Signs of the Time--Play Now, Pray Later: Regulating Signs, Sex and Religious Facilities

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INTRODUCTION

The First Amendment of the United States Constitution provides "Congress shall make no law…abridging the freedom of speech, or of the press…." Under the Fourteenth Amendment, municipal ordinances are within the scope of this limitation on governmental authority.[1] The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. Yet, a city is not powerless to protect its citizens from unwanted exposure to certain methods of expression and to impose reasonable time, place and manner regulations.[2]

Sign companies, adult use businesses and religious institutions continuously test the limits of their constitutional and statutory protections. Attorneys for religious institutions are now relying upon adult use case law to support their claims, specifically a city's need to demonstrate alternative sites and process applications expeditiously. Sign companies attempt to exploit weaknesses in local sign ordinances, often attacking allegedly insufficient procedural protections that are unrelated to the signs they intend to display. Attorneys for adult use businesses press the need for relevant studies and findings and the availability of alternative sites. This paper will discuss the intersection of local regulation and the First Amendment specifically addressing billboards/signs, adult uses and religious facilities.

Billboards and Signs

Historically, billboards are a popular means of advertising to the masses. Billboards are generally placed along highways or major traffic arterials to garner the greatest amount of attention for a specific product. These advertisements often contain witty slogans coupled with high impact graphics and bright colors, artfully designed to catch the eye of passers-by. Over the years, billboards have become more common place and the public has learned to rely on these advertisements as a way of learning about goods available within the marketplace. Supergraphics and digital billboards (LEDs) are becoming the billboard of the modern century, these advertisements may span the height of an entire building or be a virtual mega plasma television mounted on a building's facade.

Billboards and other signs are protected by the First Amendment.[3] However, billboards may be regulated and even banned by municipalities pursuant to their police

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[1] *Lovell v. City of Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666 (1938).

[2] *See Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448 (1949); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791, 103 S.Ct. 2746 (1989) [the government may impose reasonable time, place and manner restrictions on speech as long as they are content neutral, narrowly tailored to serve a significant government interest and leave open "ample channels for communication"].

[3] *See Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814 (6th Cir. 2005) [holding that billboards and other signs are a medium of expression protected by the First Amendment].

power. Cities are able to implement reasonable zoning ordinances in the interest of public health, safety, aesthetics and maintenance of property values.[4] Under *Metromedia, Inc. v. City of San Diego*,[5] municipalities may prohibit all off-site billboards for aesthetic and safety reasons, so long as the city's ordinance complies with the First Amendment. Cities constantly grapple to maintain a fine balance between the legitimate exercise of their police power and the First Amendment.

Standard of Review: Commercial vs. Non-commercial Speech

Stricter standards are applied to governmental regulation of non-commercial speech than to commercial speech.[6] Therefore, regulations that may be unconstitutional with respect to non-commercial speech may be valid when applied to commercial speech.[7] In *Metromedia,* San Diego adopted an ordinance banning outdoor advertising display signs. However, the ordinance provided exemptions for on-site signs and signs falling into twelve different categories. On-site signs were considered those signs actually on the premises of an individual business, that advertised the products available on the property where the sign was located. Off-site advertisements were signs located at any location other than the business' actual site of operation. Non-commercial advertising was prohibited everywhere unless it fell into one of the twelve enumerated exemptions. A plurality of the Supreme Court held the ordinance unconstitutional.

The Supreme Court held that non-commercial speech is afforded greater constitutional protection than commercial speech. While the city's ordinance permitted on-site commercial advertising, it banned on-site non-commercial advertising, but offered no explanation why one was permitted while the other was not. San Diego did not offer any indication that non-commercial billboards would be more distracting to drivers or would have an adverse affect on the aesthetics of the city. The Supreme Court further held that the city could not conclude that commercial messages are of a greater value than non-commercial messages.[8] Moreover, with respect to non-commercial speech, San Diego could not choose the appropriate subjects for public discourse.[9] San Diego did not ban all billboards and accordingly the Supreme Court rejected San Diego's argument that the ordinance was a reasonable time, place and manner restriction.[10]

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[4] *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996).

[5] 453 U.S. 490, 512, 101 S.Ct. 2882 (1981).

[6] *Id.* at 513.

[7] *National Advertising Company v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988).

[8] *Metromedia*, 453 U.S. at 513.

[9] *Id.* at 515.

[10] *Id.* at 515-16.

Commercial Speech

Municipalities are prohibited from imposing content-based regulation on non-commercial speech, however these rules do not apply in the context of commercial speech. Cities can in fact prohibit all billboards.[11] While there is no concise definition of commercial speech, the courts have articulated three general characteristics: (1) it is an advertisement of some form; (2) it refers to a specific product; and (3) the speaker has an economic motivation for the speech.[12] The extension of First Amendment protection to purely commercial speech is a relatively recent development in First Amendment jurisprudence.[13] Prior to 1975, purely commercial advertisements of services and goods were considered to be outside the protection of the First Amendment.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[14] the seminal case on commercial speech, the Supreme Court held that the

> Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

In *Central Hudson*, the Supreme Court adopted a four-part test to determine the validity of government restrictions on commercial speech:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no further than is necessary[15] to accomplish the given objective.[16]

In *Metromedia*, the Supreme Court applied the *Central Hudson* test and held that San Diego could impose a complete ban on billboards so long as the ban is content neutral. Under the fourth prong of *Central Hudson*, the Supreme Court found

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[11] *Id.* at 507-510.

[12] *See Bolger v. Young Drug Products Corp*., 463 U.S. 60, 103 S.Ct. 2875 (1983).

[13] *Metromedia*, 453 U.S. at 505.

[14] 447 U.S. 557, 562-63, 100 S.Ct. 2343 (1980).

[15] In *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 109 S.Ct. 3028 (1989), the Court modified the "reaches no further than is necessary" portion of this prong to require a reasonable fit between the legislative purpose and the chosen means to achieve that purpose.

[16] *Central Hudson*, 447 U.S. at 563-66.

that the ordinance was no broader than necessary because "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them."[17] The Supreme Court further held that commercial billboards could be banned off-site even if they were permitted on-site.[18]

In *Metro Lights, L.L.C. v. City of Los Angeles*,[19] the City of Los Angeles ("Los Angeles") entered into an agreement with Viacom (later to become CBS), whereby CBS would install public facilities at city-owned bus stops in exchange for the exclusive advertising rights on those facilities. Five months after executing the agreement, Los Angeles adopted an ordinance banning off-site commercial advertising, but excluded bus stops from the ban. Metro Lights owns and operates outdoor signs in Los Angeles, and after the ordinance was enacted, received numerous citations for installing new off-site signs.[20] Metro Lights brought suit against Los Angeles, claiming Los Angeles violated its First Amendment rights. The district court held that Los Angeles could not preclude Metro Lights from installing off-site signs while permitting the signs at bus stops.[21]

On appeal, the Ninth Circuit focused on the third and fourth elements of the *Central Hudson* test – whether the ordinance directly advances a government interest and whether the ordinance is narrowly tailored, and found the sign ordinance to be constitutionally sound.[22] Los Angeles' sign ordinance advanced a government interest because it allowed Los Angeles to put a cap on the amount of advertising and therefore the city would not be flooded with advertising.[23] Further, Los Angeles had some basis for distinguishing between off-site commercial signs at bus stops and uncontrolled private signs located throughout the city.[24] The Ninth Circuit held that by controlling visual clutter via the sign ordinance, the ordinance advanced a government interest.

As to narrow tailoring, the Ninth Circuit found that because Los Angeles' plan allowed it to supervise signs only at bus stops, the ordinance was contributing to Los Angeles' "interest in visual coherence as a part of aesthetic quality."[25] The Ninth

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[17] *Metromedia*, 453 U.S. at 508.

[18] *Id.*

[19] 551 F.3d 898 (9th Cir. 2009).

[20] *Id.* at 901-902.

[21] *Id.* at 903.

[22] *Id.* at 904.

[23] *Id.* at 911.

[24] *Id.*

[25] *Id.* at 912.

Circuit went on to hold that Los Angeles was permitted to allow parties to bid for "the right to speak on City-owned land, assuming that the speakers on City-owned land do not undermine the goal of the City's general prohibition."[26] The Ninth Circuit found that the agreement between Los Angeles and CBS did not undermine the sign ordinance to the point where the ordinance was not able to advance its purpose.[27]

Metromedia and *Metro Lights* support a city's ability to adopt regulations prohibiting off-site commercial signs. However, because challenges to billboard ordinances usually lead to expensive federal litigation, it is wise for municipalities to include extensive findings and specific references to case law in support of their regulations. A city's findings should state the governmental interest to be served through the regulation, and provide enough information about the need within the city to show there is a strong correlation between that interest and the regulation. Moreover, a city should exercise its judgment on how best to solve the billboard issue and explain why the final alternative was selected amongst competing interests.

Electronic Billboards

Electronic billboards are the wave of the future, and are the latest in billboard technology. Public safety concerns have been raised regarding the distractive nature of these new billboards leading some cities to ban the technology entirely. The U.S. Department of Transportation, Federal Highway Administration ("FHA") conducted cursory research as to whether the electronic billboards pose a risk to drivers. While the FHA admitted that further and more comprehensive research must be conducted, it concluded that the billboards do have the potential to distract drivers, thereby posing a public safety hazard.[28] Moreover, many sign ordinances do not contain current definitions to adequately deal with these new age signs. Cities are well served to update their codes before confronted with demands for these electronic billboards.

The advent of electronic billboards has created a host of new issues for cities to address. In *Naser Jewelers, Inc. v. City of Concord*,[29] the city adopted an ordinance banning all Electronic Messaging Centers ("EMCs") and signs that displayed electronically changeable messages. The prohibited electronic signs included those that "appear animated or projected" or "are intermittently or intensely illuminated or of a traveling, tracing, scrolling, or sequential light type" or "contain or are illuminated by

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[26] *Id.* at 914.

[27] *Id.*

[28] *See* Research Review of Potential Safety Effects of Electronic Billboards on Driver Attention and Distraction, available at: http://www.fhwa.dot.gov/realestate/elecbbrd/execsum.htm.

[29] 513 F.3d 27 (1st Cir. 2008).

animated or flashing light."[30] When adopting the ordinance, Concord found that the EMCs were detrimental to traffic safety and the aesthetics of the community.

The First Circuit in adjudging the sign ordinance's constitutionality did not employ the *Central Hudson* test. Rather, the court evaluated the ordinance using the *O'Brien* test.[31] The First Circuit held that when a regulation is content neutral, the court must look to the legislative body's statement of intent to determine whether the ordinance serves a substantial government interest. Both community aesthetics and traffic safety have long been held to be significant government interests.[32] Concord's goals were to improve pedestrian and traffic safety along with the city's appearance.[33] Based on these stated reasons, the First Circuit found that the ordinance served a substantial government interest.[34] The First Circuit then evaluated whether Concord's ordinance was narrowly tailored. While the plaintiff argued that it was necessary for the city to conduct studies to establish that its ordinance would in fact support its stated interests, the First Circuit held that the city had no duty to undertake independent studies or to put them into evidence.[35] Instead, the court gave deference to the judgment of the legislative body, and further held that when adopting a content neutral ordinance, local governments are not required to choose the least restrictive approach if that approach would serve the city's interests less effectively.[36] The First Circuit also determined that because businesses were able to use other mediums such as static billboards and manually changeable signs, that the city's ordinance left open alternative channels of communication. Examining the factors as a whole, the First Circuit held that Concord's ordinance was a constitutionally permissible, content-neutral regulation.[37]

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[30] *Id.* at 30.

[31] In *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118 (1984), the Supreme Court validated Los Angeles' prohibition on signs in the public right of way. In reaching its determination the Supreme Court employed the test articulated in *U.S. v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673 (1968), holding that a regulation is constitutional if: (1) it furthers a substantial government interest; (2) it is not broader than necessary to protect the government's interest; and (3) the interest is unrelated to the suppression of speech.

[32] *Naser Jewelers*, 513 F.3d at 34.

[33] *Id.* at 30.

[34] *Id.* at 34.

[35] *Id.* at 35.

[36] *Id.* at 36.

[37] *Id.* at 37.

In *Clear Channel Outdoor, Inc. v. City of Minnetonka*,[38] the City of Minnetonka instituted a 60 day moratorium on electronic billboards, which the Minnesota court understood to ban any new LED billboards that changed electronic messages more than once per hour.[39] However, the city construed the moratorium to ban the use of all electronic billboards, including those that contained advertisements which changed no more than once per hour. Clear Channel operated electronic billboards that changed messages once every eight seconds. The city adopted the ordinance on the grounds that electronic signs that changed once every eight seconds were a safety hazard to drivers and the city needed to conduct further safety studies. Clear Channel sought injunctive relief to have the signs operate with ad changes once per hour pursuant to the moratorium, rather than not at all.[40] The court found that when operated during daylight hours, Clear Channel's signs do not pose a threat to the public safety, health or welfare.[41] In its order, the court permitted Clear Channel to operate its signs during daylight hours provided the signs did not change more than once per hour. Clear Channel was prohibited from operating its signs before or after daylight due to public safety concerns.

Electronic billboards represent the future of advertising. However, cities may wish to regulate these types of billboards due to traffic safety and visual pollution concerns. As noted in *Clear Channel*, cities may want to adopt different regulations for day and night to address the bright lights that are emitted from electronic billboards. Cities should also review their sign ordinances to determine whether they should be updated to include definitions for LED and LCD electronic billboards. While cities do not need to conduct actual studies to show support for a billboard ordinance, municipalities should always offer findings which explain the government interest the city is addressing, and offer concrete examples of the harm the municipality is trying to prevent or eliminate. It is further suggested that specific reference to existing case law also be included in the findings.

Mobile and Portable Billboards

In *Showing Animals Respect and Kindness v. City of West Hollywood,*[42] the California Court of Appeal upheld the City of West Hollywood's ordinance banning all mobile billboard advertising. The city enacted the ordinance to promote traffic safety, improve air quality and improve the appearance of the city.[43] A mobile billboard was

[38] *Clear Channel Outdoor, Inc. v. City of Minnetonka*, No. 27-CV-06-23485 (4th Dist., MN March 7, 2007).

[39] *Id.* at 2.

[40] *Id.* at 3.

[41] *Id.* at 17.

[42] 166 Cal.App.4th 815, 83 Cal.Rptr.2d 134 (2008).

[43] *Id.* at 817.

defined as "any vehicle, or wheeled conveyance which carries, conveys, pulls, or transports any sign or billboard for the primary purpose of advertising."[44] The ordinance provided for three exemptions—buses, taxicabs and vehicles that displayed an advertisement for the business of its owner, so long as the vehicle was used for the business of the owner, and not used primarily for advertising. A non-profit organization that campaigned against cruelty to animals promoted its message by driving the "Tiger Truck" around the streets of West Hollywood. On the truck were four one-hundred inch video screens depicting scenes of animals being killed or injured by humans. The truck was also equipped with LED signs that ran messages protesting animal brutality and an audio with cries of abused animals. After the organization was cited for violating West Hollywood's ordinance, the organization filed suit against West Hollywood.

In evaluating the constitutionality of the ordinance, the California Court of Appeal employed the four part *Central Hudson* test. While the plaintiff argued that West Hollywood's ordinance was content based, the Court of Appeal held that it was content neutral because the language of the ordinance focused on the speaker's actions, not on the content of the speech. By using words such as "carries," "conveys," "pulls," and "transports" the ordinance was regulating the manner of the speech. Moreover, the ordinance applied to both commercial and non-commercial vehicles because both were prohibited from driving through the city for the primary purpose of advertising.[45] Both parties agreed that promoting traffic safety, reducing air pollution and improving the appearance of the city are all legitimate government interests.[46] The Court of Appeal found that under the third prong of the *Central Hudson* test, the ordinance was narrowly tailored. The Court of Appeal opined that while buses and taxicabs may display advertising, the primary purpose of those vehicles is not advertisement, but transporting individuals between different locations. Therefore, West Hollywood's ordinance was reasonably calculated to promote traffic safety, reduce air pollution and improve the appearance of the city.[47] Lastly, the Court of Appeal examined whether the city's ordinance left open alternative channels for communication. The plaintiff maintained that there were no alternative means of communication because of the cost efficiency associated with mobile advertising. The Court of Appeal held that cost efficiency is not a reason to grant constitutional protection and that other venues including the internet, newspaper, flyers, and direct mailings were available.

In *Ballen v. City of Redmond*,[48] the Ninth Circuit invalidated the City of Redmond's ordinance banning portable signs. The city adopted the ordinance to

[44] *Id.* at 819.

[45] *Id.* at 823.

[46] *Id.*

[47] *Id.* at 824.

[48] 466 F.3d 736 (9th Cir. 2006).

promote traffic safety and community aesthetics. There were ten categories of signage that were exempted from the prohibition:

> (1) banners on the Redmond Way railroad overpass, (2) construction signs, (3) celebration displays, (4) banner displays in the city center neighborhood, (5) major land use action notices, (6) political signs, (7) real estate signs, (8) temporary window signs, (9) signs on kiosks and (10) temporary uses and secondary uses of schools, churches, or community buildings.[49]

The Ninth Circuit held that Redland's ordinance met the first two prongs of the *Central Hudson* test, the speech was commercial in nature and the city's goals of promoting traffic safety and improving the aesthetics of the city are substantial government interests. The Ninth Circuit did not evaluate the third prong of the *Central Hudson* test, whether the ordinance advances the governmental interest, because the court held that Redmond's ordinance failed to meet the fourth prong of the test.[50] The Ninth Circuit found that because Redland's exceptions to its portable sign ordinance were all content based, the city failed to show how the exempted signs advanced the governmental interests any less than the signs that were prohibited. Moreover, the exempted signs turned the city's ordinance into a content based regulation. The Ninth Circuit held that Redmond could have employed less restrictive regulations to further its goals of improving traffic safety and preserving community aesthetics, therefore the city's ordinance violated the First Amendment.[51] The *Central Hudson* analysis is particularly relevant in today's tumultuous economic climate. Cities are being asked to allow more real estate signs as a result of the housing downturn. It is important that cities are aware of the legal issues that need to be considered as they make these types of decisions.

Mobile billboards present unique safety hazards due to their portable nature. While exceptions generally make an ordinance suspect, when it comes to mobile billboard ordinances, it is likely that a city may carve out exceptions for buses, taxicabs and other vehicles that are not used primarily for advertising. Municipalities must exercise caution to ensure that any exceptions do not turn the ordinance into a content based regulation which would likely not survive a First Amendment challenge.

ADULT USE

The regulation of adult businesses continues to be an issue for municipalities across the nation. Communities consistently struggle to adopt constitutionally sound ordinances that effectively regulate the adverse secondary effects caused by adult

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[49] *Id.* at 740.

[50] *Id.* at 742.

[51] *Id.* at 743-44.

uses. The owners of these businesses bring challenges to these ordinances on the grounds that a municipality's findings are insufficient, and that the locational restrictions preclude adult uses from a city entirely. Most recently, Flesh Club attempted to recover more than a million dollars in lost profits from the City of San Bernardino after the court enjoined the business' operation as an adult use. This is the latest chapter in the protracted legal battle between the City of San Bernardino and Flesh Club.

In *Manta Management v. City of San Bernardino*,[52] the Flesh Club opened as a comedy club in the City of San Bernardino's ("San Bernardino") CR-3 zone. A few months later, Flesh Club changed the use of the property and brought in topless dancers. San Bernardino did not permit adult uses in the CR-3 zone. The day that Flesh Club began operating as an adult business, it filed suit against San Bernardino on the grounds that its location limitations for adult uses were unconstitutionally restrictive.[53] San Bernardino then filed an action against Flesh Club seeking to enjoin Flesh Club's operation as an adult use on the grounds that the business was a public nuisance that violated the zoning code.

The trial court granted San Bernardino's motion for a preliminary injunction because the zoning ordinance was consistent with San Bernardino's general plan.[54] After rounds of appeals, the ordinance was held unconstitutional, and Flesh Club was awarded $1.4 million in damages for profits lost while it was subject to the injunction.[55] The Court of Appeal affirmed the jury award and found that a "city is liable for damages under section 1983 if it chooses to enforce an unconstitutional ordinance by means of a preliminary injunction."[56]

The California Supreme Court reversed the Court of Appeal's decision, holding that when a court is given the facts necessary to adjudicate a motion for a preliminary injunction, or stay pending appeal, "the court's intervening exercise of independent judgment breaks the chain of causation for purposes of section 1983 liability."[57] However, this rule does not apply when a judge reaches an erroneous decision because the judge was pressured or materially misled.[58] Because there were allegations that San Bernardino made materially misleading comments that led to the issuance of the preliminary injunction, the Supreme Court remanded the matter to the

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[52] 43 Cal.4th 400, 181 P.3d 159 (2008).

[53] *Id.* at 404.

[54] *Id.*

[55] *Id.* at 405.

[56] *Id.* at 406.

[57] *Id.* at 412.

[58] *Id.*

trial court.[59] This decision is of great importance to local governments because it provides guidance for enforcement strategies that cities may take when bringing claims against adult businesses. The trial court now has the case and briefing has been completed. The parties have a second case management conference scheduled for May 26, 2009.

In *Fantasyland Video, Inc. v. County of San Diego*,[60] the operators of two adult bookstores challenged San Diego County's adult business ordinance which limited the hours of operation for adult businesses, prohibited live nude dancing, required open peep show booths and limited adult businesses to an industrial area. The trial court found the county's ordinance constitutional and the Ninth Circuit upheld the trial court's decision.

In reaching its decision, the Ninth Circuit held that the county could reasonably find that by restricting the hours of operation for adult businesses, crime, disorderly conduct and noise would all be reduced. This would assist the county in accomplishing its goal of reducing the secondary effects of adult businesses. The hours restriction was therefore substantially related to an important government interest.

The Ninth Circuit further held that the county had a substantial interest in preventing sexual acts from occurring in peep show booths because such activities constitute lewd behavior pursuant to California Penal Code § 647(a).[61] Moreover, the Ninth Circuit found that Fantasyland never carried its burden of establishing that the open booth requirement was broader than necessary to curtail sexual activity in the booths. Because the county had a substantial government interest in preventing sexual conduct in the booths, and because the county's ordinance was not broader than necessary to prevent the conduct, the Ninth Circuit held that the county's ordinance was constitutional.

In *City of Santa Fe Springs v. Foxz Corporation*,[62] Spicy opened as a totally nude club in the wrong zone. Santa Fe Springs issued orders for Spicy to cease and desist operating as an adult use and filed a complaint seeking a permanent injunction to enjoin Spicy from operating as an adult business. The trial court issued a permanent injunction precluding Spicy's adult operation.[63]

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[59] *Id.* at 413.

[60] 505 F.3d 996 (9th Cir. 2007).

[61] *Id.* at 1003.

[62] 2009 WL 41633 (Cal.App. 2 Dist.), unpublished decision.

[63] *Id.* at 2.

On appeal, the Second District Court of Appeal upheld the trial court's decision finding that Santa Fe Springs relied on a number of studies regarding the secondary effects of adult uses when adopting its ordinance, therefore the ordinance advanced a substantial government interest. Moreover, there were sufficient available sites within the city's permissible commercial zones for Spicy to locate. To be considered available, the site only needs to be part of the actual market for commercial businesses generally.[64] It does not matter that a site is not available for immediate occupancy, whether the property owner is unwilling to rent to an adult business, or whether it would be too expensive to construct a suitable facility.[65] The Second District further held that Santa Fe Springs' reasons for selecting the commercial zone for adult uses was rational and sufficient. The Court found that cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[66]

Fantasyland reaffirms prior precedent with respect to time, place and manner restrictions and explains the burden shifting standards under *Alameda Books*.[67] After the California Supreme Court's decision in *Manta Management*, public entities should feel more comfortable pursuing enforcement strategies against adult businesses. Cities should also continue to have specific and detailed information about the availability of sites in order to withstand First Amendment challenges.

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT ("RLUIPA")

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA") (42 U.S.C.A. §§ 2000cc *et seq.*) with the purpose of preserving the religious exercise provisions afforded by the First Amendment in the context of state and local land use regulations. RLUIPA provides a general rule prohibiting local government from imposing or implementing a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious institution, unless the government can show that the imposition of the burden furthers a compelling government interest and is the least restrictive means of furthering that compelling government interest. A land use ordinance is considered a substantial burden when it is oppressive to a significantly great extent.[68]

RLUIPA contains provisions mandating that local land use regulations shall grant "equal treatment" to a religious assembly or institution; not discriminate against any assembly or institutions on the basis of religion or religious denomination; and not

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[64] *Id.* at 9.

[65] *Id.*

[66] *Id.* at 11, citing *Young v. American Mini Theaters, Inc.* 427 U.S. 50, 71 (1976).

[67] *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 122 S.Ct. 1728 (2002).

[68] *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006).

impose or implement a land use regulation that totally excludes religious assemblies from a jurisdiction or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

RLUIPA also provides rules for legal claims brought under the statute, including the shifting of the burden of persuasion to local government once a plaintiff produces *prima facie* evidence of a violation.

Substantial Burden

In *Petra Presbyterian Church v. Village of Northbrook*,[69] a church found property in the Village of Northbrook ("Northbrook") that it wanted to convert into a church and companion classrooms. The property was in an area designated as an industrial zone. To permit a religious use, the property would need to be rezoned and also obtain a special use permit. Prior to purchasing the property, the church made an informal request to Northbrook's governing board. The board made comments favorable to the proposal but did not reach a final decision. Based on those comments, the church purchased the property, contingent on the rezoning of the property. The church then made a formal application for the rezoning. Landowners expressed opposition to the rezoning, and without formally ruling on the matter, the planning commission directed staff to prepare documents consistent with the denial of the church's permit. Despite this action, the church moved forward and purchased the property.[70] Northbrook subsequently sought an injunction against the church which was granted, and the church then appealed arguing that Northbrook's zoning ordinance violated RLUIPA.

The Seventh Circuit held that the ban on churches in Northbrook's industrial zone does not create a substantial burden on religion, because if it did, all zoning ordinances that prevent churches from locating within any zone would constitute a *prima facie* violation of RLUIPA.[71] The Court further held that where there is plenty of land in a city where churches are able to locate, the fact that they are not permitted to build in every zone does not constitute a substantial burden on religion.[72] To successfully demonstrate a substantial burden, a church would need to demonstrate that land available for churches was scarce and therefore the exclusion of a church from a particular parcel created a substantial burden.

In *Scottish Rite Cathedral Association of Los Angeles v. City of Los Angeles*,[73] the Scottish Rite Cathedral Association ("Association"), a non-profit organization that

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[69] 489 F.3d 846 (7th Cir. 2007).

[70] *Id.* at 847-848.

[71] *Id.* at 851.

[72] *Id.*

[73] 156 Cal.App.4th 108, 67 Cal.Rptr.3d 207 (2008).

operates the Scottish Rite Cathedral ("Cathedral"), filed a writ petition challenging Los Angeles' revocation of the Cathedral's certificate of occupancy. Plaintiffs argued that Los Angeles' actions burdened their exercise of religion, in violation of RLUIPA. The trial court denied the writ and the plaintiffs appealed.[74]

The Second District Court of Appeal upheld the trial court's decision. When reaching its decision, the Second District examined the use of the Cathedral which had evolved from Masonic study to leasing the space to businesses and film production companies. Approximately 40 years later, the Association entered into a long term lease with the Center to operate the Cathedral. Some forty years later the building was renovated and rented out for private use.[75] Due to numerous complaints from neighbors, a public hearing where the Cathedral was declared a public nuisance, and the certificate of occupancy was revoked.[76]

Because the Cathedral was operating for commercial purposes, the Second District found no violation of RLUIPA. In reaching its decision, the Court held that "a burden on a commercial enterprise used to fund a religious organization does not constitute a substantial burden on "religious exercise" within the meaning of RLUIPA."[77] The Second District found support for its holding in RLUIPA's legislative history. In the Joint Statement of Senators Hatch and Kennedy, the Senators found that not every activity conducted by a religious group could constitute religious exercise. The Second District held that while a religious group may sponsor activities to raise funds to further its religious activities, fundraising efforts alone do not bring the activities into the ambit of religious exercise. Therefore, there could be no substantial burden to religious exercise.[78] [79]

Equal Terms

In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*,[80] a church purchased property in the commercial district, however churches were not permitted in

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[74] *Id.* at 209.

[75] *Id.* at 210.

[76] *Id.* at 211.

[77] *Id.* at 216.

[78] *Id.*

[79] In *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), the Seventh Circuit held that a city's requirement that churches obtain special use permits or engage in other approval processes does not constitute a substantial burden for purposes of RLUIPA. The Court further held that the scarcity of affordable land available for development also does not amount to a substantial burden on religious exercise. *Id.* at 761.

[80] 510 F.3d 253 (3rd Cir. 2007).

the commercial zone.[81] Long Branch later adopted a redevelopment plan further restricting the uses permitted within the Broadway Corridor area. While commercial and entertainment uses were permitted in the area, churches and schools were not. The church filed a claim against Long Branch arguing that the redevelopment plan violated the equal terms provision of RLUIPA because it allowed secular assemblies to locate within the Broadway Corridor but excluded religious assemblies.[82]

The district court granted Long Branch's motion for summary judgment and the church appealed. The Third Circuit held that a plaintiff raising a claim under the equal terms provision of RLUIPA does not need to demonstrate that the land use regulation imposes a substantial burden on religion.[83] The Third Circuit further held that the equal terms provision requires the plaintiff to identify a secular comparator that is better treated and "that is similarly situated in regard to the *objectives* of the challenged regulation."[84] It is not necessary for the secular comparator to perform the same *functions* as the plaintiff.[85]

Whether or not the equal terms provision is subject to a strict scrutiny analysis was the last issue examined by the Third Circuit. The Court held that RLUIPA's equal terms provision does not require strict scrutiny analysis, but instead operates on a strict liability standard.[86] In reaching its holding, the Third Circuit reasoned that the strict scrutiny standard is applicable only for claims brought under the substantial burden provision of RLUIPA. Because the statute is structured in a manner that creates clear distinctions for each provision, it can be reasoned that Congress did not intend to subject claims brought under the equal terms provision to be determined using the strict scrutiny standard. By reaching this decision, the Third Circuit declined to follow the holding in the Eleventh Circuit, which does require strict scrutiny analysis of claims brought under the equal terms provision of RLUIPA. Under the Third Circuit's holding, RLUIPA's equal terms provision does not include a substantial burden or strict scrutiny requirement.[87]

And, in *Midrash Sephardi, Inc. v. Town of Surfside*,[88] two synagogues sued the Town of Surfside alleging that the zoning ordinance excluding churches and synagogues from the business district while permitting private clubs and lodges,

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[81] *Id.* at 257.

[82] *Id.* at 262.

[83] *Id.* at 264.

[84] *Id.* at 268.

[85] *Id.* at 267.

[86] *Id.* at 268-69.

[87] *Id.* at 269.

[88] 366 F.3d 1214 (11th Cir. 2004).

violated RLUIPA. The Eleventh Circuit held that private clubs and lodges *are* similarly situated to churches and synagogues, therefore the ordinance violated the equal terms provision.[89] The Eleventh Circuit further held that requiring the churches and synagogues to locate in the residential district did not violate the substantial burden provision of RLUIPA.

In reaching this determination, the Eleventh Circuit held that because RLUIPA does not define the terms "assembly" or "institutions," the terms must be construed in accordance with their ordinary meaning.[90] Generally, an assembly is considered a place where individuals come together for a common purpose. Pursuant to the town's zoning ordinance, churches and synagogues are considered places of assembly. The town's zoning ordinance defined private clubs as a place where individuals gather for social, educational or recreational purposes. The Eleventh Circuit held that similar to churches and synagogues, private clubs are places where individuals meet for a common purpose. Therefore, churches, synagogues and private clubs are all "assemblies" or "institutions" for purposes of interpreting RLUIPA. Because churches and synagogues were treated differently under the town's ordinance, there was a violation of the equal terms provision.[91]

While petitioners argued that a substantial burden was created by the town's zoning ordinance because congregants would have to walk farther to services, greatly burdening the young and the elderly, the argument was unconvincing.[92] While the Court empathized with the congregants who had to endure the hot, humid weather, the Eleventh Circuit held that walking a few additional blocks does not constitute a substantial burden under RLUIPA.[93]

In *International Church of the Foursquare Gospel v. City of San Leandro*,[94] a church purchased property to relocate its mega church in the city's high-tech industrial zone. The church alleged that San Leandro's land use restrictions placed a substantial burden on religious exercise, that by denying its rezoning application, San Leandro was treating a religious assembly on less than equal terms with nonreligious assembly, and that denying the church's use of the property constituted total exclusion from the jurisdiction or unreasonable limits on religious assemblies pursuant to RLUIPA.

The district court held that San Leandro's land use restrictions did not place a substantial burden on religious exercise because its zoning ordinance was a law of

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[89] *Id.* at 1231.

[90] *Id.* at 1230.

[91] *Id.* at 1231.

[92] *Id.* at 1227.

[93] *Id.* at 1228.

[94] 2008 WL 5384548 (N.D. Cal. 2008).

general application that treated religious assemblies the same as other types of assembly uses.[95] Under the City of San Leandro's zoning ordinance, religious facilities were permitted in the residential zone and there were 45 churches already located within the city. San Leandro then added an overlay zone which added an additional 196 properties in both the commercial and industrial zone. Similar to adult use cases, when determining whether the zoning ordinance placed a substantial burden on religion, the district court looked to the availability of sites. The district court found that despite "the fact that there may be no other properties available to which the church can expand its operations *in the specific way it wants* does not mean that the City's zoning code imposes a substantial burden on the church."[96] Moreover, the costs associated with the acquisition of real estate are not generally recognized as a burden on religion.[97]

The district court also found in favor of San Leandro on the church's equal terms claims. The church argued that San Leandro's differentiation between "assembly uses," "entertainment activities," and "commercial recreation" violated RLUIPA because RLUIPA's legislative history suggested that an assembly is any gathering of people for any purpose.[98] By differentiating between those three uses and precluding assembly uses from operating in the overlay district, the church argued that San Leandro violated the equal terms provision. In reaching its decision, the district court opined that there was nothing in RLUIPA's legislative history that supported the church's contention that Congress intended to set aside all zoning regulations that distinguish between private or non-profit assemblies and commercial gatherings.[99] The district court found that San Leandro's zoning code does not treat churches on less than equal terms than other types of assembly uses because the "assembly use" designation applies to churches, social clubs, lodges, union halls and youth centers – a variety of different uses which all focus on gatherings. The district court held that those uses were distinct from "entertainment activities" and "commercial recreation" uses. Therefore, San Leandro's zoning code was found to be neutral and of general application.[100]

There appears to be a trend in RLUIPA jurisprudence that courts will look to site availability as one means of determining whether a zoning ordinance creates a substantial burden on religion. As long as sites are available, there is no substantial burden. Similar to decisions in adult use cases, the availability of sites is dictated by the market. The court's interpretation of the equal terms provision however, has not proved as consistent. While the Third and Ninth Circuits have held that the strict scrutiny standard does not apply to RLUIPA's equal terms provision, the Eleventh Circuit has

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[95] *Id.* at 14.

[96] *Id.* at 15.

[97] *Id.* at 16.

[98] *Id.* at 20.

[99] *Id.*

[100] *Id.*

held otherwise. However, when looking at the plain language of the RLUIPA statute, the substantial burden provision contains language requiring a "compelling government interest" while that language is notably absent from the equal terms provision.

CONCLUSION

Sign and billboard ordinances present a means by which a city may regulate traffic safety and prevent visual and urban blight. Some basic guideposts can be drawn from case law including (1) ordinances that are clearly time, place and manner restrictions will generally be upheld with respect to both commercial and non-commercial signs; (2) ordinances which contain exemptions for particular types of signs are inherently suspect; and (3) electronic, and mobile billboards have special considerations due to the unique safety issues they pose.

Cities may continue to regulate the adverse secondary effects caused by adult uses so long as their ordinances are founded on detailed analyses and findings. The recent California Supreme Court holding in *Manta Management* allows cities to enforce their ordinances against adult businesses with less fear of being liable for lost profits should a reviewing court reverse the trial court's findings. These are areas of extensive and expensive litigation, therefore due care and thoughtful analysis should be dedicated to needed findings and the administrative record.

Finally, under the evolving RLUIPA case law, courts are focusing on the availability of sites as one means of determining whether a city's ordinance poses a substantial burden on religion and analogies can be drawn from the more developed adult use case law. Under the plain meaning of the RLUIPA statutes, it is likely that the equal terms provision does not require a strict scrutiny review. However, this issue has not been resolved by the United States Supreme Court.

The intersection of local land use regulations and the First Amendment requires extra vigilance from municipal practitioners to ensure that existing and future ordinances are compliant with the ever shifting case law. By carefully balancing land use concerns with the First Amendment, cities are able to create ordinances which will improve the quality of life for their residents.

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