

## **Signs of the Times, Part II - Local Ban on Electronic Signage Upheld**

The last newsletter contained an article on the City of Concord's court victory over Carlson's Chrysler in a case that had the New Hampshire Supreme Court uphold Concord's ban on electronic signage as a legitimate limitation on free speech (read the case at [www.courts.state.nh.us/supreme/opinions/2007/carls161.pdf](http://www.courts.state.nh.us/supreme/opinions/2007/carls161.pdf)). While that case was pending, Concord's ordinance was also challenged in federal court by Naser Jewelers. Last fall, the New Hampshire Planners Association joined with the American Planning Association and other organizations in an amicus curiae brief filed with the First Circuit Federal Court of Appeals in the case of Naser Jewelers, Inc. v. City of Concord. In this important First Amendment case, a local ordinance that prohibits the use of "electronic message center" (EMC) signs was challenged on the basis that it infringes upon a Constitutionally-guaranteed right to free speech. In January 2008, the appellate court upheld the trial court's decision in a clear victory for good planning based on traffic safety and aesthetics.

That ordinance was challenged by Carlson's Chrysler in a different case that was recently decided in the City's favor by the New Hampshire Supreme Court (see [www.courts.state.nh.us/supreme/opinions/2007/carls161.pdf](http://www.courts.state.nh.us/supreme/opinions/2007/carls161.pdf)). Also see an article on this state case at [www.nhplanners.org](http://www.nhplanners.org).

***Federal Trial.*** Concord had adopted an ordinance that prohibited all EMCs except those that displayed time, date, and temperature. That ordinance was challenged by Carlson's Chrysler in state court, and after that action was initially filed the City amended its ordinance to enact a total ban on EMCs, including time, date, and temperature signs. The new ordinance was challenged by Naser Jewelers in Federal District Court. Early in 2007, the New Hampshire Federal District Court ruled in favor of the City. Although that order addressed Naser Jeweler's motion for a preliminary injunction, it had the general effect of ruling on the merits of the case.

The District Court found that the ordinance that completely banned EMCs was a content-neutral exercise of the police power (not aiming to advance or suppress a particular viewpoint) that served a legitimate state interest. Naser argued that the ordinance did not serve that purpose, as the City had failed to provide detailed information demonstrating that EMCs adversely affect traffic safety. But the Court held that the City "need not provide detailed proof that the regulation advances its purported interests of safety and aesthetics." Rather, the Court largely deferred to the City's judgment: "...it is within the City's authority to determine for itself that a particular ordinance will, in fact, advance its substantive governmental interest, and such findings shall not generally be disturbed by a court unless shown to be 'palpably false.'"

The remaining substantive question before the court was whether the ordinance was narrowly tailored to meet the governmental objective. Naser argued that a total ban on EMCs was not a narrowly tailored ordinance. The Court refused to treat EMCs as a special case, however, and found that Naser had ample opportunity to use other means of communication, including static signs and manual change copy signs, though they may lack the convenience of EMCs. The Court said that "[t]he ordinance prohibits only those signs the City plausibly thinks will adversely affect traffic safety, or prove detrimental to aesthetic values the City seeks to promote."

***Federal Appeal.*** On appeal to the First Circuit, Naser raised the same arguments and

Concord, the same defenses. Naser alleged that the EMC ban was facially unconstitutional as an abridgement of free speech in violation of the First Amendment. Echoing the trial court, the First Circuit found that the ordinance banning all EMCs was content neutral. Quoting another case, the court said “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others.”

Completing its analysis, the First Circuit also found that the ordinance was narrowly tailored to serve a significant governmental interest and allowed for reasonable alternative channels of communication. The first element of this consideration is to look to a legislative expression of intent—a purpose statement in the ordinance. The Court clearly rejected Naser’s attempts to ascribe some ulterior motive to Concord’s action, stating “the legislature’s subjective intent is both unknown and unknowable.” In this case, the ordinance cited both the promotion of traffic safety and community aesthetics as its goals. These are goals that the Court said have “long been recognized to constitute significant governmental interests.”

The Court then devoted significant energy to the question of alternatives and whether there was a requirement for the City to have used the least restrictive regulation possible. According some deference to the “common-sense judgments of local lawmakers”, the Court concluded that billboards are “real and substantial hazards to traffic safety.” The Court then continued “It follows that EMCs, which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous.” The Court rejected Naser’s plea that studies must be done by the City to substantiate this claim, stating that such analyses “would impose great costs on local governments.” Similar support of Concord’s defense of aesthetics was also offered in the Court’s opinion. Regarding less restrictive alternatives, the Court concluded that the City “was not required to adopt them if they would serve its interests less effectively.” Naser tried to characterize EMCs as their own unique medium of communication, an argument rejected by the Court. But even if it were a unique medium, the Court said “When the medium itself is the ‘evil the city [seeks] to address,’ then a ban on that entire medium is narrowly tailored.”

Finally, the Court observed that alternative means of communication remained open to Naser. Static and manually changeable signs are still available for use. Naser argued that it would lose customers if it were restricted to these alternatives, but the Court said “The maximizing of profit is not the animating concern of the First Amendment. ... ‘The First Amendment does not guarantee a right to the most cost-effective means of [speech].’”

The APA’s amicus brief in the Naser Jewelers case may be found at [www.planning.org/amicusbriefs/pdf/naserjewelers.pdf](http://www.planning.org/amicusbriefs/pdf/naserjewelers.pdf). The Court’s decision may be read at <http://www.ca1.uscourts.gov/pdf.opinions/07-2098-01A.pdf>