NOTE

CONTROLLING SUPERGRAPHICS: A NEW CHALLENGE FACING LOCAL GOVERNMENTS AIMING TO LIMIT THE SPREAD OF ADVERTISING AND PREVENT VISUAL BLIGHT

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INTRODUCTION

People do not like billboards.[1] These off-site signs, or signs advertising goods and services not available in the near vicinity, allegedly create visual blight, cheapening communities and cluttering the landscape.[2] In addition, they have proven to be hard to control.[3] Local government ordinances aimed at limiting the spread of outdoor advertising and controlling its visual impacts are continually challenged by the well-funded billboard industry.[4] While courts have developed criteria, which often incorporate guidance from the Supreme Court, for determining whether

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1. *Public Opinion Polls*, SCENIC AM., http://www.scenic.org/billboards-a-sign-control/public-opinion-on-billboards/99-public-opinion-polls (last visited Oct. 28, 2015).

2. *Id.*

3. *See* Zach Behrens, *City Attorney Files More Supergraphic Complaints as Permitted Ones Go Up Downtown*, LAIST (May 6, 2010), http://laist.com/2010/05/06/city_attorney_files_more_supergraph.php.

4. *See* Laura E. Baker, *Public Sites Versus Public Sights: The Progressive Response to Outdoor Advertising and the Commercialization of Public Space*, 59 AM. Q. 1187, 1201–07 (2007).

billboard-control ordinances are legal,[5] new technologies in the outdoor advertising industry require local governments to update their regulations and include new definitions to maintain visual protections.[6] Specifically, supergraphics, or oversized signs painted on or attached to building façades, are becoming popular in many areas.[7] This new type of sign results in the same negative visual impact as traditional billboards and is often significantly larger in size.[8] In addition, because supergraphics are often vinyl or mesh affixed to a building façade, they can be erected without the investment in infrastructure required to create a traditional, pole-standing billboard.[9] This means that supergraphics are easier and cheaper to erect, while often creating much more visual disruption.

Of all major cities attempting to impede the proliferation of billboards and supergraphics, Los Angeles is seemingly having the most trouble.[10] After years of court battles, injunctions, a subsequently overturned settlement agreement, and numerous iterations of a signage control ordinance, Los Angeles is still battling to assert its ability to regulate outdoor advertising.[11] Some believe that city officials, acting in self-interest, have pandered to the billboard industry by making deals and adopting policies that ultimately are detrimental to the goals of the community.[12] This may be the case, as the advertising industry continues to aggressively fund the political campaigns of lawmakers responsible for

5. David J. Miller, Note, *Aesthetic Zoning: An Answer to Billboard Blight,* 19 SYRACUSE L. REV. 87, 88–90 (1967).

6. *See, e.g.*, Rick Orlov, *LA Votes Permanent Ban on Digital Billboards, Supergraphics*, WHITTIER DAILY NEWS (Aug. 7, 2009), http://www.whittierdailynews.com/general-news/20090807/la-votes-permanent-ban-on-digital-billboards-supergraphics.

7. *See, e.g.*, Molly Hennessy-Fiske, *Anti-Billboard Activists Target Multi-Story 'Supergraphics*,*'* L.A. TIMES (Apr. 11, 2008), http://www.latimes.com/local/la-me-graphics11apr11-story.html.

8. *Id.*

9. *See* Dennis Hathaway, *Dangerous Advertising? Supergraphic Sign Overlooking Freeway Rips Loose in Wind Storm*, BAN BILLBOARD BLIGHT (Nov. 2, 2010), http://banbillboardblight.org/dangerous-advertising-supergraphic-sign-overlooking-freeway-rips-loose-in-wind-storm/#more-5765; David Zahniser, *Businessman Held on $1-Million Bail in Supergraphic Case*, L.A. TIMES (Feb. 28, 2010), http://articles.latimes.com/2010/feb/28/local/la-me-billboard28-2010feb28.

10. *See* Christine Pelisek, *Billboards Gone Wild: 4,000 Illegal Billboards Choke L.A.'s Neighborhoods*, LA WEEKLY (Apr. 23, 2008), http://www.laweekly.com/2008-04-24/news/billboards-gone-wild; Ken Broder, *Local Judge Tosses L.A. Billboard Ban Accepted by Federal Court*, ALLGOV: CAL. (Nov. 3, 2014), http://www.allgov.com/usa/ca/news/california-and-the-nation/local-judge-tosses-la-billboard-ban-accepted-by-federal-court-141103?news=854701.

11. Pelisek, *supra* note 10. *See also* David Zahniser, *Judge Rejects Los Angeles' Billboard Ban*, L.A. TIMES (Oct. 22, 2014), http://www.latimes.com/local/california/la-me-1023-billboard-20141023-story.html.

12. Pelisek, *supra* note 10.

regulating its growth.[13] Even so, the complexity of regulating speech of any kind has led even the most well-intentioned efforts to curb the spread of billboards to fail when faced with a legal challenge.[14]

As a result of Los Angeles's inadequate regulations and under-enforcement of outdoor signage laws, hundreds of illegal billboards have been erected across the city, annoying residents and increasing advertising industry profits.[15] As court battles between Los Angeles and the billboard industry rage on, the spread of supergraphics is quickly becoming the newest installment of illegal signage proliferation.[16] Unlike traditional billboards, supergraphics often do not conform to size restrictions on on-site signage, or signs advertising goods and services available within the attached building, and can be visually overwhelming.[17] In addition, because supergraphics are often vinyl or mesh affixed to a building, their improper installation can pose serious safety concerns to pedestrian and vehicular traffic below and impact the integrity of the structures to which they are adhered.[18] While Los Angeles has to date struggled to create regulations that legally limit the growing number of supergraphics, the unique nature of supergraphics provides lawmakers with opportunities to craft regulations that differ from traditional billboard ordinances, while still effectively limiting the spread of supergraphics.

In the future, to prevent the type of protracted legal battles that Los Angeles has endured in its efforts to regulate billboards, care must be taken to craft supergraphic regulations that can withstand constitutional scrutiny. As the Court's First Amendment doctrine related to commercial speech has continued to evolve, local governments have faced legal challenges to both new and existing regulations.[19] Ordinances that do not address the content of supergraphics or treat it as sanctioned speech may be more successful at

13. Dennis Hathaway, *L.A. Billboard Companies Maintain Big Lobbying Push in 2014*, BAN BILLBOARD BLIGHT (Aug. 30, 2014), http://banbillboardblight.org/l-a-billboard-companies-maintain-big-lobbying-push-in-2014.

14. Zahniser, *supra* note 11.

15. Christine Pelisek, *Billboards Gone Wild, L.A. City Council Defiled*, LA WEEKLY (Dec. 31, 2008), http://www.laweekly.com/2009-01-01/news/billboards-gone-wild-los-angeles-city-council-defiled.

16. *See, e.g.*, Behrens, *supra* note 3.

17. Aamir Raza, *Practice Tips: Deciphering Los Angeles's Billboard Laws*, L.A. LAW. (L.A. Cty. Bar Ass'n, L.A., Cal.), Jan. 2011, at 10–11. *See also* David Zahniser, *'Supergraphics' Anger Tenants in L.A. Office Buildings*, L.A. TIMES, (Jan. 20, 2009), http://articles.latimes.com/2009/jan/20/local/me-outdoor-signs-backlash20.

18. Zahniser, *supra* note 9.

19. Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s [R]Evolution of the* Central Hudson *and* O'Brien *Tests*, 23 HASTINGS COMM. & ENT. L.J. 723, 746–47 (2001).

controlling the spread of these signs, as they do not require the stricter review afforded to regulations affecting speech.[20]

Building from the struggles Los Angeles has had with regulating billboards and supergraphics, this Note will propose an approach to regulating supergraphics that avoids the First Amendment claims that often plague billboard regulations. Part I will carefully review the history of aesthetic and sign regulation in an effort to identify the current limits to a local government's authority. This Part will also examine the progression of cases in the arena of aesthetic zoning and signage, starting with the Supreme Court's reluctance to curtail the rights of private citizens to use their land as they saw fit, moving to an era where the Court recognized that the complexity of growing urbanism required more deference to local governments, and then settling on doctrines that acknowledge the importance of aesthetic considerations to the community as a whole. Part I will also review key cases related to First Amendment protections for commercial speech and the Court's examination of billboard ordinances.

Part II will review the contemporary history of billboard regulation within the City of Los Angeles. Using Los Angeles's experience as a practical example, this Part will discuss the numerous victories for the billboard industry and setbacks for City Hall related to outdoor advertising regulations. Part II will then review key cases, including on-going litigation related to supergraphic regulation and its relation to previous decisions associated with billboard regulation. In addition, this Part will provide valuable context related to the spread of illegal billboards and supergraphics in Los Angeles, and public reaction and criticism of the billboard industry and lawmakers.

Part III will condense the main guidance provided by the courts into practical tips for creating ordinances that effectively regulate supergraphics. After identifying the major differences between traditional billboards and supergraphics, ordinances can be crafted in a manner that allows a local government to successfully limit the erection of supergraphics without violating the First Amendment protections afforded to commercial speech. This Part will include aesthetic-based regulations, based in the police powers afforded to local governments that, if successfully adopted and enforced, can be used to regulate supergraphics.

Finally, the Conclusion of this Note will summarize these recommendations and put them into context. While it is clear that the City

20. Anne E. Swenson, Comment, *A Sign of the Times: Billboard Regulation and the First Amendment,* 15 ST. MARY'S L.J. 635, 651–53, 662 (1984).

of Los Angeles is entrenched in foreseeably continuing battles with the outdoor advertising industry, other local governments may be able to learn valuable lessons from Los Angeles's story.

I. BACKGROUND

A. EARLY SIGN REGULATION: TRADITIONAL POLICE POWERS

Before the widespread adoption of zoning and land use controls, the judiciary was suspicious of government intrusion into the realm of private land use and often required clear public welfare justifications to uphold such regulations.[21] Aesthetic considerations, which were seen as a luxury falling outside of the police powers afforded to local governments, could not stand alone as justification for infringing upon a private property owner's ability to develop and control their land.[22]

In 1900, a federal court upheld the City of Los Angeles's authority to regulate signage.[23] While questioning the reasonableness of the limitations set on billboards, the court deferred to the City's judgment in exercising its police power in an effort to ensure the safety and welfare of its citizens.[24] The City, citing concerns about potential harm resulting from billboards being dislodged by wind or earthquakes, argued that the adopted regulations were necessary to ensure the safety of citizens and property.[25] While basing the decision to uphold the ordinance on the clearly traditional police power of maintaining safety, the court noted that "the views in and about a city . . . add to the comfort and well-being of its people."[26] While the court opted not to use this added value as justification for upholding the ordinance,[27] the fact that it was noted as a secondary benefit of the regulation indicates the importance of aesthetic considerations as a secondary goal of municipal regulations.[28]

The Supreme Court first weighed in on the validity of limiting the erection of billboards in 1917.[29] In *Thomas Cusack Co. v. City of Chicago*,

21. Thomas Crumplar, Note, *Architectural Controls: Aesthetic Regulation of the Urban Environment*, 6 URB. LAW. 622, 624–25 (1974).

22. *Id.*

23. *In re* Wilshire, 103 F. 620, 624 (S.D. Cal. 1900).

24. *Id.*

25. *Id.* at 623.

26. *Id.* at 623–24.

27. *Id.* at 624.

28. Chauncey Shafter Goodrich, *Billboard Regulation and the Aesthetic Viewpoint with Reference to California Highways*, 17 CALIF. L. REV. 214, 215 (1929).

29. *See* Baker, *supra* note 4, at 1195.

the Court upheld an ordinance requiring that billboard developers obtain the consent of a majority of local homeowners before siting a billboard within a residential area against equal protection and due process challenges under the Fourteenth Amendment.[30] The Court, while "refrain[ing] from any attempt to define with precision the limits of the police power,"[31] noted that a municipal action with "real or substantial relation to the public health, safety, morals, or to the general welfare" would be upheld.[32] While not directly discussing the aesthetic impacts of billboards, the Court noted the "propriety of putting billboards . . . in a class by themselves" and regulating them as "offensive structures."[33] The Court again used traditional police powers to justify its decision, but indicated additional consideration of residents' displeasure with billboards, presumably based on their visual impacts, by comparing the regulation of billboards to that of auto garages and saloons.[34]

The Court continued to defer to a municipality's authority to exercise its police power in regulating signs in *St. Louis Poster Advertising Co. v. City of St. Louis*, by upholding an ordinance limiting the size, construction, and location of billboards.[35] The Court went so far as to state that some of the goals proffered by the City had "aesthetic considerations in view more obviously than anything else," but refused to "deny the validity of relatively trifling requirements" because the City was able to lean on other considerations to justify the limitations.[36] The Court acknowledged the fact that the underlying reasoning for the regulation fell outside of traditional police powers, but it still upheld the City's power to regulate because of the existence of a sufficient, albeit weak, relation to safety and public welfare.[37]

In applying the Supreme Court's guidance, lower courts have taken different approaches to requiring the existence of a goal related to the traditional police powers of health, safety, and general welfare to uphold

30. Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 528, 530–31 (1917).
31. *Id.* at 530–31.
32. *Id.* at 531.
33. *Id.* at 529–30.
34. *Id.* at 530.
35. St. Louis Poster Advert. Co. v. City of St. Louis, 249 U.S. 269, 275 (1919).
36. *Id.* at 274.
37. *Id.* ("Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary.").

regulations limiting billboards.[38] For example, some courts have only required the existence of a plausible primary police power goal, while others have required there be a substantial relationship to said goal instead of a veiled connection.[39] During the same era, the Supreme Court acknowledged that the changing landscape of American cities and rapid urbanization required an expansion to the interpretation of the traditional police powers afforded to local governments to regulate land use development more generally.[40]

B. EARLY POLICE POWER EXPANSION: ZONING AND AESTHETIC REGULATION

The Supreme Court first upheld the validity of a comprehensive zoning ordinance limiting the use of private property in 1926's *Village of Euclid v. Ambler Realty Co*.[41] Ambler Realty sued to enjoin the enforcement of an ordinance that restricted the development of homes on a parcel of property, arguing that the resulting reduction in the value of the land constituted a violation of the Fourteenth Amendment's guarantee of due process.[42] The Court ruled that the ordinance was a valid use of police power because its limitations could be found to have "substantial relation" to the City of Euclid's very legitimate goals of "public health, safety, morals, or general welfare."[43]

While acknowledging that similar limitations may have been seen as "arbitrary and oppressive" in early rural America, the Court described the growing need for established order in modern concentrated cities.[44] In justifying this rather novel interpretation of the Constitution, the Court noted that "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions" facing American cities.[45] While granting the use of "flexible powers of police," the Court cautioned that its decision was narrowly focused on the case at hand and refused to lay down a set of rules to guide similarly situated local governments in creating similar constitutional restrictions on land use.[46] The Court's decision upholding the

38. Miller, *supra* note 5, at 89.
39. *Id.*
40. *See* Crumplar, *supra* note 21, at 629–30.
41. *Id.* at 625; Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 396–397 (1926).
42. *Euclid*, 272 U.S. at 384.
43. *Id.* at 395, 397.
44. *Id.* at 387.
45. *Id.*
46. *Id.* at 397.

validity of a comprehensive zoning scheme was a departure from its previous adherence to requiring a clear, defined nexus between a jurisdiction's proffered goals and the direct impact a regulation had on private property owners.[47] Instead, the Court acknowledged the potential benefits associated with upholding the ordinance and generally related them back to public welfare, without specifically citing the health and safety benefits found in previous similar reviews of local government controls.[48]

Although the Court cautioned the limited nature of its ruling in the *Euclid* decision,[49] its impacts, in retrospect, have been expansive.[50] The Court empowered local governments to limit the traditionally vast rights over the use of private property without requiring the narrow relation to public health or welfare that was previously required of limitations.[51] Local governments began to explore the boundaries of this newly sanctioned power by adopting ordinances controlling all sorts of land uses under the justification of traditional police powers.[52] While courts were willing to uphold regulations that clearly supported one of the goals outlined by the Supreme Court, they were less willing to expand the scope of this power to include ordinances with goals not traditionally regarded as related to the health and welfare of citizens.[53]

In *Berman v. Parker*, the Supreme Court, in dicta, expanded the scope of traditional police powers by categorizing aesthetic considerations as a sub-section of general welfare but failed to provide that as a basis for future regulation.[54] Just as the *Euclid* Court noted, as urban living grew more complex, the constitutional protections afforded to property owners became more constrained, or, in another sense, the police powers provided to local governments expanded to include aesthetic considerations as valid, secondary reasons for enacting regulations.[55] While not related to zoning,

47. *See* Melvyn R. Durchslag, Village of Euclid v. Ambler Realty Co., *Seventy-Five Years Later: This Is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645, 646–48 (2001).

48. *Id.* at 646 n.8.

49. *Euclid*, 272 U.S. at 397.

50. Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to* Village of Euclid v. Ambler Realty Co., 51 CASE W. RES. L. REV. 617, 617 (2001).

51. *See* Kenneth Regan, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013, 1014–15 & nn.10–13(1990).

52. *See id.* at 1013, 1017–18.

53. Swenson, *supra* note 20, at 645. *See also* Regan, *supra* note 51, at 1014–15, 1020–22.

54. Berman v. Parker, 348 U.S. 26, 33 (1954); Louis H. Masotti & Bruce I. Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URB. L. 773, 784 (1969).

55. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 387 (1926); Masotti & Selfon, *supra*

the Court in *Berman* did acknowledge a broadening of police power for municipal affairs beyond the traditional limits of "[p]ublic safety, public health, morality, peace and quiet, [and] law and order."[56] In *Berman*, the Court applied the concept of police powers to the use of eminent domain to obtain property to be razed and redeveloped.[57] While not clearly leaning on aesthetic considerations as the only concern motivating the planned redevelopment, the Court noted that the "concept of the public welfare is broad and inclusive" of "aesthetic as well as monetary" values.[58] Although the discussion of aesthetic considerations is dicta and related to eminent domain, subsequent courts have used this language as justification for upholding zoning based solely on aesthetic considerations.[59]

For years after *Berman*, litigation relating to aesthetic zoning, or zoning that was enacted generally to control the visual impacts of development, was handled at the local level, as jurisdictions created various types of regulatory schemes to control everything from signage to junkyards.[60] Post-*Berman*, courts, while generally moving toward accepting aesthetic considerations as justification for the exercise of police power, often packaged their decisions in favor of such ordinances in a manner that highlighted additional, often more traditional, reasons for local governments to exercise their regulatory authority.[61] The combination of aesthetic values and traditional public welfare goals created an uncertain environment for local governments enacting regulations,[62] as the courts had not yet "decided conclusively that aesthetics alone [were] sufficient grounds for the exercise of the police power."[63] At the same time, courts were increasingly allowing local governments to regulate things without any direct effects on health and safety that would have been traditionally considered outside of their police power.[64] The lag between what the judiciary stated as its reasoning and what many assumed were the underlying reasons for upholding aesthetic regulations—mainly that aesthetics were within the scope of a local government's police power—resulted in a lack of clearly defined judicial limitations on the reasonableness of the use of police power to regulate for aesthetic

note 54, at 783–87; Miller, *supra* note 5, at 87.

56. *Berman*, 348 U.S. at 32.
57. *Id.* at 34–35.
58. *Id.* at 33.
59. Masotti & Selfon, *supra* note 54, at 784; Regan, *supra* note 51, at 1014, 1025.
60. Regan, *supra* note 51, at 1014–16, 1018.
61. Miller, *supra* note 5, at 94.
62. Masotti & Selfon, *supra* note 54, at 780–87.
63. *Id.* at 786.
64. *Id.* at 782–86; Miller, *supra* note 5, at 90–94.

purposes.[65]

Over the following decades, local governments embraced their newly discovered power to influence the development of their communities by adopting hosts of regulations that limited the uses of private land and even dictated how structures could be built upon it.[66] Many regulations that seemingly had no other justification than aesthetic considerations were upheld based on flimsy secondary reasons, like unsubstantiated health and safety claims, which related more closely to the government's traditional police powers.[67] As local governments continued to adopt further reaching regulations, the impact of visual blight on property values and the reverberating economic impacts that would be suffered by the community were common justifications used to uphold these new laws.[68] Generally, these challenges were resolved at the state level, meaning the Supreme Court had yet to venture into the realm of limiting the stretch of local actions outside of the traditional exercise of police power.[69]

C. FIRST AMENDMENT PROTECTION EXTENDS TO COMMERCIAL SPEECH

Local governments continued to expand their role as aesthetic regulators by increasingly regulating billboards and justifying those regulations based on the protection of public welfare.[70] Some courts allowed these ordinances to stand on the basis of aesthetic considerations alone.[71] Until the mid-1970s, challenges to such limitations were based on the overreach of a local government's police power and not a violation of a sign-builder's constitutional rights.[72]

In the 1975 case of *Bigelow v. Virginia*, the Supreme Court clarified that the First Amendment protection of free speech extends to commercial speech.[73] Citing various cases to support this conclusion,[74] the Court

65. Miller, *supra* note 5, at 94.

66. Regan, *supra* note 51, at 1018–19.

67. *See e.g.*, Masotti & Selfon, *supra* note 54, at 779 (describing a Missouri Supreme Court case in which a local ordinance banning billboards was upheld based on "a 'fictional' defense of the state," when the court ruled that "[s]ignboards . . . endanger the public health, promote immortality, constitute hiding places and retreats for criminals and all classes of miscreants." (quoting St. Louis Gunning Advert. Co. v. City of St. Louis, 137 S.W. 929, 942 (Mo. 1911))).

68. *Id.* at 786.

69. *Id.* at 779–80 (noting that the Supreme Court refused to overturn a Boston ordinance that the Massachusetts Supreme Court had upheld, preferring to defer to the states on public welfare determinations).

70. Regan, *supra* note 51, at 1018.

71. Swenson, *supra* note 20, at 636.

72. *Id.* at 636–38.

73. Bigelow v. Virginia, 421 U.S. 809, 818 (1975).

overturned a Virginia Supreme Court decision upholding a misdemeanor conviction of a newspaper editor for violating a law prohibiting the advertisement of abortion services.[75] The Court's clear assertion that commercial speech is indeed protected by federal law opened the door for new challenges to local billboard and sign limitations.[76] This not only afforded advertisers significant new protections, but also complicated local governments' ability to regulate signs. Because commercial speech was now afforded First Amendment rights, local governments were still allowed to limit the "time, place, or manner" of signage but regulations had to be content neutral.[77]

This leveling of commercial and noncommercial speech rights opened a new area of First Amendment protections without clearly articulating any limitations to the newly afforded rights. The balance between commercial First Amendment rights and local government police power was further clarified in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[78] The Court noted that while commercial speech was afforded some free speech protection under the First Amendment, there was a "commonsense distinction" between commercial and noncommercial speech and protection of commercial speech "turn[ed] on the nature both of the expression and of the governmental interests served by its regulation."[79] The Court then outlined a four-part test for determining whether a regulation limiting commercial speech was constitutional.[80]

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.[81]

The Court, and lower courts, finally had a clear standard to apply

74. *Id.* at 818–21.

75. *Id.* at 829.

76. *Cf.* Swenson, *supra* note 20, at 638 (stating that the Supreme Court's holding in *Va. State Bd. Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 766–70 (1976), resulted in "a number of other state commercial speech regulations . . . to be similarly attacked on [F]irst [A]mendment grounds").

77. *Id.* at 649–50.

78. *Id.* at 651; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–66 (1980).

79. *Cent. Hudson*, 447 U.S. at 562–63.

80. *Id.* at 566.

81. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981) (citing *Cent. Hudson*, 447 U.S. at 563–66).

when determining the validity of government actions related to commercial speech and utilized this standard in a variety of cases.[82] It was not long until the Court applied this standard to a challenged billboard regulation in *Metromedia, Inc. v. City of San Diego*.[83] In that case, the Court held that the City had "reache[d] too far into the realm of protected speech" by enacting an ordinance that unconstitutionally differentiated between commercial and noncommercial speech.[84] The disputed ordinance banned both commercial and noncommercial billboards but allowed sweeping exceptions for certain types of commercial messages.[85] This ran counter to the Court's recent trend of "consistently accord[ing] noncommercial speech a greater degree of protection than commercial speech."[86]

While San Diego's ordinance was found to be unconstitutional,[87] the Court's analysis of it provided valuable guidance to local governments looking to craft constitutional limitations on billboards.[88] First, the Court clearly acknowledged and supported aesthetic considerations as a valid justification for enacting billboard regulations, even full bans on off-site signage.[89] Additionally, the Court noted that a broad prohibition of off-site commercial speech, or billboards, would not itself be an unconstitutional violation of a billboard company's First Amendment freedom of speech right.[90] *Metromedia* includes the modern Court's first and most substantial discussion the Court has undertaken related to billboards and serves as the cornerstone of constitutional guidance on billboard regulation.[91]

In general, while the Court ruled against San Diego,[92] *Metromedia* serves as a victory for local governments in the effort to regulate and limit the proliferation of billboards.[93] This is not just because the Court provided clear guidance as to what portion of the ordinance created an unconstitutional limitation on speech, but also because the Court went beyond that to identify the sections of the ordinance that were within the

82. Ross, *supra* note 19, at 740.
83. *Metromedia*, 453 U.S. at 507–12.
84. *Id.* at 521.
85. *Id.* at 493–96.
86. *Id.* at 513.
87. *Id.* at 521.
88. Katherine Dunn Parsons, Comment, *Billboard Regulation After* Metromedia *and* Lucas, 31 HOUS. L. REV. 1555, 1605–06 (1995).
89. *Id.* at 1563, 1574–75.
90. *Metromedia*, 453 U.S. at 512.
91. Parsons, *supra* note 88, at 1572, 1579.
92. *Metromedia*, 453 U.S. at 521.
93. *See* Parsons, *supra* note 88, at 1580–81.

City's authority.[94] For the first time, local governments could lean on guidance from the Supreme Court that acknowledged the importance of aesthetic considerations as an underlying justification for the exercise of limiting regulations and affirmed the use of sweeping controls to slow the growth of the outdoor advertisement industry.[95]

II. RECENT BILLBOARD BATTLES IN LOS ANGELES

A. LOS ANGELES ATTEMPTS TO CURB BILLBOARDS

In 2002, the City of Los Angeles utilized the guidance provided via *Metromedia* when it adopted an ordinance that banned the majority of off-site signs.[96] The ban ostensibly prohibited the erection or modification of billboards but provided exceptions for new signs in areas designated as sign districts via other parts of the zoning code.[97] Prior to the adoption of this sweeping ban, Los Angeles had been ineffective in regulating off-site signs and had failed to adequately enforce the limited regulations it did have.[98] The new ordinance banned the erection of new off-site billboards, freeway facing signs, and supergraphics in the majority of the areas in Los Angeles while allowing such signs in dense, urbanized areas determined to be appropriate venues for increased commercial messaging and the visual impacts associated with oversized signage.[99]

The first major challenge to the new law came only months after the new ordinance's adoption when Metro Lights, LLC, an advertising company erecting and selling advertising space on off-site signs in Los Angeles, filed a lawsuit challenging the ban as unconstitutional in *Metro Lights, LLC v. City of Los Angeles*.[100] After years of litigation,[101] in 2009, the Ninth Circuit upheld Los Angeles's ordinance, noting that it was "virtually identical" to the ordinance challenged in *Metromedia* as it related to a blanket ban on commercial signage.[102]

Metro Lights was a victory for Los Angeles and provided valuable judicial affirmation that the approach taken to regulating billboards and supergraphics, specifically a general ban, was not a legislative overreach

94. *See id.* at 1581; *Metromedia*, 453 U.S. at 507–21.
95. Parsons, *supra* note 88, at 1563, 1605–06.
96. *See* Raza, *supra* note 17, at 9.
97. *Id.*
98. Pelisek, *supra* note 10.
99. *See* Raza, *supra* note 17, at 9.
100. Metro Lights, LLC v. City of Los Angeles, 551 F.3d 898, 902 (9th Cir. 2009).
101. Raza, *supra* note 17, at 9.
102. *Metro Lights*, 551 F.3d at 908, 914.

into the realm of protected speech.[103] Attorneys for Metro Lights attempted to distinguish Los Angeles's regulatory scheme from the one reviewed in *Metromedia* by focusing on, in addition to the ordinance itself, a contract between Los Angeles and an advertiser authorizing the installation of signage on public transit facilities.[104] However, the Court held that *Metromedia*, and its approach to applying the *Central Hudson* four-part test, controlled.[105] In addition, the Court reiterated the deference to local government interests called for when evaluating sign controls[106] and noted that *Central Hudson's* requirement for a narrowly tailored ordinance does not require a perfect fit.[107]

B. LOS ANGELES'S APPROACH TO CONTROLLING SUPERGRAPHICS IS TESTED

The next year, the Ninth Circuit again heard a challenge to Los Angeles's billboard ordinance in *World Wide Rush, LLC v. City of Los Angeles*.[108] The district court had granted summary judgment in favor of World Wide Rush and had enjoined Los Angeles from enforcing its Freeway Facing Sign Ban and Supergraphic and Off-Site Sign Bans.[109] The City, in an effort to curtail the spread of signage resulting from the injunction, had adopted a "complete moratorium on new supergraphic and off-site signs" and had attempted to utilize other portions of its ordinance to limit the spread of illegal signage.[110] As a result, the district court that had granted the initial injunction found the City in civil contempt of the initial ruling in favor of World Wide Rush, leading Los Angeles to appeal both the initial injunction of its bans and the contempt order.[111]

103. Raza, *supra* note 17, at 10.

104. *Metro Lights*, 551 F.3d at 908–11.

105. *Id.* at 903–04, 909. "Having considered the four elements of the *Central Hudson* test in light of *Metromedia*, we conclude that the [Street Furniture Agreement] does not render the Sign Ordinance unconstitutional under the First Amendment. Indeed, we believe that *Metromedia* compels such conclusion." *Id.* at 914.

106. *Id.* at 908 ("[T]he Court insisted that '[t]he ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance . . . its interests should yield. We do not reject that judgment.'" (alterations in original) (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981))).

107. *Id.* at 906 ("The Supreme Court has clarified that this requirement does not demand that the government use the least restrictive means to further its ends.").

108. World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676 (9th Cir. 2010).

109. *Id.* at 679–80.

110. *Id.* at 683–84.

111. *Id.* ("The district court concluded that the City improperly had denied WWR permits and issued WWR citations under the guise of other Article 4.4 provisions, when, in fact, the City was continuing to enforce the Supergraphic and Off-Site Sign Bans in contravention of the injunction. The

In *World Wide Rush*, the Ninth Circuit was, for the first time, charged with evaluating the validity of Los Angeles's regulations as they related to supergraphics and, in undertaking this evaluation, noted the evolving nature of billboard technologies and the application of law to those technologies.[112] Similar to *Metro Lights*, the plaintiff advertising company in *World Wide Rush* challenged Los Angeles's ordinance, specifically the Freeway Facing Sign Ban and Supergraphic and Off-Site Sign Bans, as unconstitutional limitations on free speech.[113] The Ninth Circuit found that the Freeway Facing Sign Ban satisfied the four-part *Central Hudson* test, as applied in *Metromedia* and *Metro Lights*, noting that the exceptions provided to the Ban were not sufficient to "undermine the City's interests in aesthetics and safety."[114] The court even noted that the exceptions to the ordinance actually served Los Angeles's aesthetic and traffic goals more effectively than a strict ban by allowing freeway facing signage in predetermined districts deemed appropriate for such visual displays, such as the area surrounding the Staples Center in downtown Los Angeles.[115] By allowing signs to be erected in specific sign districts, Los Angeles was able to bargain with advertisers to achieve a net reduction in signs citywide.[116] The Ninth Circuit critiqued the lower court's "all-or-nothing approach to its constitutional analysis" of the ordinance rather than stepping back to view the results in the aggregate.[117]

Related to the Supergraphic and Off-Site Sign Bans, the plaintiffs "could have, but failed to, assert a *Central Hudson* challenge," so the Ninth Circuit's analysis of that portion of the ordinance focused on Los Angeles's legislative power to limit speech.[118] The Ninth Circuit found that "the Bans do no more than affirm the existence of . . . legislative powers" delegated to Los Angeles and were not an unconstitutional overreach into the regulation

district court found the City in civil contempt and required it to discharge certain citations.").

112. *Id.* at 680–81 ("These appeals present the latest chapter in the 'story of billboards.' No longer tied to wooden posts protruding from holes in the ground, in modern-day cities such as Los Angeles, today's billboard may be projected onto or hung from the sides of skyscrapers or strategically located near main traffic arteries so that they are visible from great distances by masses of would-be consumers. Their labels alone (e.g., 'supergraphic signs') conjure up a setting far removed from Saint Louis in the early 1900s. As the nature of billboards has changed, so too has the nature of the legal problems they present. The question of the day is no longer whether cities may regulate billboards at all, but is instead the extent to which they may do so consistent with the First Amendment guarantee of freedom of expression.").

113. *Id.* at 682–83.

114. *Id.* at 685.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 689.

of speech.[119] Noting that Los Angeles had the authority to adopt special districts and regulations specific to a particular area within the City's boundaries, outside of any regulations related to limiting sign erection, the court held the City's bans could not be struck down as prior restraints on speech.[120]

C. SETTLING WITH THE ADVERTISING INDUSTRY AND THE RESULTING BACKLASH

Both of the Ninth Circuit decisions related to Los Angeles's sign ordinance were clearly supportive of the City's authority to regulate and limit the erection of off-site signs. If Los Angeles had opted to only utilize the legislative powers affirmed by the Ninth Circuit, then, as a result of these two decisions, the City may have been able to effectively curtail the spread of illegal signage. During the mid-2000s, along with battling the litigation discussed above, Los Angeles also entered into a settlement agreement directly with advertising companies.[121] In 2006, to end what could have become costly on-going litigation related to the validity of the signage control ordinance, Los Angeles opted to enter into a settlement agreement with three of the largest outdoor advertising companies in an effort to control the increasing number of illegal, and often visually intrusive, off-site signs.[122] The settlement, which required the removal of a handful of existing, illegal signs, gave the billboard companies the ability to "modernize," or digitize, hundreds of existing billboards, some of which were never authorized in the first place.[123] Opponents of the settlement were outraged that Los Angeles had agreed to what seemed like a losing deal with the industry that had taken it hostage and had continued to defy established regulations by erecting and modifying billboards.[124]

While community activists publicly voiced their outrage with the results of the settlement agreement, namely related to an intensification of

119. *Id.* at 688.

120. *Id.* at 688–89.

121. David Zahniser & Phil Willon, *U.S Court Upholds L.A. Ban on Billboards*, L.A. TIMES (Jan. 7, 2009), http://articles.latimes.com/2009/jan/07/local/me-billboard7 ("[The City Attorney] has had to respond to more than a dozen lawsuits, including one that led to a legal settlement allowing as many as 840 billboards owned by CBS Outdoor and Clear Channel Outdoor to be converted to a digital format.").

122. Rebecca Cathcart, *Billboards Brighten Los Angeles Night, to the Anger of Many*, N.Y. TIMES (Nov. 5, 2008), http://www.nytimes.com/2008/11/06/us/06billboard.html?r=0.

123. Raza, *supra* note 17, at 10.

124. *See Legal Wars*, BAN BILLBOARD BLIGHT, http://banbillboardblight.org/legal-wars-2 (last visited Nov. 3, 2015) (noting that the settlement was "widely regarded as a disaster for the city" and "grandfathered hundreds of billboards erected or modified illegally").

the visual impacts posed by the newly approved digital billboards,[125] advertising firm Summit Media, LLC, which was excluded from the agreement, filed a lawsuit to set the provisions offered to the other advertising companies aside.[126] The Second District Court of Appeal ruled that the "settlement agreement allowed the city and [advertising firms] to circumvent the general ban in the municipal code on alterations to existing off-site signs" and was therefore *ultra vires* and unenforceable.[127] As a result, the court voided the entire settlement agreement and called for the revocation of all permits granted for billboard conversion while the settlement agreement was in effect.[128] This decision looked to be a setback to Los Angeles's efforts to regulate off-site signage, but some argued that being freed from the settlement agreement, which provided massive concessions to the billboard industry, was beneficial to Los Angeles and that the revocation of the permits for digital conversion that had already been granted would allow for those signs to be permanently removed.[129] The settlement agreement represented a deal that Los Angeles had struck before the Ninth Circuit upheld its efforts to ban billboards and supergraphics, so the City could now clamp down on illegal signs and was no longer obligated to permit upgrades to and digitization of hundreds of billboards.[130] Regardless of the future benefits associated with the settlement agreement being voided, the initial consequences of having to deal with the more than a hundred already-converted billboards, the permits for which had been revoked, proved to be an administrative nightmare for Los Angeles.[131]

D. SPEECH IS MORE FREE IN CALIFORNIA

In another blow to Los Angeles's efforts to control billboards, Lamar Central Outdoor, LLC, an outdoor advertising firm operating locally, filed a lawsuit in state court attempting to invalidate Los Angeles's billboard and supergraphic bans under the California Constitution.[132] Lamar alleged that

125. Cathcart, *supra* note 122.

126. Summit Media, LLC v. City of Los Angeles, 150 Cal. Rptr. 3d 574, 576–77 (Ct. App. 2012).

127. *Id.* at 585.

128. *Id.* at 590.

129. *See* David Zahniser, *77 Digital Billboards Ordered to Go Dark by Monday Evening*, L.A. TIMES (Apr. 12, 2013), http://articles.latimes.com/2013/apr/12/local/la-me-adv-digital-billboards-20130413.

130. Maeve Reston, *L.A. Council to Discuss Billboards amid Calls to Have Digital Signs Removed*, L.A. TIMES: L.A. NOW (Nov. 17, 2009), http://latimesblogs.latimes.com/lanow/2009/11/la-council-to-discuss-billboards-amid-calls-to-have-digital-signs-removed.html.

131. *Id.*

132. Dennis Hathaway, *Another Billboard Lawsuit: The Hits Just Keep on Comin'*, CITYWATCH

the ban could not pass the heightened scrutiny required under the California Constitution's guarantee of free speech and that the Ninth Circuit had erred in validating the constitutionality of the ban.[133] The court declared that the ordinance was regulating speech based on content because it allowed on-site, commercial signage but prohibited off-site signage with the same physical characteristics, thereby differentiating between signs based on the content of the message it included in violation of Article I of California's Constitution.[134] The court could find no reason for the distinction between on-site and off-site signs that was not content-based, focusing its review on authorities related to Article I jurisprudence rather than relying on federal and state cases related to the First Amendment.[135] Emphasizing the different treatment of structurally similar signs distinguished by their message,[136] the court failed to address the fact that many off-site signs do not conform to the size and design requirements applicable to on-site signs.[137]

This most recent attack on Los Angeles's billboard regulations, if upheld on appeal, could severely hinder recent efforts to curb billboard blight.[138] In addition to the concerns associated with a rush to erect new billboards while there is no prohibition in effect, the court's decision provides very little guidance as to how Los Angeles can craft an ordinance that regulates billboards, prevents their wide proliferation, and does not violate the State's Constitution.[139] The ruling, specifically related to the

(Feb. 4, 2014), http://www.citywatchla.com/8br-hidden/6393-another-billboard-lawsuit-the-hits-just-keep-on-comin.

133. Lamar Cent. Outdoor, LLC v. City of Los Angeles, No. BS142238, slip op. at 8 (L.A. Super. Ct. Oct. 14, 2014).

134. *Id.* at 11.

135. *Id.* at 11–13.

136. *Id.* at 11 ("For example, such a restriction would allow a 200 square-foot digital sign that changes between 'Joe's Hot Coffee Sold Here' and 'Joe's Bagels Sold Here,' and is located on the property where the advertised coffee and bagels are sold, while prohibiting a nearly identical 200 square-foot digital sign erected in the exact same location that alternates between 'Bill's Hot Coffee – 1 Mile Ahead' and 'Bill's Bagels – 1 Mile Ahead' but, as the sign indicates, is located one mile down the road from where the coffee and bagels are sold . . . . [T]he regulation is triggered by the content of the message.").

137. *See* Adrian Glick Kudler, *LA Might Make it Unprofitable to Put up Illegal Billboards*, CURBED LA (Oct. 7, 2013), http://la.curbed.com/archives/2013/10/la_might_start_making_it_unprofitable_to_put_up_illegal_billboards.php ("The city estimates 'that between 1,000 and 4,000 signs either lack permits or have other code violations.'").

138. Zahniser, *supra* note 11 ("[T]he decision . . . could open the floodgates for digital signs by an array of companies.").

139. *See id.* (noting that the superior court's ruling is at odds with federal court decisions related to ostensibly the same challenges to the constitutionality of the City's ban).

unconstitutionality of regulations targeted at off-site signage, has been interpreted as being in direct opposition to the reasoning employed in *World Wide Rush,*[140] in which the Ninth Circuit upheld regulations targeted specifically at off-site signage.[141] The superior court in *Lamar* noted that the ordinance could not withstand the fourth prong of the *Central Hudson* test because it was "more extensive than . . . necessary to serve the City's interests."[142] The court in *World Wide Rush* had allowed the City to differentiate between on-site and off-site signs when applying the regulations while the *Lamar* Court used this differentiation to show that the regulations overstepped the City's authority when applied to off-site signs.[143]

After years of litigation resulted in Los Angeles's ordinance being upheld numerous times by the Ninth Circuit, it seemed as though the most serious challenges to the validity of the City's chosen regulatory scheme were behind it and that city officials could focus on effectively enforcing the sign ordinance and its controls.[144] This most recent state-level decision, which has been appealed, throws a wrench in these efforts and, in effect, takes Los Angeles back to square one.[145]

III. LEARNING FROM LOS ANGELES: HOW TO SUCCESSFULLY REGULATE SUPERGRAPHICS

While Los Angeles's battle has been a long and difficult one, there are steps other jurisdictions can take to prevent the protracted litigation, often confusing court orders, and a lack of clear boundaries to a local government's power to regulate signs. Ordinances related to or limiting the erection of signs are difficult to craft, and poorly written regulations are ripe for First Amendment challenges.[146] Regulations must be "content-neutral," focused only on the "time, place and manner" of the speech, and must refrain from any directives that could be interpreted as being based on the message included.[147] In light of the recent *Lamar* ruling, the task of creating content-neutral sign regulations in California is even more

140. *Id.*

141. World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 690 (9th Cir. 2010).

142. Lamar Cent. Outdoor, LLC v. City of Los Angeles, No. BS142238, slip op. at 16 (L.A. Super. Ct. Oct. 14, 2014).

143. *Id.* at 11–13; *World Wide Rush*, 606 F.3d at 685–87.

144. *See* Zahniser, *supra* note 11.

145. *Id.*

146. *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 795, 831.

147. *Id.* at 789.

complex, as long-standing Supreme Court guidance is no longer sufficient to determine whether an ordinance is in violation of the California Constitution's guarantee of freedom of expression.[148]

In addition to the difficulties of navigating the legal boundaries of regulating traditional signs and billboards, the growth in popularity of supergraphics poses new challenges to regulators aiming to curb visual degradation of their communities.[149] While supergraphics have the same impacts—mainly visual impacts to surrounding neighborhoods and distractions to drivers navigating local roadways—as traditional billboards, their unique construction provides local governments with the ability to regulate them differently than traditional signs. As legal battles relating to the protections offered by the First Amendment and Article I of the California Constitution continue to be fought, local governments can take immediate, effective steps to prevent the spread of illegal supergraphics.

A. STRONGER DEFINITIONS FOR SPECIAL SIGNS

The definitions within a zoning code have wide-reaching implications for the code's application and potential legal challenges. First Amendment challenges are upheld when the government is inappropriately limiting access to constitutionally protected speech.[150] Signs, which almost always include commercial messages, are protected under the First Amendment, so regulations concerning signs must not be content-based in order to withstand a First Amendment challenge.[151] Careful crafting of a definition of a sign, or a specific type of sign, can help ensure that regulations limiting or prohibiting unwanted signs, including supergraphics, are sufficiently content neutral to survive a First Amendment challenge while also providing clear, effective limitations that can be enforced.

One mistake that the City of Los Angeles made was to include a definition for the term "supergraphic" in the zoning code while limiting the area available to develop such signs to a few small sub-regions of the city.[152] The definition of the term made no reference to its very limited

148. *See Lamar*, slip op. at 11 ("Article I guarantees that every person may freely speak on 'all subjects,' and that no law may restrain such right. This explicit reference to 'all subjects' is not an empty guaranty but rather a point of distinction between article I and the First Amendment. As the California Supreme Court has repeatedly recognized . . . . " (citation omitted)).

149. Zahniser, *supra* note 17.

150. *E.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 572 (1980).

151. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502, 516–17 (1981).

152. L.A., CAL., MUN. CODE ch. 1, art. 4.4, § 14.4.2 (2013) (effective Dec. 20, 2007) (defining a supergraphic as "[a] sign, consisting of an image projected onto a wall or printed on vinyl, mesh or other material with or without written text, supported and attached to a wall by an adhesive and/or by

application on the ground or the need to obtain special approval to allow for the erection of such a sign.[153] This became problematic for Los Angeles when, after the City was enjoined from enforcing its Supergraphic and Off-site Sign Bans, it attempted to compel the removal of illegally erected supergraphics by applying the standards outlined for other allowable signs.[154] Not only did the court determine that this was a contravention of the injunction, but it also held Los Angeles in civil contempt.[155]

Los Angeles may have been able to avoid this outcome in a couple of ways. First, the City's definition of a supergraphic should have included language related to the limited application of the use within Los Angeles and the need to obtain additional approvals before the use was allowable. In addition, the definition could have noted that all signs that do not comply with all requirements within the definition of a supergraphic—namely that signs must be legally erected with Los Angeles's approval—would be regulated by the existing provisions in the code, likely those relating to wall signs. This construction of the definitions and interdependence between them ensures that if, as was the case after *World Wide Rush*, a court determines that one portion of the ordinance is unenforceable, there is not such a clear gap in regulation that it provides an opportunity for new signs to be erected while preventing the city from leaning on its existing regulatory tools.

B. REGULATE THE BUILDING, NOT THE SIGN

Courts have long acknowledged local governments' authority to regulate land use, including limiting private citizens' right to develop private property in a manner that is inconsistent with the aesthetic context of the surrounding area.[156] While sign regulations continue to be plagued by First Amendment challenges, regulations related to other aspects of aesthetic controls have been upheld as valid uses of a government's police powers.[157] Restrictions on the use of property that relate specifically to the materials used, colors employed, and design fall squarely within the

using stranded cable and eye-bolts and/or other materials or methods, and which does not comply with the following provisions of this Code: Sections 14.4.10; 14.4.16, 14.4.17; 14.4.18; and/or 14.4.20").

153. *See id.*

154. World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 683 (9th Cir. 2010).

155. *Id.*

156. Crumplar, *supra* note 21, at 630.

157. Regan, *supra* note 51, at 1018–28 (discussing various design-related and aesthetic ordinances that have been upheld by courts, including anti-similarity ordinances, architectural review requirements, and limitations to the use of historic properties).

government's authority to regulate for aesthetic considerations,[158] but may also be used to prevent the erection of supergraphics without triggering free speech challenges so often employed to invalidate traditional sign ordinances.[159]

For example, an ordinance limiting the number of colors a structure can use on its exterior would likely be upheld as a valid use of a jurisdiction's power to regulate the aesthetic aspects of development within its community.[160] The same regulation could be used to require the removal of a supergraphic painted on the exterior of a building if that supergraphic consisted of more than the maximum number of paint colors allowed, as the regulation would relate to the physical attributes of the structure and not the content of the message.[161] Utilization of a code section related solely to the number of colors allowed on a building's façade, and not referencing signage, could effectively prevent a First Amendment free speech claim from a property owner who used too many colors on a sign. For example, a supergraphic painted on the façade of a building advertising a new NBC television show that includes the network's signature six-color peacock logo would clearly be in violation of an ordinance only allowing a maximum of three colors on a building's exterior. While the goal of the supergraphic would clearly be to advertise the television show, the enforcement action would in no way be related to the underlying message, but rather to the use of more than the allowable number of paint colors. While counsel for the property owner may try to employ the First Amendment to argue against the enforcement, a court would have to overlook a wealth of jurisprudence supporting a local government's ability to regulate building aesthetics and expand free speech protections far beyond their current limits in order to strike down a city's authority.[162]

Another purely aesthetic regulation that could be used to battle supergraphics is an ordinance prohibiting mesh, vinyl, or any other material from being affixed to a structure. Supergraphics are often printed on material that is then hung onto a structure.[163] This allows property owners and advertisers to easily switch out the graphics rather quickly, giving neighbors and regulators little notice.[164] While an ordinance limiting the number of colors allowed on a building's exterior may be insufficient to

158. *See id.* at 1016 n.17, 1023 n.69.
159. Swenson, *supra* note 20, at 660.
160. *See* Crumplar, *supra* note 21, at 627.
161. *See* Swenson, *supra* note 20, at 660–62.
162. Regan, *supra* note 51, at 1017–18.
163. Zahniser, *supra* note 17.
164. *Id.*

require the removal of a supergraphic that employed the maximum number of colors, an ordinance banning the use of material affixed to the building's exterior could effectively be used to prevent the same sign from being hung from a building's façade. While the supergraphic itself sends a message, the material used to construct it is content neutral, allowing a local government wide leeway in regulating its use.[165]

C. TRANSPARENCY ABOVE EXPEDIENCY

Along with the legal challenges faced by cities attempting to regulate signage, there are also political and societal impacts for whatever approach is chosen. In any large city, there are factions both for and against expansion of any regulation, often including residents, who are fearful of the potential impacts of not regulating, and industries, vehemently protecting the freedoms that offer the most opportunity to be economically successful. While public participation can often complicate the decision-making process, stakeholders interested in key issues can have a major influence on the outcome of decisions, specifically by making substantial contributions to the campaigns of the elected officials responsible for weighing each side's argument before making a decision.[166] In addition, local residents fired up about an issue not only demand the attention of elected officials, as the constituents that put and keep elected officials in office, but also can bring much needed public attention to their plight and fervently oversee the enforcement of regulations.[167]

The final major mistake that the City of Los Angeles made in its attempt to limit the erection of new supergraphics was to enter into a settlement agreement with only a sub-set of the local billboard industry. The settlement agreement, which was panned by many as ridiculously generous to the industry at the expense of residents, was eventually thrown out as unenforceable.[168] The settlement agreement not only caught the ire of competing outdoor advertising companies angered that preferential treatment was being provided to only a small portion of the industry, but it also enraged local residents who opposed its very liberal provisions,

165. *See* Swenson, *supra* note 20, at 660.

166. Dennis Hathaway, *Who's Supporting Whom? L.A. Billboard Company Campaign Contributions,* BAN BILLBOARD BLIGHT (Mar. 3, 2013), http://banbillboardblight.org/whos-supporting-whom-l-a-billboard-company-campaign-contributions/#more-7693 (noting that in 2013 more than $160,000 of campaign contributions were provided to Los Angeles's elected city officials by the billboard industry).

167. Hennessey-Fiske, *supra* note 7.

168. Cathcart, *supra* note 122.

leading to a rally around stronger, more transparent regulations.[169]

There is no guarantee that Los Angeles would not have encountered similar difficulties and challenges in taking a different approach to regulating outdoor signage. With that said, the mess that resulted from the decision to adopt the settlement agreement, the subsequent public outcry, accusations of corruption, continued scrutiny, and subsequent overturning of the preferential settlement agreement could have been avoided, or at least minimized, if a different, more traditional regulatory scheme had been employed to address growing concerns.

Los Angeles alienated almost everyone with the settlement agreement, save those few companies that received the bulk of the accommodations Los Angeles made in exchange for measly reduction and compliance measures from the industry. Residents lost trust in their elected officials, who residents argued had sold out to the billboard industry and were exchanging campaign contributions for lenient oversight and relaxed standards with local residents taking on the brunt of the negative impacts.[170] Other billboard companies not only sued, but were also able to point to provisions in the settlement agreement to argue for more relaxed, general regulations.[171] It was as if Los Angeles had shown its cards before any of the billboard industry players had to bet—there was now a clear blueprint of what Los Angeles, or more specifically, the Council, was willing to put up with, their bottom line, the best compromise they were willing to give.[172] This was powerful evidence as the settlement agreement represented an approach far more liberal and far more industry-friendly than residents and activists could have imagined.[173]

CONCLUSION

Cities looking to avoid the embarrassment, expense, and eventual denial of the right to enforce regulations that Los Angeles has suffered must proceed carefully as they develop regulations to prevent the erection of supergraphics. While courts have yet to agree on the legal limitations of a local government's ability to control signage speech, a review of Los Angeles's recent litigation identifies the major pitfalls that have led to the current state of signage control.

169. *Id.*
170. *Id.*
171. Pelisek, *supra* note 15.
172. *Id.*
173. *Id.*

Carefully crafted definitions may prevent discouraged supergraphic and sign developers from exploiting creative interpretations of regulations and loopholes resulting from portions of an ordinance being struck down. Definitions that specifically describe the limited application of a sign type do not easily lend to a much wider application. In addition, strengthening aesthetic-related provisions in a code can provide a separate and less controversial means of regulating supergraphics. By focusing enforcement efforts on more basic aspects of a building's exterior, rather than anything related to speech, local governments are provided means to achieve their goals without being dragged into court. Finally, when elected officials document their decision-making process, through public hearings, public comments, and findings, they create an inference that all interested parties' perspectives were weighed evenly. Without a transparent, deliberative process at which to point, it becomes difficult to justify decisions that can be perceived to favor one group over another or are silent on issues raised by interest groups. In the absence of such a process, stakeholders lose confidence in decision-makers and their decisions, which can result in more legal challenges to regulations.