OUTDOOR ADVERTISING CONTROL CASE LAW REVIEW

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- Café Erotica v. Florida Department of Transportation, 830 So.2d 181 (Fla.App. 1 Dist. Oct 23, 2002)
  - The DOT issued notice of violation against Café Erotica for failure to obtain a permit to maintain an outdoor advertising sign located near I-95. Appellant requested a formal hearing, arguing that its sign was exempted from the permitting statutes as an on-premises business sign. After the formal hearing, the Administrative Law Judge issued a Recommended Order, finding that appellant failed to demonstrate an entitlement to the on-premises exemption.
  - In its Final Order, the DOT adopted the Administrative Law Judge's Recommended Order and directed appellant to remove the outdoor advertising sign. Café Erotica sought review of this order, and also argued that Florida law imposed a facially unconstitutional prior restraint on speech in violation of the First Amendment of the United States Constitution.
  - The Court, in finding for the DOT, said statutes and administrative rules restricting erection of billboards were not impermissible prior restraints and were valid restrictions on commercial speech.

- Ozarkland Enterprises, Inc. v. Missouri Highway and Transportation Commission, 84 S.W.3d 483 (Mo.App. W.D. Sept. 03, 2002)
  - Ozarkland, the owner of an advertising sign, sought judicial review of decision of Missouri Highway and Transportation Commission to tear down the sign based on its damage and deterioration. It appealed from a Circuit Court ruling that affirmed the Commission's decision.
  - The Court of Appeals, finding for the plaintiff, held that: (1) evidence was insufficient to support finding that sign needed 50% or more of its poles replaced, and (2) Commission's determination that sign was deteriorated or damaged after inspector of Department of Transportation had represented to owner that sign had less than 50% damage and was repairable, was wholly unreasonable.

- Drayton v. Department of Transportation, 62 P.3d 430 (Or.App. Jan 29, 2003)
  - Petitioner sought judicial review of three final orders of the Oregon DOT requiring him to remove outdoor advertising signs that the department concluded do not comply with the Oregon Motorist Information Act (OMIA). The OMIA was Oregon's effort to comply with the federal Highway Beautification Act of 1965
  - Petitioner argued that the department's orders must be set aside because of defects in the notices of violation, because the orders are based on findings not supported by substantial evidence, because they are based on misinterpretations of the OMIA, and because the OMIA itself is unconstitutional.
  - The Court of Appeals held that: (1) notice to owner of OMIA violations was insufficient, given that notice did not mention the specific administrative rules relied on in decision; (2) owner was prejudiced by failure to provide adequate notice; (3) removal of advertising copy from sign post did not bring sign into compliance with statute; (4) owner's sign was not an exempt sign of a governmental unit; (5) a sign was not required to advertise goods, products, or services to violate statute; and (6) sign that was changed to be nonconforming after date in grandfather clause was not entitled to exemption for pre-existing nonconforming signs.

- Natural Resources, Inc. v. Missouri Highway and Transportation Commission, 2003 WL 1973622 (Mo.App. S.D. Apr. 30, 2003).
  - **NOTE: THIS CASE IS STILL SUBJECT TO APPEAL**
  - Sign owner sought judicial review of decision of the Commission for the Missouri DOT finding that the Department properly terminated a permit for outdoor advertising. The Circuit Court affirmed, and owner appealed.
  - Appellant received a permit on March 8, 1999 to "maintain outdoor advertising," and built the sign at the prescribed location and in accordance with the permit's provisions. The entire billboard was built by May 15, 1999. By that date, the west side of the structure contained an advertising message, but no advertising was in place on the east side. The east side contained "stringers" which were described as the boards to which the advertising message would be affixed.

- Natural Resources, Inc. (Cont.)
  - A legislative change in the Billboard Law took effect August 28, 1999, which in part reduced the maximum allowable size for outdoor advertising from 1200 square feet to 800 square feet. It also provided that if a sign existed on August 28, 1999, that complied with pre-August 28, 1999 law, it would be denominated as "nonconforming," but could remain. Relevant regulations then in effect established "criteria for maintenance of nonconforming signs," including a prohibition against increasing the size of such sign.
  - In essence, the DOT concluded that the sign "was increased in size" by the addition of an advertising message affixed to the east side after the new legislation became effective.
  - The Court of Appeals held that: (1) the statutory term "outdoor advertising" includes blank billboards as well as billboards that display advertising, and (2) the owner's sign was not increased in size by the mere addition of a message being affixed to a it

- Brown v. California Department of Transportation., 2003 WL 21038139 (N.D.Cal. Apr 23, 2003).
  - Private citizens who were prevented by DOT permit policy from displaying anti-war signs on state highway overpass fence brought §1983 action against DOT for deprivation of their First Amendment rights. DOT appealed from entry of preliminary injunction against enforcement of DOT's policy of exempting American flags from permit requirements, but requiring permits for, or prohibiting display of all other expressive signs or banners. The Court of Appeals affirmed and remanded.
  - Here, the U.S. District Court held that: (1) DOT permit policy violated plaintiffs' First Amendment rights, and (2) plaintiffs were entitled to permanent injunctive relief requiring enforcement of the policy on a content neutral and viewpoint neutral basis.

- Corteal v. Department of Transportation, 821 A.2d 173 (Pa.Cmwlth. Apr 9, 2003).
  - Divito Park, a roller and ice skating rink and dining room, petitioned for review of order of the DOT adopting proposed report of hearing officer revoking its advertising device permit on ground that it violated the Outdoor Advertising Act. The Outdoor Advertising Act was intended to comply with the federal Highway Beautification Act of 1965.
  - The statute provided in part: "Signs which contain, include or are illuminated by a flashing, intermittent or moving light or lights shall be prohibited, **except those giving public service information** such as time, date, temperature, weather or similar information."
  - Divito Park contended the DOT's interpretation of the statute unreasonably and arbitrarily differentiates between incidental advertising through sponsorship of public service announcements and direct advertising because it did not define those terms. In other words, it argued that there was no rational basis for treating those two classes differently.
  - The Court held that: (1) rational basis existed for Department's distinction between incidental and direct advertising signs, and (2) Department was not estopped from revoking advertising device permit of business.

- Immaculate Conception Corp. v. Iowa Department of Transportation, 656 N.W.2d 513 (Iowa Jan. 23, 2003).
  - High school sought judicial review of order of state DOT requiring high school to remove advertising signs that were attached to athletic field fence and that were visible from highway. The District Court reversed. The Court of Appeals affirmed.
  - Upon granting DOT's petition for further review, the Supreme Court held that: (1) on-premise exception to statute prohibiting advertising devices within area adjacent to highway did not apply; (2) statute was not a content-based speech regulation that violated First Amendment; and (3) statute did not violate high school's constitutional freedom of commercial speech.

- Hobbs v. Department of Transportation, 831 So.2d 745 (Fla.App. 5 Dist. Nov. 15, 2002).
  - Landowner appealed the DOT's rejection of a sign permit, after county certified landowner's sign was legally existing as non-conforming sign.

- In 1983, Hobbs had purchased land adjacent to I-95. Included in the purchase of the land was an outdoor advertising sign, which was located on the property, and leased to Cape Kennedy KOA (KOA) for purposes of advertising. KOA had obtained, and continuously maintained, a state permit authorizing such use. KOA continued to lease the sign from Hobbs and to maintain the permit through December 1998.

- During that 15-year time period, Brevard County rezoned Hobbs' property, which authorized the land for residential use only. The rezoning caused the advertising sign to become a nonconforming use, but the county and DOT determined that the use was legal. Consequently, upon application by KOA, DOT continued to renew the sign permit even after the zoning change.

■ Hobbs (Cont.)

- In December 1998, KOA asked DOT to cancel its sign permit and DOT agreed. No one notified Hobbs of this action. Upon discovery that KOA's sign permit had been cancelled, Hobbs began efforts to obtain a new permit, first seeking the necessary permission from Brevard County. In November 2000, a Brevard County official certified that Hobbs' sign was "not in compliance with local ordinances, but is legally existing as a non-conforming sign." Based upon this certification, Hobbs applied to DOT for a sign permit. However, DOT denied the application, stating that the sign was "not permittable under land use designations of site." After a hearing to challenge the denial of the permit, DOT issued a final order finding that Hobbs' permit application was properly denied and ordering that the sign be removed from his property.

- The District Court of Appeal, in finding for the landowner, held that: (1) landowner's right to use sign did not become illegal simply because entity which applied for permit to use sign changed, and (2) there was no evidence that landowner intended to abandon right to advertise on sign.

■ Meredith v. Oregon, 321 F.3d 807 (C.A.9 (Or.), Feb. 27, 2003).

- A sign owner brought suit seeking declaratory judgment that Oregon Motorist Information Act (OMIA) violated First Amendment and Oregon constitution, and preliminary injunction enjoining Oregon Department of Transportation (ODOT) from further enforcing Act.

- In district court, the State filed both a motion to dismiss and an opposition to Meredith's motion for a preliminary injunction, arguing in both that the district court was required to abstain under the U.S. Supreme Court case of Younger v. Harris. The district court denied the State's motion to dismiss because the court was not convinced that Meredith would have an adequate opportunity in state court to raise his federal constitutional claims regarding his amended sign. State appealed. The Court of Appeals dismissed the appeal.

- Following grant of petition for rehearing, the Court of Appeals held that: (1) Court of Appeals had pendent appellate jurisdiction to review the otherwise non-appealable order denying Younger abstention, and (2) district court properly declined to abstain.

■ Texas Department of Transportation v. Barber, 46 Tex Sup. Ct. J. 916 (July 3, 2003)

- Landowner brought action against the Texas Department of Transportation (TxDOT) and others, seeking declaratory judgment that the Texas Highway Beautification Act (THBA) was unconstitutional. TxDOT counterclaimed, seeking a permanent injunction and removal of the billboard.

- Upon appeal from a District Court summary judgment decision in favor of TxDOT, the Supreme Curt held that (1) In district court, the THBA's proscription against outdoor advertising signs was content neutral; (2) the THBA's proscription was a valid time, place and manner restriction, as applied to sign reading "Just say NO to Searches" displayed on landowner's property, and thus did not violate landowner's First Amendment rights; and (3) landowner could not show that the State Constitution provided him greater protection than Federal Constitution.

■ In the Matter of the Denial of Eller Media Company's Application for Outdoor Advertising Device Permits in the City of Mounds View, Minnesota, ____ MN ____, (Minn. Sup. Ct. July 3, 2003).

- Employee of Minnesota Department of Transportation (MnDOT) denied media company's request for permits to place six billboards on a city owned golf course adjacent to a primary highway and zoned as a public facilities district. The company appealed. The city intervened.

- After a contested hearing before the Administrative Law Judge Division (ALJ), the ALJ recommended that the permits be issued. The commissioner of MnDOT denied the permits and the company and city appealed. The Supreme Court held that the city's public facilities district, a district that designated municipal land for public use, was neither a "business area" under the Minnesota Outdoor Advertising Control Act, nor a district "most appropriate for commerce, industry, or trade" under the Federal Highway Beautification Act (HBA), for purposes of determining whether city could allow billboard to be placed on the golf course. Therefore, it was not a district in which outdoor signs were allowed under State and Federal law.

THE END