

Signs of the Times: Electronic Sign Ban Upheld

[CARLSON'S CHRYSLER v. CITY OF CONCORD](#) Argued: April 3, 2007 Opinion Issued: November 8, 2007

In an important case, the NH Supreme Court today addressed the constitutionality of a ban on electronic signs containing commercial speech. This has significant implications for planning and zoning statewide. But stay tuned for the companion case pending in federal court (see below).

The plaintiff, Carlson's Chrysler (Carlson's), owns and operates an automobile dealership in Concord. In 2005, Carlson's submitted an application to the City to erect an electronic changeable copy sign on its property to replace an existing manual changeable sign. The proposed sign would electronically display messages advertising Carlson's vehicle inventory. The City's code administrator denied the application based upon a section of the sign ordinance that prohibits "[s]igns which move or create an illusion of movement except those parts which solely indicate date, time, or temperature." Concord, N.H., Zoning Ordinance art. 28-6-7 (2001). Carlson's appealed to the Concord Zoning Board of Adjustment (ZBA), which, after a public hearing, upheld the decision of the code administrator. Carlson's appealed the ZBA's decision to the superior court, which held that the City's ordinance violated the First Amendment to the United States Constitution as an unlawful infringement upon commercial speech.

Following the trial court's decision, the City amended its zoning ordinance to prohibit all electronic message centers, including those indicating time, date and temperature. In an entirely separate action from this case, the constitutionality of the amended ordinance was challenged in the United States District Court for the District of New Hampshire, where the district court held that the amended ordinance is content neutral and constitutes a lawful time, place and manner restriction upon commercial speech. That decision has been appealed to the First Circuit Court of Appeals as *Naser Jewelers, Inc. v. Concord*. Briefs have been filed in that appeal.

Meanwhile, Concord appealed the state trial court decision to the NH Supreme Court. In a decision written by Chief Justice Broderick, the court examined the special characteristics of signs as speech—namely, that the legitimate interests of the government in protecting public safety and aesthetics (the physical characteristics of signs) must be balanced against the rights of individuals right to free expression ("...the government has legitimate interests in controlling the noncommunicative aspects of the medium, but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects.")

Observing that commercial speech is afforded a lower level of protection than other forms of expression, the Court identified the four-prong test of governmental regulation of commercial speech:

- (1) whether the advertising is neither unlawful nor misleading and therefore entitled to First Amendment protection;
- (2) whether the ordinance seeks to implement a substantial governmental interest;
- (3) whether the ordinance directly advances that interest; and
- (4) whether the ordinance reaches no further than necessary to accomplish its stated goals.

The trial court found that the advertising in question was entitled to protection, and that the ordinance sought to implement an important governmental interest, but concluded that the ordinance did not advance that interest and did not reach further than necessary because the City had failed to present evidence that regulating the content of electronic signs would promote aesthetics and safety.

The Supreme Court disagreed with the trial court's conclusions on the final two prongs of the test, finding that the court had incorrectly inserted its own judgment regarding aesthetics and safety for that of the City. According substantial deference to the legislative judgment of the City, the Supreme Court, citing an earlier case, said

"zoning is a legislative function, and judging the wisdom of the legislation is not the function of this court. The State zoning enabling act grants municipalities broad authority to pass zoning ordinances for the health, safety, morals and general welfare of the community. In enacting a zoning regulation, a town may consider the knowledge of town selectmen and planning board members concerning such factors as traffic conditions and surrounding uses resulting from their familiarity with the area involved. Furthermore, a municipality may exercise its zoning power solely to advance aesthetic values because the preservation or enhancement of the visual environment may promote the general welfare."

Furthermore, the Court said "The City need not provide detailed proof that the regulation advances its purported interests of safety and aesthetics."

Finally, addressing the fourth prong of the test, the Court said "The most effective way to eliminate the problems raised by electronic signs containing commercial advertising is to prohibit them." This effectively repudiated the argument that to allow non-commercial speech (time, date, temperature signs) on electronic signs opened the door to requiring that commercial speech also be allowed. Instead, the Court found that the City had appropriately circumscribed commercial speech with an appropriate legislative action.

The case can be found at <http://www.courts.state.nh.us/supreme/opinions/2007/carls161.pdf>

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