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# The Free Speech Revollution in Land Use Control

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# THE FREE SPEECH REVOLUTION IN LAND USE CONTROL

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Land use regulation has enjoyed a presumption of constitutionality that protects local land use decisions from judicial invalidation.[1] This presumption has now collided with a fundamental constitutional limitation—the free speech clause. That clause requires an exacting standard of judicial review when courts find that freedom of expression has been infringed. This standard effectively reverses the presumption of constitutionality. Courts apply this standard of judicial review to land use restrictions that affect freedom of expression. They carefully review land use restrictions to inquire whether the free speech clause has been violated, reversing long-standing judicial behavior in land use jurisprudence.

This article examines recent developments in free speech law affecting land use regulation. It highlights the trend to active judicial review of two types of land use regulation affecting freedom of speech—the control of adult businesses and outdoor advertising. Judicial departure from the standard presumption of constitutionality is illustrated with case examples, and the implications for land use law are examined.[2]

Skeptical observers of the free speech revolution may reply that the free speech overlay on land use law has so far been limited to isolated and quite different types of land use regulation. The vast bulk of land use controls, they would say, still enjoys the conventional judicial protections. This observation has merit, but ignores companion trends in land use law that have increasingly isolated selective land use controls for differential and searching judicial treatment. Exclusionary zoning and land use restrictions affecting competition are two examples. Courts reverse the presumption in exclusionary zoning cases,[3]

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1. This judicial view developed gradually through various stages of land use control. *See*, 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW ch. 5 (1974).

2. This article does not attempt a detailed treatment of the case law. For a summary review *see* D. MANDELKER, LAND USE LAW §§ 2.41, 5.38-5.40, 11.9-11.11 (1982) [hereinafter cited as MANDELKER]. Regarding the outdoor advertising issues see T. Blumoff, *After* Metromedia, *Sign Controls and the First Amendment*, 28 ST. LOUIS L.J. 171 (1983).

3. *See, e.g.*, Southern Burlington County NAACP v. Township of Mt. Laurel (Mt. Laurel II), 92 N.J. 158, 456 A.2d 390 (1983).

and the United States Supreme Court has applied the demanding requirements of the federal anti-trust act to land use regulations affecting competitive interests.[4] Like these companion developments, the free speech revolution may reflect a judicial trend to isolate for more searching treatment those land use controls that infringe interests the courts find vulnerable to local regulation. Courts intervene more aggressively whether land use regulation affects freedom of speech or excludes minorities and others from housing opportunities.

## I. Local Control of Adult Businesses

The term "adult businesses" encompasses a wide range of commercial establishments that cater to sexual curiosity, whether they be adult movie theaters, book stores, or establishments that provide nude dancing. These businesses were not fully and effectively entitled to free speech protection until the United States Supreme Court extended the protections of the first amendment to commercial speech.[5] Since that time, commercial businesses whose products or services contain elements of expression have enjoyed free speech protection.

Here, as with outdoor advertising control, the Supreme Court has not provided clear guidelines. The leading case is *Young v. American Mini Theatres*.[6] In *Mini Theatres*, the Court considered a municipal ordinance that deconcentrated adult businesses, one of two common zoning techniques. The other is to concentrate these businesses in a single area, as in Boston's Combat Zone. The Detroit ordinance in *Mini Theatres* deconcentrated adult businesses by requiring a distance of 1000 feet between them and by prohibiting adult businesses from locating within 500 feet of a residential area. The ordinance was based on legislative findings and supported in court by expert evidence indicating that the concentration of adult businesses would have a number of adverse effects on adjacent areas.

Writing for a plurality of the Court, Justice Stevens upheld the ordinance. Although the Detroit ordinance regulated free speech because of its content, Justice Stevens held that the protection afforded commercial speech varied depending on its content. Neither would he give commercial free speech the same protection he would give to political debate. Alternative sites were available for adult theaters, the ordinance did not limit their number, and a factual basis existed for the

4. *See, e.g.*, Community Communications Co., Inc. v. City of Boulder, 102 S. Ct. 835 (1982).
5. Bigelow v. Virginia, 421 U.S. 809 (1975).
6. 427 U.S. 50, *reh'g denied*, 429 U.S. 873 (1976).

city's conclusion that the ordinance would help preserve the character of city neighborhoods. "[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."[7]

Justice Powell concurred. Although he would give adult sexual expression the same status as political debate, he found that the ordinance had only an "incidental" impact on free speech.[8] He upheld the ordinance as an innovative zoning technique, holding that it "affects expression only incidentally and in furtherance of governmental interests wholly unrelated to the regulation of expression."[9]

In a later decision, *Schad v. Borough of Mount Ephraim*,[10] the Court confronted an ordinance that totally excluded live entertainment in any business, this time from a suburban community rather than a large city. The excluded business was an adult book store whose owner had installed glass booths in which customers could observe nude dancers perform. The Court held the ordinance unconstitutional, restating the rule that effectively reverses the usual presumption of constitutionality in zoning cases: "[W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest."[11] The Court noted that the *Schad* ordinance totally excluded live sex entertainment while in *Mini Theatres* the ordinance had a minimal and justifiable impact on free speech because it only required dispersion.[12]

The municipality in *Schad* advanced some traditional zoning justifications for the exclusion, arguing it could selectively exclude adult businesses that created parking, police protection and similar problems. The Court found no evidence indicating that adult businesses were incompatible with other commercial uses permitted in the municipality. Neither did the Court accept an argument that the exclusion was acceptable because live sexual entertainment was available outside the municipality. It found no evidence to support this claim, though indicating it might accept this justification in an appropriate case.

*Mini Theatres* and *Schad* adopt an approach to commercial zoning radically different from the approach usually adopted in state zoning cases in which free speech problems are not present. Zoning law looks

7. *Id.* at 71.
8. *Id.* at 73.
9. *Id.* at 84.
10. 452 U.S. 61 (1981).
11. *Id.* at 68.
12. *Id.* at 76. The impact of *Schad* on free speech questions raised by adult business regulation is somewhat unclear because the Court read the ordinance to exclude all live entertainment as well as sexually-related entertainment.

to the compatibility of a use with its surrounding area. No doctrine in zoning law requires ample opportunity for particular commercial uses. The courts have not adopted an "adequate number of sites" doctrine for bakeries, for example. Practically all courts also uphold the total exclusion of commercial uses from a municipality, although they may require a finding that comparable uses are provided outside the municipality.[13] *Schad* left this justification for an exclusion open, but did so on free speech and not traditional zoning grounds.

Lower federal court cases since *Mini Theatres* and *Schad* have accepted their mandate to closely inspect zoning ordinances restricting opportunities for adult businesses. Free speech problems in adult business restrictions have especially become critical in a group of cases considering ordinances that concentrate rather than disperse or exclude sex businesses, a zoning category not yet considered by the Supreme Court. These cases are notable for the extent to which they review local zoning restrictions to determine the extent to which opportunities for adult businesses are available. Assertive judicial review of this type does not occur under traditional zoning law.

*Basiardanes v. City of Galveston*[14] is a typical case in this category. As in many of these cases, the city adopted an absolute ban on adult theaters in some locations as well as the *Mini Theatres*' spacing requirements in other locations. Under the facts of the case, the city's use of the spacing technique approved in *Mini Theatres* did not save the day. As the court noted, in the ten to fifteen per cent of the city from which adult theaters were not banned they could operate only in industrial zones at a great distance from consumer-oriented businesses. "Few access roads lead to the permitted locations, which are found among warehouses, shipyards, undeveloped areas, and swamps."[15] These locations were poorly lit, had no structures suitable for showing adult films, and appeared unsafe. The district court had held that "the unattractiveness of these locations is irrelevant."[16] The court of appeals disagreed:

> A tolerance of economic burden is appropriate in judging [a] zoning ordinance that has no impact on protected speech. But when a claim of suppression of speech is raised, an exclusive focus on economic

13. MANDELKER, *supra* note 2, §§ 5.7, 5.12.

14. 682 F.2d 1203 (5th Cir. 1982). For a similar case in which a court treated a *Mini Theatres* spacing requirement as a total exclusion *see* CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983). *Accord*, Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1983). *But see*, Jeffrey Lauren Land Co. v. City of Livonia, 119 Mich. App. 682, 326 N.W.2d 604 (1982).

15. 682 F.2d at 1214.

16. *Id.*

impact is improper.[17]

So much for the presumption of constitutionality!

## II. CONTROL OF OUTDOOR ADVERTISING

If the Supreme Court has revised the judicial role in reviewing commercial zoning that affects free speech interests, it has totally destroyed the usual basis for judicially appraising local ordinances that regulate outdoor advertising. In *Metromedia, Inc. v. City of San Diego*,[18] a badly divided and sometimes incomprehensible Court demolished the doctrine state courts developed over a substantial period of time to determine the constitutionality of outdoor advertising controls.

State decisional law has concentrated primarily on total exclusions of billboards, a form of off-site advertising, from municipalities and areas within municipalities. The cases concentrated on the purposes served by billboard exclusions, and considered whether the regulation of billboards for aesthetic reasons was an appropriate use of the land use control power. Earlier cases rejected the aesthetic justification. The more recent cases either accept aesthetic regulations fully or accept the aesthetic justification as a "factor" if other and more conventional justifications are present.[19] One of the conventional justifications accepted under the "factor" rule is the protection of property values. This formulation of the "factor" rule may be spurious. Negative effects on property values are usually produced by the visual offensiveness of outdoor advertising.

State court aesthetics law became most strained when municipalities totally excluded all billboards from their territories. A problem arises because municipalities of any size have commercial and industrial, as well as residential areas. Exclusion of billboards from residential areas as visually offensive is justified, but their exclusion from industrial and commercial areas for this reason stands on difficult ground. One leading New Jersey case justified a total municipal exclusion in a case like this because the municipality was small and the total exclusion was justified to protect its residential character.[20] This view was not accepted by the Colorado Supreme Court when Denver at-

17. *Id.*

18. 453 U.S. 490 (1981). Locally adopted and administered controls calling for the architectural design review of new dwellings may also raise free speech problems. For a thorough analysis of this issue *see* Kolis, *Architectural Expression: Police Power and the First Amendment*, 16 URB. L. ANN. 273 (1979).

19. MANDELKER, *supra* note 2, § 11.2.

20. United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964).

tempted to exclude billboards from all of its area.[21] Denver was simply too big for an application of the New Jersey rule. The view that billboards may be excluded from an entire municipality even though they are arguably acceptable in less attractive industrial and commercial areas is an extension of zoning beyond its normal function of regulating land use conflicts in circumscribed neighborhoods. The courts accept preservation of the municipal "image" or appearance as a proper zoning purpose.

Traffic safety is another justification sometimes used for billboard exclusions. The argument advanced is that billboards contribute to traffic accidents by distracting motorists from the highway. Studies do not fully support this contention, but some courts have upheld billboard exclusions for traffic safety reasons.[22]

The regulation of on-site (also called on-premise) advertising presents another outdoor advertising regulation problem. Although they may wish to ban off-site billboards entirely, municipalities recognize that businesses need advertising as a means of identification. On-site commercial signs, regulated to limit size, location and character, usually are permitted even when municipalities ban off-site billboards entirely. Municipalities usually do not allow "content" or political signs on-site, although their display in other locations is allowed. The result is a pragmatic response to a sensitive regulatory problem. Most state courts uphold the prohibition of off-site billboards and the concession to on-site business advertising even though both can be aesthetically offensive and the distinction could be considered an equal protection violation.[23]

*Metromedia* totally upset this state court accommodation to the competing interests in outdoor advertising regulation. The outdoor advertising ordinance in *Metromedia* fit the model that has been described here. San Diego banned all off-site billboards but allowed on-premise commercial advertising, as well as a number of other traditionally exempted signs such as government and temporary political signs.

21. Combined Communications Corp. v. City of Denver, 189 Colo. 462, 542 P.2d 79 (1975).

22. *E.g.*, Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961). The New Hampshire Supreme Court did not explicitly uphold a billboard exclusion law for traffic safety reasons. Rather, the court rendered an advisory opinion that no constitutional provision would be violated by a law proposed by the New Hampshire House of Representatives which would restrict outdoor advertising on interstate highways located within the state. The court further stated that the proposed law was not rendered unconstitutional because one of its purposes was to secure federal funds. Regarding traffic safety, the court noted that highway billboard signs could reasonably be found to increase the danger of accidents so that exclusion of billboards fell within the state's police power.

23. MANDELKER, *supra* note 2, § 11.7.

This last set of exemptions also is a municipal concession to sign realities, and exemptions of this type have not been troublesome in the state courts.

In what was clearly a tactical mistake, the city stipulated with the sign company on the effects the ordinance had on San Diego's outdoor advertising industry and opportunities for alternative advertising opportunity. The city agreed that the ordinance would eliminate the outdoor advertising industry in San Diego, that billboards increased sales and benefited the city, and that alternative advertising media were inadequate or too costly to meet the needs of outdoor advertisers. This last concession is an especially fatal one to make in a free speech case.

A divided Supreme Court struck down the San Diego ordinance. Although no single point of view commanded a majority, the Justices clearly indicated that free speech concerns substantially changed the rules under which municipalities regulate outdoor advertising. No attempt is made here to canvass the different and conflicting opinions. Attention is directed to the way in which Justice White's plurality opinion, Justice Brennan's concurring opinion and Chief Justice Burger's dissent handled the billboard exclusion problem and the on-site advertising exemption. The Court's treatment of these two issues does most to unsettle the standard state court approach to outdoor advertising control.

Both the White and Brennan opinions clearly modify the traditional state court approach to municipal billboard exclusions, at least in states that allow these exclusions. White reviewed the four-part test for restrictions on commercial speech adopted by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[24] This test requires a more stringent review of commercial outdoor advertising restrictions than traditional state court doctrine. Most noteworthy are the Court's requirements that the restriction implement a substantial governmental interest, directly advance that interest, and reach no further than necessary to accomplish the governmental objective. This "least restrictive alternative" rule requires more assertive judicial review than the standard presumption of constitutionality and the lenient state court view that accepts the constitutionality of billboard exclusions in order to protect municipal images. The California Supreme Court had adopted an equivalent of this traditional state view in its *Metromedia*

24. 447 U.S. 557 (1980).

decision.[25]

White believed that the third *Central Hudson* standard, which requires the municipal regulation to "directly advance" a governmental interest, was most troublesome. He was still able to find that this standard had been met by San Diego. White demanded only a rational relationship between the billboard exclusion and its goals. He found that San Diego had a sufficient basis to conclude that billboards created traffic hazards and aesthetic problems. Suppression of speech was not in issue, and the billboard exclusion could be upheld, insofar as it regulated commercial speech.

Justice Brennan did not accept the total billboard exclusion. He formulated a standard for commercial speech restrictions similar to the *Central Hudson* standard used by Justice White, holding that a total exclusion of billboards was justified if it furthered a substantial governmental interest and if a more narrowly drawn restriction would not accomplish this objective. He then applied this standard rigorously. Brennan rejected the traffic safety objective because he found that no evidence had been introduced to support it. He rejected the aesthetic objective because some parts of the city, such as its industrial and commercial areas, were not a visually pleasing environment. Brennan noted the conventional equal protection formula; that a regulatory ordinance need not address all regulatory problems at the same time and can proceed incrementally. He rejected this formula, holding that the city was not making "a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment."[26]

Equally revealing is the divergence between Justice White and Chief Justice Burger on the city's treatment of on-site signs. Justice White rejected, on free speech grounds, the majority state court view that some types of advertising can be allowed and some banned even though both have comparable impacts on their visual and highway environments.[27] White noted that the city could not explain why on-site non-commercial advertising would be more threatening to safe driving or more aesthetically intrusive than on-site commercial advertising. He held that the city could not limit on-site advertising to commercial speech if on-site advertising was allowable as an exemption. The limited exemption for on-site commercial advertising, and the ban on non-

25. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 164 Cal. Rptr. 510, 610 P.2d 407 (1980), *rev'd* 453 U.S. 490 (1981).

26. 453 U.S. at 531.

27. MANDELKER, *supra* note 2, § 11.7.

commercial on-site advertising were invalid as impermissible regulations of free speech content. Justice Brennan's concurring opinion took a similar view.

Chief Justice Burger disagreed. He applied a more traditional standard of judicial review, holding that the Court should not review the means selected to accomplish legitimate governmental interests. The exemptions contained in the ordinance were neutral and did not impermissibly restrict free speech. They properly reflected "the balance between safety and aesthetic concerns . . . and the need to communicate . . . ."[28] Neither did the Chief Justice find a "hierarchy" in free speech doctrine that required municipalities to give the same protection to "higher" forms of free speech that they gave to "lower" forms.[29] Selective and differential regulations that banned non-commercial speech on-site were permissible. A municipality also was entitled to totally ban billboards as one form of commercial speech if the ban advanced a legitimate governmental interest.

Wide gaps in analysis divide these opinions, a failure to give direction that has left the state and lower federal courts to adopt their own interpretation of what the Supreme Court really meant.[30] Several important implications do flow from the analysis contained in the opinions discussed here. One is that the Court, as in the adult business cases, is applying a more rigorous standard of review when free speech is implicated than they apply when zoning does not affect free speech interests. The presumption of constitutionality again is effectively reversed, even by the more generous *Central Hudson* tests as applied to commercial speech restrictions in outdoor advertising control.

An important consequence of the presumption reversal is that some of the Justices in the outdoor advertising context will again scrutinize the justifications for land use regulation more closely than many state courts. Some state courts accept total billboard exclusions from municipalities as a proper implementation of local aesthetic interests even though an exclusion could not be justified in some parts of the municipality. Justice Brennan, at least, would require municipalities to "prove it." Even restrictions on commercial billboards would not be justified under his analysis unless the municipality could show the

28. 453 U.S. at 565.

29. *Id.* at 567.

30. *Compare*, City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52 (1981) (striking several provisions of sign code), [and] Metromedia, Inc. v. Mayor of Baltimore, 538 F. Supp. 1183 (D. Md. 1982) (invalidating ordinance limiting on-site exemption to commercial signs), *with* Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So. 2d 1312 (1982) (upholding ban on off-site advertising).

Court to its satisfaction that its billboard control program was as effective and comprehensive as it could be. The municipal burden of proof under this standard is substantial. Extensive evidence will be necessary, and the court will review the municipal effort in depth.

The traditional exemption of on-site commercial advertising from a ban on off-site billboards also is suspect. A municipality may have to revise its ordinance to allow non-commercial as well as commercial messages on commercial premises. The problem may well be trivial, even though the limitation of the on-site exemption to commercial signs was an issue that most troubled the Justices who struck down the San Diego ordinance. Commercial proprietors, unless they have strong ideological commitments, are not likely to offend potential customers with political and message signs that call for banning "nukes" or abortions. Neither are any of the opinions clear on how the tolerance for on-site non-commercial signs is to be accommodated with the allowance for commercial signs. Municipalities do not allow on-site commercial signs indiscriminately, and always apply restrictions on size, location and character. Must the allowance for non-commercial signs be in addition to the allowance for commercial signs? Nobody knows. What if the municipality decides to adopt a restrictive on-site advertising regulation, so that on-site signs allowed on business premises are very small? Would a small "Stop Nukes" sign be acceptable under Supreme Court free speech doctrine? Restrictive advertising regulation of this type would probably be acceptable under standard state court doctrine if justified by the circumstances.

## III. What The Free Speech Revolution Means

The free speech revolution in land use control has important consequences for land use regulation where it applies, and its application can have critical impacts on local land use regulation. Municipalities may find, for example, that they must provide ample opportunity for commercial adult businesses, a requirement that can become a "thin edge of the wedge" that complicates local regulation of commercial uses. Commercial zoning turns on compatibility. Assume a municipality must zone sufficient areas for commercial adult businesses. To meet this obligation, it may have to open up to these uses some areas of the municipality from which all commercial uses are banned. May the municipality then draw a line at the free speech-protected adult business use? *Schad* pointed out that adult businesses raise land use control problems similar to those raised by other commercial uses. This

similarity in control problems prevented the municipality in *Schad* from excluding adult businesses but not other commercial uses. This line of reasoning might be reversed when it is the commercial use not protected by free speech that is regulated or prohibited. A municipality compelled to provide sites for adult businesses in areas previously closed to commercial uses may find that it will be required to open these areas up to commercial uses that do not have free speech protection.

The suggestion has been made that the free speech problem perceived by Justices White and Brennan in *Metromedia* is trivial. Is it really important to freedom of expression to compel municipalities to allow "Stop Abortion" signs on the local drug store, or is it inconsequential to free speech protection whether this avenue of expression is open or closed? *Metromedia* raises an even more fundamental question. Local outdoor advertising regulation, typified by the San Diego ordinance, has made pragmatic accommodations to the competing interests that are affected. State courts have generally come to accept this compromise, even though some of its elements may appear faulty on equal protection grounds. What is there in free speech doctrine that compels a more assertive judicial review of this local compromise in the interest in freedom of expression?

One answer may be that the issue was foreclosed to some extent in *Metromedia* because the parties stipulated that no effective alternative means of communication were available. If the parties in a free speech outdoor advertising case do not make this stipulation, should a court take a different view of the free speech problem? An answer to this question turns to some extent on whether the court considers the outdoor advertising medium to be essential to freedom of speech opportunities. After all, there are competing local interests in problems such as traffic safety and control of the visual environment. Some Justices of the Supreme Court would downgrade these concerns under a view that a competing interest in freedom of expression takes priority. This view is acceptable only if a court also concludes that the outdoor advertising medium is essential to free speech expression.

The impact of the Supreme Court free speech decisions on judicial review of land use regulation is substantial. Courts will now review local land use regulations to determine whether a community has enough adult businesses. They may also ask whether a local outdoor advertising regulation is really doing all it can. If the answer to this question is negative, they may strike down the regulation as an impermissible infringement on free speech interests.

An unexpected consequence of this heightened judicial review is a shift in the distribution of power in land use control. Land use decisions once left principally to local governments through the application of the presumption of constitutionality are now shifted to the judicial arena. Courts make these land use decisions by applying federal constitutional law based on a federal constitutional provision rather than state court land use doctrine. Court-made zoning may be substituted for local zoning to protect freedom of expression, a change in the distribution of power justified by the sensitivity of the free speech interest. As noted earlier, comparable changes in the distribution of power have occurred in other land use control categories in which the courts sense a need to protect vulnerable interests. Exclusionary zoning is only one example.

This shift in the distribution of power is the most important change brought about by the free speech revolution in land use control. So far, the United States Supreme Court has not been able to exercise its new-found authority in a principled manner. The public interest in land use regulation demands that it accept this responsibility.