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In Print

SHOPPING CENTER LEGAL UPDATE

THE LEGAL JOURNAL OF THE SHOPPING CENTER INDUSTRY

Spring 2015: Volume 35 Issue 1

Evolution of Shopping Center Signage Creates New Legal Issues for Landlords and Tenants

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The ancient Greek philosopher Heraclitus (535 to 475 BC) said, "The only thing that is constant is change." With the advent of the Internet 20+ years ago, the pace of change has been greatly accelerated, and the impact has become more dramatic and far reaching. National trends such as the evolution of technology, the REIT revolution, and consumer and industry responses to such trends have had profound effects on how real estate owners and their tenants do business today. And as the retail real estate business changes, so do the legal issues facing landlords and tenants. This article will examine some of the trends driving retail real estate today, their impact on retail signage, and legal issues that are emerging as signage morphs and changes.

National Trends Impacting Signage

It is suggested that the following four trends are among the major influences that affect retail signage today.

1. *The Internet*
The intersection of the Internet and the SmartPhone has placed the "world's largest store in every [consumer's] pocket." This gives each consumer unprecedented power to buy whatever and whenever s/he wants, at lower prices than ever before. SmartPhone penetration is now reported to be approximately 40%, and will grow to 60% in three years.[1] Amazon, probably the best-known online retailer, has been growing at the rate of approximately 17% per year.

The result is that brick-and-mortar stores are becoming smaller, and perhaps fewer. Consider the following:

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- 4,500 brick-and-mortar stores closed in 2012.
- New retail stores are generally 25% smaller, but retain 90% of in□store sales.[2]

This is having a tremendous effect on retailers and their landlords, who are scrambling to fill excess space. The good news for shopping center owners and tenants is that engagement and interaction with social media reportedly increase consumer spending 20% to 40%. Omnichannel retail interfaces reportedly increase in-store sales in the neighborhood of 30%, and have become a major focus for most national chain stores.

Just as NFL and NBA owners view themselves as being in the entertainment business rather than the "sports business," now property owners are seeking to bundle experiences for the consumer to enhance the "draw" of their projects, lure customers back to brick-and-mortar stores, and stay relevant. Tenant mix now contains 12% to 20% leisure, food and entertainment uses, which are combining dining, entertainment (whether it be movies, comedy clubs, billiards, bowling, etc.), socialization and shopping. The goal is to provide a complete family experience, with a higher spend per visit because people stay longer and spend more.

There is also an emphasis on experiential retail that is interesting and unique. For instance, in order to drive traffic, shopping centers hold events such as in□store cooking demonstrations, wine tastings, rock climbing and curating a wardrobe using a "magic mirror" that employs computer technology to show customers how they look in the merchandise. Landlords desire to create an exciting, aesthetically pleasing and fun environment—a mini-Disney World—that can be easily accessed at the local level.

The result is that customers enjoy a unique and memorable experience, and the shopping center stays relevant in the face of increased competition from the Internet. Amenities, lighting and signage are part of that experience.

2. *Branding and Trade Dress*
Years ago, signage was strictly limited to the occupant's trade name above the front door in a uniform format—in accordance with municipal codes and landlord sign criteria. Now, trade name, logo, color(s) and "trade dress" are key to a tenant's success. Branding appears not only on sign bulkheads, but also at myriad locations, including exterior awnings, on store display windows, blade signs and banners, which are used to dress up building facades and create interest.

3. *New Sign Technologies*
Retailers are always looking for attractive and enticing signage. Newer energy efficiency codes now typically require LED (light-emitting diode) or fluorescent lighting, which use less energy and generally lasts longer than the older incandescent lighting. These technologies have improved, such that the colors they produce are more true and vibrant, and letters on signs can be thinner and more attractive. Many shopping centers are using digital video media boards in shopping centers, including "crawlers" and "Jumbotron" screens (discussed below), which fall within the category of "flashing, blinking or animated-type signage." For decades, digital video media boards were all but outlawed in the shopping center context. Many tenants' present and future plans include the incorporation of big-screen TVs and digital video media boards into their stores and/or in show windows. All of these devices require more electrical capacity. Also, since these devices generate heat, stores with these features are having to increase both their electrical and HVAC capacities.

4. *The REIT Revolution*
Today, much of the retail landscape is dominated by publicly traded real estate investment trusts, which must please Wall Street analysts and shareholders by generating increased funds from operation each quarter. REITs are looking to generate "ancillary income" from every facet of their operation. One fruitful source is advertising revenue from signage on exterior pylons, on the exterior face of buildings and throughout enclosed malls. Such advertising can easily generate millions of dollars for the landlord, with a relatively modest investment of time and money (discussed below).

The Goal of Signage

The goals of retail signage are, simply put, to advertise the tenant's business, goods and services, and to attract customers who will make the cash registers ring. In the face of increased competition from online retailers, brick-and-mortar retailers are, more than ever, looking for signage that:

- Is inviting, vibrant and entertaining,
- Blends with the architecture and environment of the retail project,
- Is tasteful and proportioned to respect the architectural scale of the surrounding space,
- Provides immediate recognition of the tenant's business and premises,
- Is illuminated.

How do tenants get what they want, quickly, in the context of regulation by both landlords and municipalities? The focus here is not only on substance, but also timing, because the faster a store opens, the faster it generates revenue for the tenant—and for the landlord (as well as for the municipality, in the form of tax revenue)! Landlords and municipal code authorities have, and should have, the same goals as tenants:

- Attractive, inviting and entertaining signage,
- Streamlined approvals.

Regulation of Signage

Forward-thinking sign criteria set parameters, encourage innovation and will usually require submission of a color computer graphic or rendering of the entire elevation, along with sign drawings, for approval by the landlord and code authority. Parameters addressed by such criteria will typically include the type of signage (e.g., facade or storefront-mounted, canopy or awning, window graphics, blade signs, rooftop/parapet signs). Technical factors include the size, proportion, location, type of lettering, illumination, mounting, fabrication and materials, installation, operation and maintenance responsibilities, and limitations on signage in display windows. Fast and effective approvals require close cooperation between the landlord and tenant to achieve their shared goals.

Anchor tenants, which also have a legitimate concern about the appearance of signage in shopping centers that they occupy, have an appreciation of the retail landscape today, and are tending to be more flexible in what they will permit.

Municipal approvals are more difficult because municipalities strive for uniformity, not creativity. Furthermore, cash-strapped cities are short of staff, so approvals take longer; knowing this, tenants often negotiate to require their landlords to obtain their signage approval for them— based in part on the assumption that the landlord, as the local property owner, has a relationship with the code authority. Finally, most municipal sign codes have not been updated in decades, while the pace of change in a retailer's advertising and signage requirements moves at the speed of the Internet. But the financial realities that most local governments now face do not make overhauling their sign codes a priority.

Nevertheless, there seems to be a growing recognition that to be competitive, retailers have to upgrade their signage to be more attractive and inviting, and their retail signage must include tenant logos, colors and trade dress. The governmental emphasis on uniformity, and the desire to prevent garish signs that distract motorists and "clutter" the landscape, [3] is giving way to a recognition that the retail environment is changing, and that retailers and property owners need to stay competitive.

This situation was highlighted in a recent zoning battle in Paramus, New Jersey (generally regarded as "the retail capital of New Jersey"), between Paramus Park Mall, owned by General Growth Properties, and the Paramus Zoning Board of Adjustments.[4] In this case, local retail vacancies were hovering above 10%, and the municipality was forced to recognize that "shifting shopper habits" were having a negative impact on the trade area.

Consequently, the zoning board granted the mall owner variances that permit more signs per wall than normally permitted, and up to seven colors on a sign, rather than the four permitted by Paramus codes, to better accommodate retailers' trade dress.

Unfortunately, this increased flexibility is often seen only in connection with new projects that a municipality wants to do well and prosper, or with seriously troubled projects with high vacancy rates that are important to the municipality because of their size or location. Nevertheless, many financially strapped, enlightened, municipalities are backing off on tight signage requirements in the hope of raising tax revenue through increased sales.

There also seems to be a trend among city planners to try to eliminate pylon signs along roadways, which they view as producing a cluttered streetscape. Instead, planners prefer slightly larger and taller monument signs, and larger signs on buildings and storefronts as compensation for loss of the pylon advertising. In response to this trend, some big-box retailers add tower features to their stores, to which they add their logo and (in some cases) a sign bearing their trade name. This functions as a pylon, but is regulated as an "architectural feature" under many local codes.

With regard to new and redevelopment projects, forward-thinking developers are incorporating their signage criteria into their planned unit development approvals or zoning amendments to provide the speed and flexibility needed in today's retail world. For instance, codes in Columbus, Ohio [5] and Worthington, Ohio [6] have been modified to streamline approvals and allow the municipality to issue a sign permit within a few weeks. Without these changes, the process could take three months or more.

Digital Video Media Boards

The digital video media board (or Jumbotron) represents the intersection of new sign technology and property owners' quest for ancillary income. This device can deliver pictures, text and sound; is programmable; and can be changed in real time. Digital video media boards and crawlers are appearing on pylons, on monument signs, in malls, on kiosks, on parking structures and even in tenants' display windows. Digital video media may be the most controversial and problematic area in signage today because of the conflict between property owners' desire for revenue generation from these devices and the potential for disputes with anchors and other occupants over content. This type of sign can generate millions of dollars in revenue for the property owner/developer, and can be the deciding factor in whether a real estate project moves forward or not. For instance, store windows in Manhattan can be sublet for the purpose of locating a digital video media board for $1.2 million per year and up!

Large landlords are locking into national advertising contracts for digital video media boards that cover dozens of properties, and the landlords do not want any restrictions on content. Anchor tenants, on the other hand, are pushing back (primarily because they do not want competitors' advertising on these boards), and saying to landlords: "Here are our concerns—You figure it out."

When adding these boards to existing properties, there are a number of issues to consider, including municipal approvals and anchor approvals. Some municipalities prohibit digital media boards and crawlers, while others have not updated their codes in decades and impose no regulation whatsoever on these types of devices. Most older reciprocal easement agreements, on the other hand, were drafted before anyone ever thought of the Jumbotron. These agreements may prohibit flashing, rotating and animated signs or have blanket controls over "advertising medium," so the owner/developer will likely need multiple anchor approvals for one of these devices.

Keep in mind that some anchors may still be bound by Federal Trade Commission consent decrees that prohibit certain anti-competitive behavior. While these anchors do not want a competitor's ads on these devices, they may be prohibited from explicitly restricting them by their consent decrees. This can lead to gridlock—where all non-occupant advertising is prohibited. One area in which such gridlock can be broken, however, is by permitting advertising for businesses such as car dealerships that do not compete with the property's retail tenants.

Some of the many other issues that arise in this context are:

- Purpose. What is the purpose of the digital media board? What will it be used for? To promote the center and its occupants? To advertise products and events at the center? Or to simply generate revenue for the landlord? Landlords argue that the revenue from these devices is theirs and theirs alone (generally, there is no dispute on this point), and is necessary to offset growing tenant subsidies and allowances necessary to attract high-quality tenants. Such reasoning is frequently unpersuasive to a tenant, particularly to an anchor store, with approval rights.
- Economics. A digital video media board can present significant installation and maintenance costs that must be defrayed through its use. Will landlords require an advertising minimum from certain tenants? Will free or discounted advertising be offered to tenants? Will there be tenant and non□tenant rates? Will certain tenants be offered a "most favored nations" rate?
- Favoritism. May these boards be used for advertising non-occupants' businesses? How about advertising the business of a tenant's competitor? The authors' informal surveys indicate that most industry professionals (representing landlords and tenants, including anchor tenants) consider advertising competitors' businesses to be objectionable, unfair and inappropriate.
- Aesthetics. Digital media boards produce glare, bright flashes and (sometimes) noise. Is the impact positive or negative?
- Permitted Locations. A digital video media board may be appropriate at one location, but it may constitute a traffic hazard in another area (see below).
- Legal Liability. These boards are programmable. What happens if a hacker gets into the system? What if a flashing screen causes a traffic accident, or triggers an adverse reaction by a disabled person? Who is liable? If screens show people, what about privacy issues? And how will all of this affect insurance rates?

Courts have not yet addressed many of these issues, and the legal landscape is still evolving. However, trends in related areas suggest that the impetus is on viewers to behave responsibly, and that sign proprietors owe them no legal duty. Courts have held, for example, that "the responsibility to lookout when driving is on the driver."[7]
In a case involving an injured party struck by a driver allegedly distracted by a Marlboro billboard, the court granted summary judgment in favor of the defendant property owner, sign owner and store lessee because "a rule which would uphold liability in the present case would be at odds with reasonable notions of individual responsibility."[8]
While the court acknowledged that "the Marlboro sign did exactly what it was intended to do by Philip Morris, i.e., attract the attention of a passing motorist who might wish to purchase tobacco products," the court nevertheless found that the defendants owed no legal duty to passersby.[9]

Yet, these two cases held that liability for injuries attributed to commercial signage should be resolved by a jury.[10] At least one court has found that insurers are obligated to defend parties sued for signage-related personal injuries. [11]

Permitted and Prohibited Content

This is probably the greatest issue affecting signage (of any type) today. Developing guidelines in this area seem to include the following:

- Advertising of tenants' competitors should be prohibited.
- Advertising of non-occupants should be limited, unless the advertiser does not compete with tenants of the shopping center).
- Content must relate to the shopping center, its occupants and (perhaps) community activities.
- There must be a policy on access to the digital media board by community groups.[12]
- No political ads.
- No controversial issues.

- No intimate apparel/underwear ads (i.e., only “family-oriented’ content).

Conclusion

Brick-and-mortar retail needs to attract more (and younger) shoppers to stay relevant. The flash and glitz of “Times Square” neon may be too much in most locations. Therefore, owners and occupants of retail projects, particularlyanchor stores, need to work together to produce an exciting, esthetically pleasing and fun environment that is unique and memorable. At the same time, the architecture and environment of the project must blend with the advertising, be tasteful and proportioned in respect of the architectural scale of the surrounding space, and still meet the tenants’ advertising requirements. With a thorough understanding of all parties’ objectives (and objections) and a large dose of creativity, this effort need not be Mission Impossible!

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This article grew out of two presentations that Mr. Wright was involved in: The first was at the 2014 ICSC Ohio, Kentucky, Indiana, Michigan and Western Pennsylvania Retail Development and Law Symposium in February 2014. The second was at the 2014 ICSC U.S. Law Conference in October 2014. Mr. Wright wishes to acknowledge the contributions of his co-panelists in these endeavors, and those of the many architects, designers, construction professionals, real estate professionals and attorneys (from firms, owner/manager/developers, and department, big-box and national chain stores) who graciously consented to be interviewed in connection with his preparation for the presentation. Nevertheless, the views expressed herein are solely those of the authors.

[1]See “How retailers can keep up with consumers” by Ian MacKenzie, Chris Meyer and Steve Noble, published by McKinsey & Company, October 2013, accessed July 8, 2014 at http://www.mckinsey.com/insights/consumer_and_retail/how_retailers_can_keep_up_with_consumers

[2] *Ibid*.

[3] Whether city planners’ desire to protect the public from such unsightly clutter is rooted in aesthetics or concerns over public safety is unclear. There are some California cases that hold that “an occupier has no legal duty to provide a distraction barrier to prevent passing motorists from seeing or hearing what is occurring upon the land. […] the occupier has no liability for injuries caused by the motorist who is not paying attention to where he or she is going. Rather, it is the motorist who has the duty to exercise reasonable care at all times, to be alert to potential dangers, and to not permit his or her attention to be so distracted by an interesting sight that such would interfere with the safe operation of a motor vehicle.” *Lompoc Unified Sch. Dist. v. Superior Court*, 20 Cal. App. 4th 1688, 1694 (1993) (collecting cases). In light of these cases, it would seem that sign regulation based on concerns for public safety would be difficult to justify. Nevertheless, consider the following case discussing the constitutionality of restrictions on signage: “It cannot be disputed that signs are distracting. Their whole purpose is to call attention to themselves and to the extent that they are successful, a motorist’s powers of observation are diverted from those things which he may injure or which may bring injury to him. A sign that is large enough to be seen at one glance may also be large enough to conceal a hazard. A small sign may get more than a glance just because it needs more attention to be understood. Usually, temporary signs rely on the impact of multiple exposures to convey their message, proliferating without seeming limit in the process. To suggest that one may simply turn away from the impact of temporary signs is to suggest that one may do that which the sign-placer has resolved one shall not do. Neither pedestrians nor drivers can turn away if there are three-four signs on every pole on both sides of the street. To argue that one need not look is to contend one should walk or drive carelessly. Furthermore,

It cannot be disputed that temporary signs posted on traffic signs which either detract attention from them, or worse, conceal them, are hazardous both to drivers and pedestrians. Therefore, I find the ordinance promotes significant government interests which are causally related to achievement of stated goals." *Frumer v. Cheltenham Twp.*, 545 F. Supp. 1292, 1295 (E.D. Pa. 1982) aff'd, 709 F.2d 874 (3d Cir. 1983).

[4]*See* "Paramus Move to Ease Rules on Signs Aimed at Helping Hub Compete," by Joan Verdon, *The Record*, April 25, 2014, accessed on July 8, 2014 at: http://www.northjersey.com/news/paramus-move-to-ease-rules-on-signs-aimed-at-helping-retail-hub-complete

[5]*See* Columbus (Ohio) Code Chapters 3375 to 3383.

[6]*See* Worthington (Ohio) City Ordinances Chapter 1170.01 et seq.

[7] *DeFini v. Broadview Hts.*, 76 Ohio App. 3d 209, 216, 601(1991) (the city owed no duty to pedestrians who were killed when a motorist, distracted by a Christmas light display, struck them on a public road), and company employees "were not bound to anticipate that a passing motorist would negligently disregard his own safety because of their advertising acts, and that such motorist would violate traffic laws and cause injuries to third persons." (*Blakely v. Johnson*, 220 Ga. 572, 577, 140 S.E.2d 857, 860 (1965) (the driver was distracted by gas station employees attempting to attract attention to the station from potential customers.)

[8] *McCray v. Myers*, 614 So. 2d 587, 590 (Fla. Dist. Ct. App. 1993).

[9] *Id*.

[10] *See e.g., Chinnaraj v. Chehab*, No. A-2793-08T1, 2010 WL 3258135 (N.J. Super. Ct. App. Div. Aug. 13, 2010) (holding that "whether the visual clutter created by the assemblage of signs in the vicinity of the crosswalk posed a distraction to the driver or whether the signage obscured other signs giving notice of the crosswalk and contributed to the accident should be resolved by a jury.");*Colonial Stores, Inc. v. Owens*, 107 Ga. App. 436 (1963) (whether it was foreseeable and likely that someone might trip over signage and injure herself was a question for the jury).

[11] *Burdge v. Excelsior Ins. Co.*, 194 N.J. Super. 320 (App. Div. 1984) (insurance company required to defend party accused of negligently erecting a sign in a manner which "obstructed, distracted and impaired" driver's vision, causing collision).

[12]Many properties' written "Pruneyard" policies on public access may need to be reviewed to cover the use of messaging on digital video media boards and "crawlers," consistent with state laws where the property is located. For an excellent summary of public access and free speech rights in the shopping center context in all 50 states, see "Knowing When (or Whether) to Say When—A Survey of Public Access and Free Speech Rights at U.S. Shopping Centers," by Brian D. Huben, Esq., and Janella T. Gholian, Esq., *Shopping Center Legal Update*, Volume 34, Issue 2, Summer 2014