

## [Billboard Regulation: Proceed With Caution; Land Use and Planning](#)

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### **Body**

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Over the past several decades, as they have become increasingly common and conspicuous, billboards also have become a source of land use litigation in both state and federal courts. The legal issues implicated by their regulation are broad, and include First Amendment and exclusionary zoning claims. As a result, local governments seeking to control the location and style of billboards must be sure to navigate carefully when weighing a landowner's or an advertising company's interests against those of the general public.

Most recently, on Feb. 11, 2013, the U.S. Court of Appeals for the Third Circuit rendered a decision in [Interstate Outdoor Advertising v. Mount Laurel, 706 F.3d 527 \(3rd. Cir. 2013\)](#), which upheld a New Jersey municipality's zoning ordinance banning billboards. There, a billboard company challenged the ordinance because it prohibited commercial and non-commercial billboards in the township, asserting that it violated free speech guarantees under the First Amendment to the U.S. Constitution. The court disagreed, and found that the township sufficiently justified the ban with a report from the township engineer reviewing 37 articles on billboard and traffic safety and the township planner's testimony that the ban preserved the "billboard-free aesthetic charm and character of the area."

In upholding the ordinance, the Third Circuit cited the U.S. Supreme Court's 1981 ruling in [Metromedia v. San Diego, 453 U.S. 490 \(1981\)](#), which expressed deference to local lawmakers and reviewing courts regarding billboard impacts and ultimately upheld San Diego's ban on off-site commercial advertising based on traffic and safety concerns. The Third Circuit demonstrated similar deference by holding that Mount Laurel's ordinance was a reasonable means of achieving the town's substantial interests in traffic safety and aesthetics.

Despite the Third Circuit's decision in Mount Laurel, Pennsylvania municipalities should proceed with caution when considering similar regulations. It is critical to note that the Mount Laurel challenger did not raise an argument that the township's zoning ordinance was exclusionary. As a result, the decision does not impact the Pennsylvania Supreme Court's 2009 holding in [Township of Exeter v. Zoning Hearing Board, 962 A.2d 653 \(Pa. 2009\)](#), that billboards are a legitimate land use and cannot be banned outright in a municipality.

In Exeter, the court addressed a constitutional challenge to a zoning ordinance limiting billboards to 25 square feet. Unlike the plaintiff in Mount Laurel, the challenger in Exeter argued that the ordinance

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excluded billboards from the township, and that the exclusion violated its constitutionally protected right to enjoy its property. The court agreed with both points. The court found that the ordinance excluded billboards based on the applicant's testimony that a 25-foot billboard cannot function as a billboard because it is "too small to contain and convey an advertising message to the motoring public."

While the court acknowledged that the exclusion could be justified if it had a substantial relationship to public health, safety or welfare, it found no such relationship in the record. The court was careful to note, though, that contrary to the plaintiff's argument, the industry standard of 300 square feet was "not necessarily the absolute minimum size necessary to make a billboard effective in serving its communication purpose and economically viable."

Thus, municipalities still can rely on their police powers to impose reasonable regulations on billboard characteristics, such as location, size and height. Since Exeter, the Commonwealth Court has addressed several ordinances with these types of restrictions, such as the 50-square-foot size and 25-foot height limitations upheld in [\*Interstate Outdoor Advertising L.P. v. Zoning Hearing Board of Warrington Township\*, 39 A.3d 1019 \(Pa. Commw. Ct. 2012\)](#).

In reaching the conclusion that those limits did not result in a de facto exclusion, the court in *Interstate Outdoor Advertising* relied upon evidence presented by the township that indicated billboards of that size and height can effectively convey an advertising message to passing motorists. Similarly, in 2013, the Commonwealth Court upheld an ordinance in [\*Smith v. Hanover Zoning Hearing Board\*, 78 A.3d 1212 \(Pa. Commw. Ct. 2013\)](#), that limited billboards to a heavy industrial district, and imposed a 300-square-foot size limitation and 25-foot height limitation, on the basis that the applicant failed to present any evidence that effectively explained why the limitations created a de facto exclusion.

In both *Interstate Outdoor Advertising* and *Smith*, the parties challenging the ordinances could not show and/or did not present sufficient evidence demonstrating that the regulations unconstitutionally excluded billboards, and the municipalities were able to present sufficient evidence supporting the regulations. Therefore, a municipality is in a better position to defend an ordinance that regulates billboards, so long as the regulations are not so stringent that they result in an outright ban and are reasonably related to the objective of fostering public safety, health and welfare.

When crafting zoning rules to address billboards in a non-exclusionary manner, municipalities should note that the Pennsylvania Supreme Court has held that they may not regulate billboards as "land developments" under the Pennsylvania Municipalities Planning Code. In [\*Upper Southampton Township v. Upper Southampton Zoning Hearing Board\*, 934 A.2d 1162 \(Pa. 2007\)](#), the township denied a billboard company's application for building and sign permits to erect six billboards on the basis that the erection of the billboards also required "land development" approval under the township's subdivision and land development ordinance (SALDO). The Supreme Court, however, disagreed with the township, finding that billboards do not implicate the same concerns addressed by the SALDO review process (e.g., provision of sanitary sewer, water, stormwater management, parking, driveways and the like). As a result, the court held that the construction of a billboard is not a "land development" and, therefore, does not require land development review and approval.

Despite these recent legal developments and clarifications, local regulation of billboards remains a topic of much debate and controversy. Accordingly, municipalities should proceed with caution when imposing

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limitations on billboards in order to ensure that they comport with the current state of the law, both state and federal. .

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