

The State of South Carolina



Office of the Attorney General

Opinion No 86-16  
P66

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February 6, 1986

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Dear Mr. Johnson:

By your letter of January 1, 1986, you have asked that this Office review a proposed amendment to a sign ordinance which Jasper County Council is considering and advise as to the enforceability of such an ordinance. The proposed amendment provides that applications for signs shall be accompanied by a fee based upon square footage of the proposed sign; the permit issued therefor would be renewed annually. This permit would be in addition to any building permit or permit issued by the South Carolina Department of Highways and Public Transportation pursuant to Section 57-25-110 et seq., Code of Laws of South Carolina (1976). If the annual permit is not renewed, the sign is to be removed by a specified date.

You first asked whether a county council has authority to enact a sign or billboard ordinance. We would first note that regulation of signs and billboards is generally found to be a part of zoning regulation. Veterans of Foreign Wars v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (1978), and is generally accepted to be within the police power of political subdivisions. Cf., Rieke Building Co., Inc. v. City of Overland Park, 232 Kan. 634, 657 P.2d 1121 (1983). Because counties in this State appear to have been granted police power, Op. Atty. Gen. No. 84-66 dated June 11, 1984, and further because county councils are empowered to act in matters of public safety 1/ and zoning 2/ generally, we would conclude that a county council

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1/ See Section 4-9-30 (5) of the Code.

2/ See Section 6-7-310 et seq. of the Code.

Mr. Johnson  
Page 2  
February 6, 1986

would be empowered to enact an ordinance regulating signs or billboards, within constitutional limits.

There are numerous cases and other authorities available on the regulation of signs and billboards which present the constitutional challenges to ordinances so regulating signs and billboards. 3/ In some instances, ordinances were adopted for public safety, traffic control, esthetic, or other similar reasons and have been upheld as a proper exercise of police power. 4/ Whether fees imposed constituted license or regulatory fees or taxes in disguise has also been raised. 5/ We will present the arguments most commonly advanced when billboard or sign ordinances are challenged, so that you may assess the ordinance and recommend any appropriate amendments for consideration by Council. 6/

Whether an annual fee imposed for the annual inventory of signs or billboards was a regulatory, as opposed to revenue-raising, measure was discussed in United Business Commission, supra, footnote 5. The court stated that a question of fact was involved. The test is stated as follows:

If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary

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3/ See Annot., 81 A.L.R.3d 486; cases collected in West's digests under such key numbers as Municipal Corporations 602, Highways 153.5, and Zoning and Planning 81, 282; 7 McQuillin, Municipal Corporations, §§ 24.380 - 24.388; 3 Am.Jur.2d Advertising § 13 et seq.; and 51 Am.Jur.2d Licenses and Permits § 5.

4/ See, for example, Veterans of Foreign Wars v. City of Steamboat Springs, supra.

5/ See, for example, United Business Commission v. City of San Diego, 91 Cal. App. 3d 156, 154 Cal. Rptr. 263 (1979).

6/ The Jasper County Sign Ordinance adopted February 4, 1985, appears to be regulatory in nature. The first paragraph provides as follows:

Whereas, Jasper County has developed a serious problem with unregulated outdoor advertising devices, it has been found necessary to regulate same by Ordinance. ...

Mr. Johnson  
Page 3  
February 6, 1986

purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax. ... In general, therefore, where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax.

154 Cal. Rptr. at 269. The court found the annual fee to be regulatory in nature from such evidence as a city manager's report to the mayor and council as to costs involved in inventorying signs and other relevant evidence as to the history of the fee.

The plaintiffs also argued in United Business Commission that the sign ordinance, with its graduated fee scales (by square footage of a given sign) and penalty provisions for erecting or altering a sign without obtaining the necessary permits, amounted to an ex post facto law or bill of attainder. No ex post facto law was involved since the ordinance would permit punishment of violations occurring after the date of enactment, nor would the ordinance permit punishment of violations of former fee requirements under a previous ordinance. The court's reasoning for determining that the ordinance was not a bill of attainder is not clear; inferentially, it is because the ordinance itself does not impose penalties. Rather, a violator must be found guilty of a misdemeanor and have the penalties of the ordinance imposed by a court of competent jurisdiction.

Violation of due process was considered in John Donnelly & Sons, Inc. v. Outdoor Advertising Board, 369 Mass. 206, 339 N.E.2d 709 (1975). The test stated therein was whether the terms of the ordinance were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 339 N.E.2d at 716. In this case, the court extensively discussed the esthetic considerations in an ordinance which prohibited off-premise and non-accessory signs located in any residential, business, or industrial zone

Mr. Johnson  
Page 4  
February 6, 1986

of a town; the court concluded that esthetics alone would justify the ordinance and that the means employed (prohibition of certain signs in certain zones) bore a reasonable relation to the aim sought to be accomplished. 339 N.E.2d at 719. Amortization periods, to phase out non-conforming uses, have been held not to constitute a taking of property, as well. Elliott Advertising Company v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970); Annot., 81 A.L.R.3d 486, § 3.

The First Amendment has been considered in conjunction with billboard or sign regulation, particularly where commercial speech is involved. The landmark case in this area is Metromedia, Inc. v. City of San Diego, 435 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). We would note that the "imposition of license fees in connection with legislation regulating First Amendment protected activity is not unconstitutional where the fee is designed solely for the purpose of reimbursing the governmental entity with the regulatory costs incident to the administration of the act." United Business Commission, supra, 154 Cal.Rptr. at 275. Thus, while the First Amendment may not present a problem if the Jasper County ordinance is regulatory in nature, we are sending Metromedia and Maurice Callahan & Sons v. Outdoor Advertising Board, 12 Mass. App. 536, 427 N.E.2d 25 (1981) (purely commercial speech, unlike Metromedia) for your information. See also Rieke Building Co., Inc. v. City of Overland Park, supra, relative to commercial speech.

The foregoing represents the arguments commonly made in constitutional challenges to billboard or sign ordinances. The ordinances in these cases were more extensive in their scope of regulation, but several cases were identified which addressed graduated fees for licenses or permits for signs or billboards. United Business Commission, supra; Board of Adjustment of Fayetteville v. Osage Oil & Transportation, Inc., 258 Ark. 91, 522 S.W.2d 836 (1975), both dealing with fees based upon square footage. Where such fees amount to license or permit fees, the amount charged "may not be such as to effect a prohibition of, or unreasonable restraint on, a useful or harmless occupation." 51 Am.Jur.2d Licenses and Permits § 39. See also City of Columbia v. Putnam, 241 S.C. 195, 127 S.E.2d 631 (1962), as to graduated rates for license fees.

In conclusion, we would advise that Jasper County Council would have the authority, under its police power, to adopt an ordinance regulating signs or billboards. Annual fees, as regulatory rather than revenue-raising measures, have been upheld, as have graduated fees based upon the size of the sign. As long as penalties for violation are imposed by a court, the

Mr. Johnson  
Page 5  
February 6, 1986

ordinance would not be deemed a bill of attainder; similarly, punishment under this ordinance only, rather than under any previous ordinance, would not amount to an ex post facto law. Imposition of regulatory fees may well not run afoul of the First Amendment, but the ordinance must be examined to determine its impact upon commercial speech. Finally, as long as the means employed bears a reasonable relation to the aim sought to be accomplished, due process requirements appear to be satisfied.

We understand that a sign ordinance of the City of Columbia was recently successfully challenged in federal court on an antitrust theory. We have not examined the City's ordinance and thus do not know how it would compare to Jasper County's ordinance. You may wish to contact the City's legal department to obtain more information and to avoid similar difficulty for Jasper County.

We trust that the foregoing discussion of challenges commonly made to sign or billboard ordinances and the various enclosures will be useful in your advising Jasper County Council on their sign ordinance and proposed amendment thereto. Please advise if you should need additional assistance.

Sincerely,

*Patricia D. Petway*

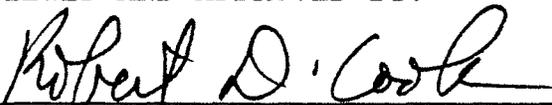
Patricia D. Petway  
Assistant Attorney General

PDP/an

Enclosures: As stated;  
7 McQuillin, §§ 24.380-24.388;  
3 Am.Jur.2d Advertising § 13 et seq.  
51 Am.Jur.2d Licenses §§ 39-41

cc: The Honorable Juanita White

REVIEWED AND APPROVED BY:

  
Robert D. Cook  
Executive Assistant for Opinions