churches from being constructed in their towns.

than to benefit the community as a whole. The implementation of policies based on the desire to enhance one's own occupational opportunities, aid one's friends or political allies, advance one's own political or social beliefs, or increase or decrease the value of particular parcels of land can quite easily produce negative economic, aesthetic, and social consequences for consumers, business owners, and property owners. Decision makers should at all times take note of stakeholder interests and biases, taking into consideration the broader public policy issues.

Stakeholders

Stakeholders are people or groups who have something to gain or lose from the outcome of a decision. In order to conduct a credible benefit-cost analysis,

and thus arrive at a beneficial approach to the regulation of signage, all stakeholders in the process must be identified and their interests examined.

The sign permit applicant.

More often than not, the sign permit applicant is seeking to make money via a commercial activity. Sometimes, the applicant is a nonprofit organization, and its ability to provide assistance or convey its message to the community depends upon the effectiveness of its sign. In either case, one must not forget that the applicant also has a stake in the aesthetics of the sign. The sign must be attractive, or it will not function as it should.

Sign manufacturers. These individuals are members of the community, employing citizens

and paying taxes. Their success or failure is entirely dependent on their ability to help the sign user succeed through the effective use of signage. When sign regulations are based on assertions that cannot be supported in court when tested against the actual results in the field (such as the accusation that signs cause traffic accidents or that they are not very valuable), sign manufacturers are harmed and their ability to sell more upscale and aesthetically pleasing signage to their customers is impaired. As a result of restrictive regulations based on unfounded assertions, signage assets in the community are underappreciated and underutilized. Further, unfounded assertions on the part of regulators undermine people's trust in government.

Building and electrical inspectors.

A common misconception is that building inspectors and electrical inspectors are not stakeholders in the land use planning process. However, in ways that are both subtle and extensive, these inspectors are, in fact, projecting themselves into the planning of their communities' development. The discretionary, indeterminate language used in many sign codes empowers inspectors, who often are given the authority to interpret and implement the code as they see fit. Sometimes their interpretations are directly contrary to official city policies.

For example, if a city has made a policy decision to support storefront renovation, a building

inspector can work against that policy by requiring levels of conformance that increase costs to the point where simple economics make the planned renovation impossible. Where no structural or electrical changes will be made, a seemingly benign request like requiring the submission of structural drawings and permits can turn an affordable face lift into an expensive, major undertaking. When the projected payback period for the investment is too long, the project will not occur, and the city's policy can be undermined.

Elected officials. The vast

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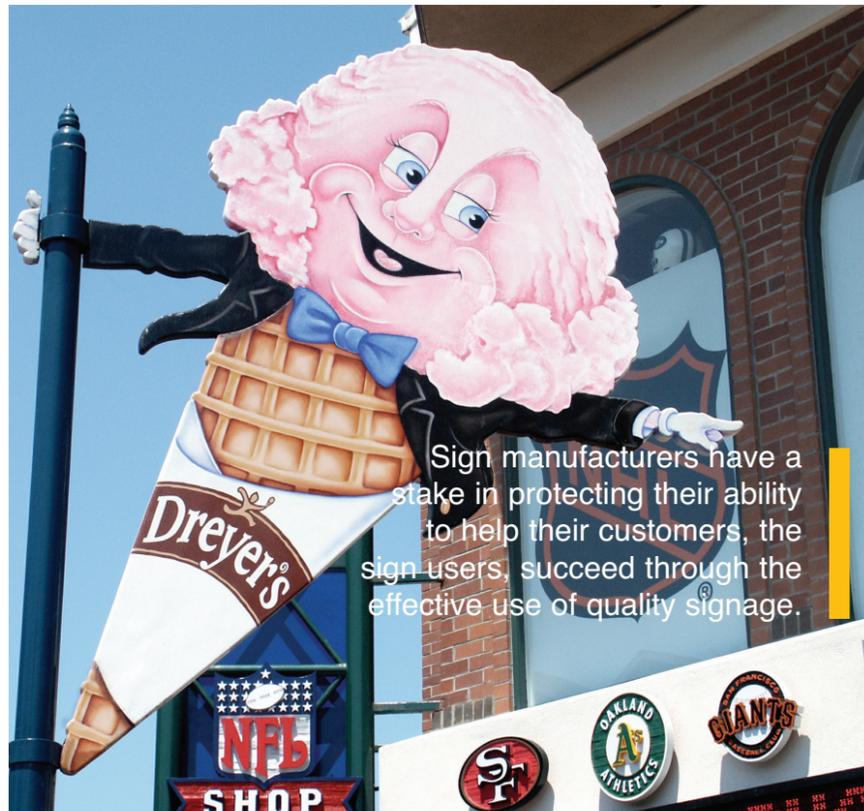
majority of elected officials are interested in what is best for their community. City codes that provide economic vitality to local business and promote the community are important policy considerations for local decision makers. Many elected officials seek sensible regulations.

Consultants. Interestingly, even the consultant a city hires may have a stake in the drafting of the code. Many of the consultants that write sign codes also are available for hire to businesses seeking a variance. As a result, consultants will often

spend a great deal of time and effort in writing a variance section that will create future job opportunities. This bias can slant the code in ways that do not benefit either the city, its businesses, or its residents.

Neighbors. Another common participant in the land use planning process is the neighbor. Neighbors have an inherent and justifiable reason to participate—they are community members, property owners, and taxpayers.

Typically neighbors do not extensively participate in sign regulations unless they perceive a threat. The neighbor may be someone who wants to keep out



Sign manufacturers have a stake in protecting their ability to help their customers, the sign users, succeed through the effective use of quality signage.

what they perceive as unwanted elements or developments, perhaps in the belief that he or she is protecting or increasing the value of his or her own land. Land use rules based on such intangible issues as “stability of the neighborhood” can be difficult to resolve. Individuals who frequently object to development, even when it is outside their own neighborhood, may be motivated by a fear of any kind of change, by a desire to halt all economic progress, or by any of a variety of unusual worldviews.

Special interest groups. Some associations and special interest groups write model codes and

press for their adoption. The codes can contain discretionary language that has the effect of making work and enhancing job security for the associations’ members. By thus inserting their own interests into the planning process, they become stakeholders in that process.¹⁷

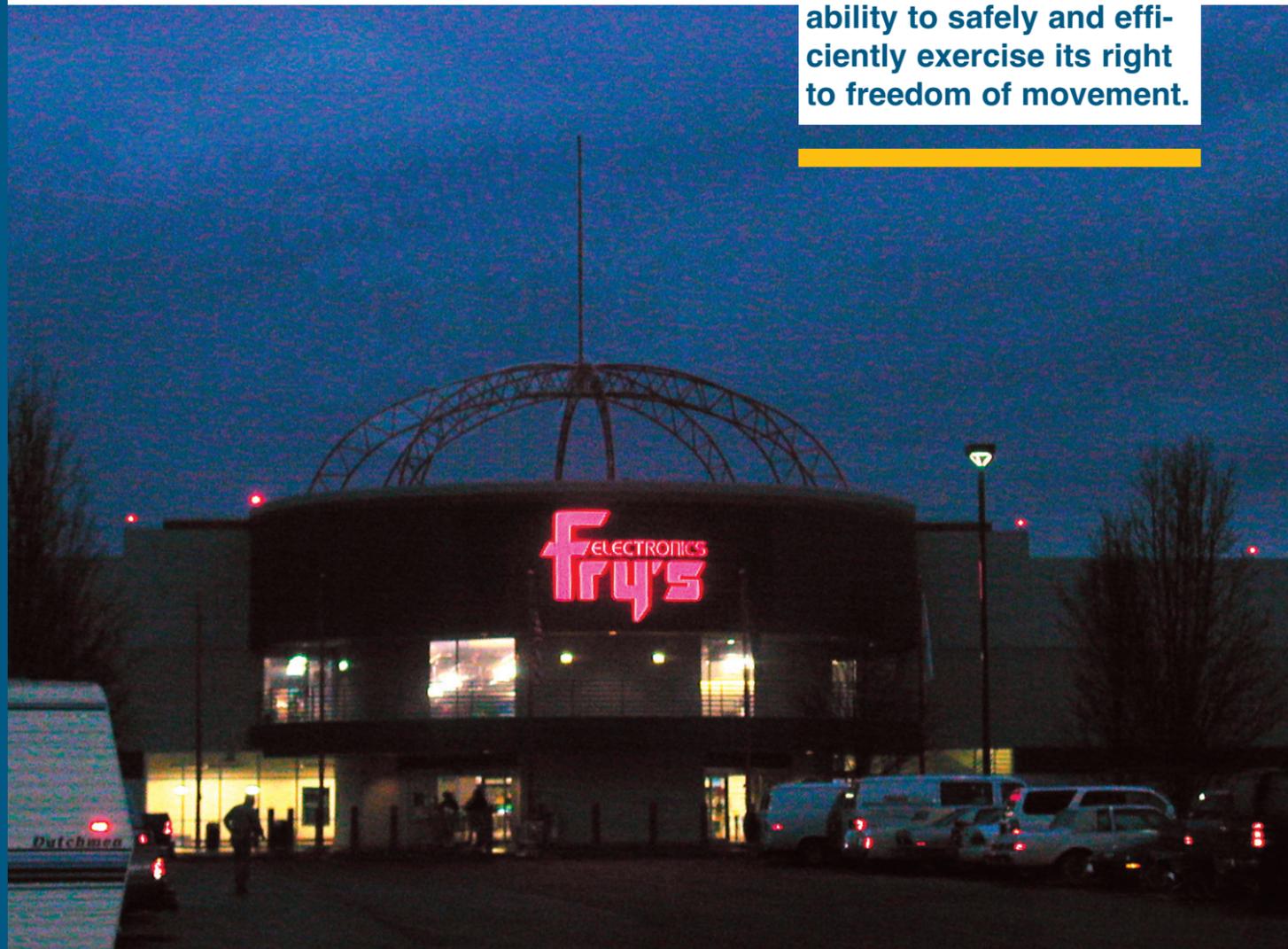
Planners and unelected officials. Planners and other unelected government officials become stakeholders when the sign code gives them broad discretionary zoning powers. Some questionable code language seems to grant officials discretion to regulate and impact what

happens inside the business. The decisions they make in design review can impact the marketing and business plan of the business or organization. The official can, in effect, become a de facto participant in the running of the business or organization itself. Such discretionary decision making authority is inappropriate. Rarely do

By impairing the public’s ability to locate goods and services they wish to purchase, or making businesses difficult to find at night, sign codes can impact the public’s ability to safely and efficiently exercise its right to freedom of movement.



Many companies have successfully seized opportunity by recognizing Americans’ desire for convenience in a fast-paced society. Although this business is auto-oriented, it actually reduces driving by serving immediate, impulse needs right where people work and live.



any of the people writing the sign code or overseeing the permit process have either the business experience or knowledge to make such decisions. Nor do they bear any responsibility for the subsequent success or failure of the businesses they have impacted.

The public. Another stakeholder is the motoring and consuming public. Members of the public are affected by sign codes that regulate their access to information and notification about their surroundings. By impairing the public’s ability to locate goods and services they wish to purchase, or making businesses difficult to find at

night, sign codes can impact the public’s ability to safely and efficiently exercise its right to freedom of movement.

These groups, and many others, may become stakeholders in the sign code permit process, and often their stake in the process is at odds with the needs of the community at large. Stakeholders have a general interest in maximizing the amount of discretion contained in a sign code. This discretion allows them the opportunity to exert influence in individual decisions.

Some zoning regulations have enormous potential to be, and

often are, inherently discriminatory acts, open to manipulation.

It is important for stakeholders to be informed of the underlying constraints associated with proposed and existing sign regulations. An open dialogue is encouraged to promote sensible regulation along with protection of basic constitutional rights.