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### ZONING AND LAND USE

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BY ANTHONY S. GUARDINO

#### Regulating Signage

BY ANTHONY S. GUARDINO

More than two decades ago, the U.S. Supreme Court issued a landmark opinion setting forth the standard that ordinances regulating outdoor signs and billboards must meet to defeat a First Amendment challenge.<sup>1</sup> Despite that decision, local governments have continued to face court battles—including in the U.S. Court of Appeals for the Second Circuit and in the U.S. District Court for the Eastern District of New York—over zoning laws and regulations to limit the proliferation of signs in their communities.<sup>2</sup> Indeed, earlier this year, a federal district court upstate ruled that a town's sign ordinance was invalid, and issued an injunction barring it from being enforced.<sup>3</sup>

A recent decision by Eastern District Judge Leonard D. Wexler in a case arising on Long Island should help clarify the standards for local officials, property owners and the sign industry.

In *Nichols Media Group v. Town of Babylon*,<sup>4</sup> Judge Wexler substantially upheld ordinances regulating the size and placement of signs that had been enacted by the towns of Babylon and Islip against virtually every argument raised by the plaintiff Nichols Media Group, a company



engaged in the outdoor sign and advertising business. The opinion thus provides a roadmap for municipalities seeking to regulate outdoor signs and billboards within the constraints of the U.S. Constitution.

#### 'Central Hudson' Test

To consider the impact of the ordinances on Nichols' signs, the court first applied the four-part test articulated by the U.S. Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Service Commission*<sup>5</sup> to regulate commercial speech. Under the *Central Hudson* test, the court must determine (1) whether the expression is protected by the First Amendment, (2) whether the asserted governmental interest is substantial, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.<sup>6</sup>

Initially, the court found that the

speech at issue here was neither unlawful nor misleading and therefore was entitled to First Amendment protection.

The court next found that the governmental interests identified by both Babylon and Islip— aesthetics and traffic safety—were "unequivocally substantial governmental objectives" that satisfied the second prong of the *Central Hudson* test.

The court then examined whether the regulations "directly and materially" advanced the stated goals by alleviating the perceived ills "to a material degree." The court ruled that the ordinances directly advanced the goals of avoiding driver distraction and improving the towns' aesthetics and therefore satisfied the third prong of the test.

Finally, the court analyzed whether the ordinances were "reasonable and not more extensive than required" to further their stated goals.

Importantly, the court observed that *Central Hudson* did not require a showing that the legislating entity had employed the "least restrictive means" to accomplish its goals; so long as there was a reasonable fit between the means chosen and the ends identified, a regulation will meet the fourth prong of this test.

The court then concluded that the required reasonable fit existed between the interests of both Babylon and Islip and their respective regulations. Accordingly, the court held that the ordinances did

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not have an unconstitutional impact on commercial speech.

### Other Arguments

Nichols also asserted that the ordinances were invalid based on various other arguments.

First, it argued that the ordinances were unconstitutional because those charged with the granting of sign permits had the unfettered discretion to make content-based distinctions. The court noted that local governments may impose content-neutral prohibitions on the exercise of speech, but that they may not condition the expression of speech on obtaining a license where the grantor of the license had unbridled discretion in determining whether or not a license shall be granted.

It then found that although a permit application had to be read before it was granted, that fact, standing alone, did not mean that the ordinances made content-based distinctions and did not make them unconstitutional.

Nichols also contended that the ordinances' prohibition on obscene or pornographic signs rendered them unconstitutionally vague. The court noted that the Constitution does not protect such speech and that states have a right to regulate obscenity without running afoul of the First Amendment, and thus ruled that the use of the terms "obscene" or "pornographic" did not render the ordinances unconstitutionally vague.<sup>7</sup>

In addition, Nichols contended that the sign permit fees required by the ordinances placed an unconstitutional tax on the exercise of its First Amendment rights. As the court explained, a Babylon commissioner had testified that the amount of sign permit fees collected by Babylon was significantly less than the costs of administering and enforcing its

ordinance. In this situation, the court ruled that Babylon's permit fee structure was not an impermissible tax on the exercise of Nichols' First Amendment rights.<sup>8</sup>

Nichols also argued that Babylon's allowing off-premises advertising in a limited commercial district, and Islip's general ban on off-site advertising, violated the Commerce Clause.

The court observed that Babylon's regulation allowing for limited off-site advertising in the district made a distinction not solely between in-state and out-of-state advertisers, but between in-district and all other advertisers.

Similarly, the court noted, Islip's ordinance distinguished only between on-premise and off-premise advertisers.

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The court then stated that the "mere fact" that out-of-state advertisers could not place signs in Babylon's district or on the premises of businesses within Islip had "little effect on whether these interests are able to communicate their message to those located within the State of New York," given that there are "numerous other outlets for such advertising," including the Internet.

Balancing the needs of the towns against the "minimal effect" of the sign regulations on interstate commerce, the court held that the towns' actions were valid exercises of government power that did not violate the Commerce Clause.

Finally, Nichols challenged Babylon's ordinance's exception for governmental signs, and Islip's practice of not enforcing its ordinance with respect to

signs posted by the town's government.

In the court's view, by freeing governmental signs from the reach of the ordinances, the towns created "an impermissible distinction" that favored the towns' speech over that of other speakers. It then ruled that the exemption of governmental signs was unconstitutional. This does not mean that the towns must be prohibited from erecting signs conveying important information; rather, those signs must be subject to the same requirements as signs sought to be erected by non-governmental entities.

### Conclusion

Local governments seeking to regulate outdoor signage can learn a great deal from the *Nichols* decision.

From the importance of a statement of purpose to the value of a severability provision, to the specific language that can be included in an ordinance—or that should be excluded—the decision sets forth the standard that local governments can rely on when enacting this kind of legislation.

Victory in the battle against billboards, at least in local towns and villages, may finally be near.

1. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

2. See, e.g., *National Advertising Co. v. Town of Babylon*, 703 F. Supp. 228 (E.D.N.Y. 1989), aff'd in part and rev'd in part, 900 F.2d 551 (2d Cir. 1990).

3. *Clear Channel Outdoor, Inc. v. Town of Windham*, 352 F. Supp.2d 297 (N.D.N.Y. 2005).

4. 365 F. Supp. 2d 295 (E.D.N.Y. 2005).

5. 447 U.S. 557 (1980).

6. *Id.* at 566.

7. It should be noted that the court did strike down Islip's prohibition on "immoral" signs, finding it too vague to pass constitutional scrutiny.

8. The court did not decide the constitutionality of the Islip permit structure because Islip had not called any witness to justify it. Instead, it ordered Islip to produce a witness with knowledge, similar to the witness produced by Babylon, so that it could evaluate the merits of this claim.