November 2021

Transportation Interim Committee
Toni Henneman

MONTANA LEGISLATIVE SERVICES DIVISION Office of Research and Policy Analysis ORPA

STATE REGULATION OF BILLBOARDS

OVERVIEW

The Outdoor Advertising Act was enacted in 1971 "to promote the safety, convenience, and enjoyment of travel on and protection of the public investment in highways within this state and to preserve and enhance the natural scenic beauty or aesthetic features of the highways and adjacent areas."[1] To meet those ends, Title 75, Chapter 15, Part 1 lays out regulations to ensure that outdoor advertising, which includes billboards, are erected and maintained in a manner that is consistent with federal public policy regarding interstate and primary road systems.

> Billboards are regulated through both statute and rules developed by the Transportation Commission.

The Outdoor Advertising Act sets broad requirements and prohibitions related to outdoor advertising, such as determining the allowable proximity to highways, permitting requirements, and defining what constitutes unlawful advertising. The Act provides state standards but also clearly states in 75-15-104, MCA that a local and lawful ordinance, regulation, or resolution may be enacted that is more restrictive. Additionally, if federal policy changes or the U.S. Department of Transportation changes its rules, the Transportation Commission must amend its rules to align with federal policy.[2]

The Transportation Commission has promulgated rules related to the Outdoor Advertising Act which are found in ARM 18.6.201 through ARM 18.6.272.

PROXIMITY OF ADVERTISING TO HIGHWAYS

75-15-111, MCA states that most outdoor advertising may not be located and maintained **within 660 feet** from the nearest edge of the right-of-way.

Signs that are exempt from the distance requirement include:

- signs directional in nature,
- property for sale or lease signs,
- certain signs in commercial or industrial areas,

[1] 75-15-102, MCA
[2] 75-15-105, MCA

- signs advertising cultural exhibits of nonprofit historical or arts organizations, and
- signs intended to provide information of specific interest to the traveling public.

The exempt sign categories are often governed by federal policy, and, if not, the Transportation Commission is required to develop rules to standardize their placement and use.

BASIC REQUIREMENTS[3]

Most outdoor advertising must meet the following requirements to acquire a permit:

- may not exceed 672 square feet, including border and trim;
- may not exceed 48 feet in length;
- may not be taller than 30 feet, measured from the surface of the roadway at the centerline of the interstate or highway;
- may not have more than two facings visible from the same direction, and if the sign has two facings:
    - the facings may not exceed 325 square feet, and
    - two or more faces, back to back, on separate structures are considered a single sign;
- must be placed at least 500 feet apart unless the signs are separated by buildings or other obstructions,
- may not be located within 500 feet of:
    - public parks,
    - public forests,
    - public playgrounds,
    - scenic areas, or
    - cemeteries; and
- may not be within 500 feet of an interchange or intersection.

Signs may be illuminated if the lighting:

- is not flashing, intermittent, or moving except for displays such as time, date, or weather;
- does not cause glare or impair the vision of the driver of any motor vehicle; and
- does not interfere with the operation of a traffic sign, device, or signal.

Lastly, signs along a section of primary highway that enters or intersects the main-traveled way must be spaced:

- a minimum of 150 feet apart if the distance between the centerlines of intersecting highways is less than 1,000 feet; or
- a minimum of 300 feet apart if the distance between the centerlines of intersecting highways is more than 1,000 feet.

[3] 75-15-113, MCA

PERMITTING FEES[4]

The department requires permits for certain signs by application and approval. Each sign may be issued a renewable, 3-year permit and assessed an initial fee. Fees are established by rule and are determined by the square footage of the sign face. A permitted sign is given an identification tag and may be renewed unless the structure is removed for improper maintenance.

ENFORCEMENT[5]

The department is granted the authority to inspect outdoor advertising and may remove advertising deemed unlawful. The owner of the advertisement is given notice of the intent to remove the unlawful advertising and may request a hearing before the Transportation Commission if the owner does not agree with the department's determination.

If a willful or misleading statement was used to obtain a permit or if a sign structure is deemed unsafe, the department may notify the owner and within 60 days of receipt of notice may remove or seek remedial action in regards to the unlawful or unsafe sign.

Lastly, any sign determined to not conform to the Outdoor Advertising Act is declared a public nuisance and anyone violating the act is guilty of a misdemeanor.

TAXATION OF BILLBOARDS

According to ARM 42.21.155, the Department of Revenue classifies billboard as class 8 personal property.

15-6-138, MCA states that the first $6 million of class 8 taxable market value is taxed at 1.5% and all taxable market value above $6 million is taxed at 3%.

However, a portion of the market value is exempt. HB303 from the 2021 session increased the allowed exemption from the first $100,000 to the first $300,000 of market value. Many billboards were already exempt under the lower $100,000 threshold, so DOR assumes that the personal property tax revenue from billboards will decrease further under the new $300,000 exemption.

[4] 75-15-122, MCA
[5] 75-15-131, MCA through 75-15-134, MCA

ADDITIONAL RESOURCES

The following relevant case law may help provide additional detail regarding the regulation of billboards. If the committee desires, these cases may be investigated at more length at future meetings.

U.S. Supreme Court

Metromedia, Inc. v. San Diego (1981)
Reed et al v. Town of Gilbert, Arizona (2014)
Clear Channel Outdoor, Inc. v. City of Baltimore (2018)

Montana Supreme Court

Montana Media, Inc. v. Flathead County (2003)

Case notes included in MCA:

Commercial Versus Noncommercial Speech — Analysis to Determine Validity of Commercial Speech Restriction — Local Government Billboard Prohibitions Not Overreaching: Plaintiff petitioned for a declaratory judgment requesting that city and county zoning regulations for off-premises signs and billboards be declared unconstitutional and violative of the state Outdoor Advertising Act. The petition was denied and plaintiff appealed. The Supreme Court noted that under Metromedia, Inc. v. San Diego, 453 US 490 (1981), commercial and noncommercial speech enjoy different constitutional free speech protections, and that commercial speech is afforded less constitutional protection than noncommercial speech. Commercial speech may be regulated in situations in which noncommercial speech may not. In determining the validity of a commercial speech restriction, pursuant to Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 US 557 (1980): (1) commercial speech must concern a lawful activity and may not be misleading to be protected; (2) there must be a substantial government interest for adopting a commercial speech regulation; (3) if the speech is protected and a substantial government interest exists, the regulation must directly advance the asserted government objective; and (4) the regulation must reach no further than to achieve that objective. Despite subsequent holdings related to other forms of media, Metromedia remains the controlling law in billboard cases. Here, the first prong of the Metromedia test was not disputed. With regard to the second prong, the parties conceded that aesthetics and safety constituted substantial government interests. Further, the ordinances in question directly advanced the government's goal of reducing visual blight and traffic hazards, meeting the third prong of the test. Last, because the ordinances prohibited billboards only in residential areas and restricted billboard use in commercially zoned areas, speech was restricted no more than necessary to achieve the government objectives, so the fourth prong of the test was also met. Thus, the validity of the zoning ordinances was affirmed. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Disparate Government Treatment of Outdoor Signs Not Violative of Equal Protection: Plaintiff contended that the disparate treatment of outdoor signs under city and county zoning ordinances was violative of equal protection because the city of Whitefish did not regulate its own "Welcome to Whitefish" sign in the same manner as other off-premises signs. The Supreme Court found no constitutional violation. In contrast to plaintiff's sign, the

welcome sign did not advertise an establishment, merchandise, service, or entertainment located elsewhere. Further, the welcome sign fit within the official government sign exemption in the city ordinance. The city's disparate treatment of the signs did not violate equal protection guarantees because the signs in question were not of the same class. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Billboard Regulations Not Violative of Due Process Right to Notice and Opportunity to Be Heard: Plaintiff contended that city and county billboard regulations violated due process because they did not guarantee a hearing before deprivation of property. The Supreme Court disagreed. The Board of Adjustment was responsible for hearing appeals that allege an error related to enforcement of the ordinances. The Board was bound by known procedures and there was a right to appeal a Board decision to a court of record, so only under exceptional circumstances that did not apply to plaintiff could the city or county deprive someone of property without a hearing. The procedural safeguards provided for in the ordinances were sufficient and did not violate due process. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Ordinance Restricting Billboards Not Considered Unconstitutional Prior Restraint on Commercial Speech: Under Desert Outdoor Advertising, Inc. v. Moreno Valley, 103 F3d 814 (9th Cir. 1996), an ordinance or regulation that subjects protected speech to prior restraint without narrow, objective, and definite standards to guide permitting officials violates the federal constitutional right to free speech. The law may not condition the exercise of free speech on the unbridled discretion of permitting officials. In the case at bar, city and county ordinances governing billboards provided objective guidelines for the issuance of billboard permits that allowed permitting officials little discretion in deciding whether to grant a permit and thus did not create an unconstitutional prior restraint on speech. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).

Local Ordinances Restricting Billboards Not Unconstitutionally Vague: Plaintiff contended that city and county zoning ordinances regulating billboards were vague and subject to inconsistent and arbitrary application. The Supreme Court cited Broers v. Dept. of Revenue, 237 M 367, 773 P2d 320 (1989), for the holding that a noncriminal statute or regulation is vague if a person of common intelligence must guess at its meaning, but is not vague simply because it can be dissected or subjected to different interpretations. The court went on to analyze the various provisions of the ordinances regarding political signs, holiday signs, and the distinction between offsite signs and billboards, but found that plaintiff failed to demonstrate that any of the definitions were unconstitutionally vague. Mont. Media, Inc. v. Flathead County, 2003 MT 23, 314 M 121, 63 P3d 1129 (2003).