

## The Role of the Regulator in Sign Repair Following Natural Disasters

*A heavy windstorm rages through town, blowing the faces out of every on-premise sign oriented in an east-west direction. (Memphis, TN, 2003)*

*High force hurricane winds damage the mountings of a projecting sign. (Hurricane Charley, Florida, 2004)*

*A coastal surge washes seawater and sand across the beach and into the waterfront business area, knocking signs over. (Hurricane Opal, Florida, 1995)*

*A dam breaks and floods a nearby town, damaging the illumination systems and breaking out the faces of numerous on-premise signs, while leaving the sign structures largely in tact. (Hurricane Liza, La Paz, 1976)*

These are a few examples of real natural disasters that have damaged signage, resulting in serious problems for the associated businesses. Such disasters are not uncommon. Each year, one in ten small businesses will be closed for a minimum of 24 hours as a result of a natural disaster of one sort or another. Of those small businesses, ten percent will be extremely impacted, resulting in the closure of the business for at least a week and/or causing damage in the amount of \$100,000 or more.<sup>1</sup>

These numbers include a variety of disasters, such as extreme weather, earthquakes, and sinkholes. According to the U.S. Small Business Administration, 40 percent of small businesses that suffer an extreme impact from a natural disaster never recover and go out of business.<sup>2</sup> This article will look at how the sign code can be used to minimize the loss of local businesses when natural disasters strike.

### “Sign” Definition is Crucial

The fact that signs are a form of free speech, rather than a mere land use activity, coupled with the visual impact of their presence in the public venue, means they are

sometimes a matter of controversy. Much of the controversy stems from the difficulty of defining signs concretely for purposes of regulating them. Speech in any medium has the potential for inventiveness and subtlety that defies precise classification, and signs are no different in this regard. A natural disaster will often highlight the definitional problems of a sign code.

For example, some franchised companies employ signage programs that not only include freestanding and building signage, but also utilize a signature building – one that is architecturally nearly identical to every other store in the franchise. Though the building’s design is not commonly considered a sign, it functions in exactly the same way as a sign. In fact, if such a business lost its sign in a natural disaster and the franchiser has used the building’s appearance as part of an advertising program, then chances are good that the building itself could still communicate effectively to passers-by.

Some businesses use large storefront windows to enhance the effectiveness of their on-premise signage and communicate more effectively with passing traffic. When the business’s sign is damaged, if the store is located close to a road, then the brightly lit windows may be able to tell some customers that the store is open for business. Outdoor displays, such as lots full of automobiles for sale or racks of flowers outside a garden center, also work to attract customers and act as signage. When damage affects these businesses’ on-premise signage, the businesses may still be able to attract some customers, though in a diminished capacity.



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*Even without the benefit of a face in this business's sign, most people will readily recognize it. Further, even if the sign face is not replaced before the business opens again, the store's large windows can help communicate with passing consumers that the business is open. Many small, independent retailers, however, are unrecognizable without their on-premise signs and are otherwise unable to effectively let the public know they are open for business.*

The same is not the case for the typical independent small business. Usually, a business starts out in leased space located in a generic building. Freestanding and building-mounted signage is then added and serves as the sole generator of visibility for the business. It is the sign – and only the sign – that creates visibility for the business.

A single cataclysmic event that destroys the communication features of the sign can literally force a small independent business to close its doors for good because it is no longer able to communicate effectively to potential customers. In some cases, if the signage isn't repaired within a matter of weeks, the business will die. Businesses that are already struggling at the time of a natural disaster, and businesses that rely on impulse sales are most likely to fail following the event,<sup>3</sup> and these are typically the businesses most dependent on their on-premise sign.

## **Disaster Preparedness Includes Features of the Sign Code**

The potential loss of local businesses is a serious matter for any community. Natural disasters often result in significant financial losses for local businesses. Interestingly, though the common perception is that these losses are a result of building damage or loss of inventory, the vast majority (62%) of businesses that have suffered a natural disaster report that they were primarily hurt due to lost sales and customers.<sup>4</sup> Yet little attention is typically focused on efforts to help these businesses attract the customers they need in order to minimize their losses. Preparing for the possibility of a natural disaster should include adopting a strategy to ensure that local businesses can effectively communicate as soon as possible in order to minimize the loss of customers and sales that can destroy small businesses.

When a business's on-premise sign is damaged, that business is often no longer able to tell passing traffic that it is open or even that it exists. The lack of signage can easily cost an established business 7-15 percent of its customers, and a new business as much as 50 percent of its customers.<sup>5</sup> That loss of volume is sufficient to destroy most businesses. This is why local governments must carefully consider their approach when affected businesses seek to repair damaged signage. Regulatory barriers to sign repair can literally finish off a business that was seriously harmed by the natural disaster.

As we will see later, cities have taken a variety of approaches to these issues. Some have had positive results, while others have not.

## Replacement of Damaged Sign Faces and Illumination Repairs

Very often in a natural disaster, damage occurs to a sign's face, which must then be replaced. Exactly how much control do regulators have over the copy on a sign face, or over changing a sign face? In short, the replacement of a sign face following a natural disaster should be treated no differently than any other face change, and should be guided by the First Amendment protections.

U.S. courts recognize First Amendment protections require that speech regulation – including regulation of signs – be limited to “content-neutral” regulation of “time, place and manner.” This means that on-premise signage must be allowed to be of adequate size, height, and illumination, given its placement, to be capable of being seen and read by the intended recipient.

Regulators seeking further restriction on signs are required to prove that they have identified the purposes underlying their proposed time, place and manner regulations. Additionally, they must demonstrate that they have determined how those purposes are furthered by their proposed regulations, in a manner that fits the defined purposes and minimizes the consequences of restricting freedom of speech. Proof of compliance with these duties must be based upon evidence that existed at the time the ordinances were enacted.

What does this have to do with sign face changes? The key is found in the requirement that sign codes be content-neutral. “Content-neutral” means that the government cannot impose time, place and manner limits on the message based upon what the message says or who is saying it (with exceptions, of course, for messages containing false or misleading information, or otherwise

posing an imminent threat to public health, safety, or welfare). In other words, the speech expressed by the sign cannot be a factor in whether or not a sign is permitted.

When only the speech portion, or face, of a sign is damaged, but the sign's support structure remains in-tact, its restoration to original condition is not a matter that should legitimately concern local government. The initial permit and regulatory process has already addressed the sign's construction in terms of the public's health, safety, and welfare. The sign has already been approved. No justification exists for requiring a permit process and official review of a sign's replacement face. Numerous court cases have made this point clear.<sup>6</sup>

Cities who seek to require that nonconforming signs be brought into conformity with current code if a face change is needed should carefully consider cases such as *Kevin Gray-East Coast Auto Body v. Village of Nyack*.<sup>7</sup> In this instance, the new owner of a local business wanted to change the business's name and, therefore, the face of its sign. The sign structure was grandfathered and nonconforming. The village's sign ordinance mandated that face changes would require that the sign be brought into compliance with current code. The Court overruled the local ordinance and allowed the face change without bringing the sign into conformance because the only change was a change in content – a change that is almost always beyond the scope of regulatory authority.

It makes no sense to impose a lengthy, costly, and discretionary permit process on a struggling business that is already reeling from a natural disaster. The franchise down the street may have similarly lost its freestanding sign, but its signature building continues to attract customers. It likely also has the ability to hire legal counsel to help it secure its permits and even a variance, if needed. Why should an independent local merchant in the same circumstances be virtually prevented from surviving due to a discriminatory and costly process? It is quite simply a classic example of the outcome of poor public policy.

Obviously, if major structural repairs are involved in sign repair, and the public safety is at risk, then the sign's structure should be required to go through the permit process for its re-engineering and reconstruction.

If no structural or safety issues are involved in a sign's repair, or if any repairs are simply a restoration of previously permitted illumination systems and the replacement of the sign's face, no permit fees (a form of user fees) should be applied. The service those fees are earmarked to fund has not been used; therefore, the fees

cannot legally be applied.

As Richard L. Rothfelder, Esq., explains, “if there is no reasonable relationship between the purported fee and costs, or if the fee is more than reasonably necessary to cover the cost of regulation, such an exaction becomes more than mere recoupment of reasonable regulation costs. Its primary purpose is the raising of revenue, and it is illegally excessive as an unauthorized tax.”<sup>8</sup>

To determine the legality of a user fee, the courts compare the cost of the service to the revenue raised by the fee. If the court determines that the purpose of the fee is to raise revenue, rather than to provide the fee-payer with a service at a reasonable charge, the Court may set a fee it deems sufficient.<sup>9</sup> If a user fee is applied to a sign and “imposes an impermissible impediment in suppressing protected expression,” it could be deemed a violation of the sign user’s civil rights.<sup>10</sup> In such a case, the Court may block the city from charging the fee at all.<sup>11</sup> Additionally, the sign user can seek to recover the fees it had to pay, as well as its attorney fees.<sup>12</sup>

Good public policy and numerous court decisions suggest that in the event of a natural disaster, sign users should be allowed to restore their speech, including illumination and sign faces, to original condition without facing a permit process or fee. To deprive these businesses of the ability to quickly restore their street communication systems and attract customers not only violates their civil rights and discriminates against the independent merchant, but it also jeopardizes local tax revenues, public services, and jobs.

## Examples of Post-Disaster Permitting

### *Memphis, Tennessee*

On July 22, 2003, a 100 mph windstorm known locally as “Hurricane Elvis” blasted through downtown Memphis from west to east. The winds blew out a large percentage of the sign faces and damaged the illumination of the on-premise sign structures that were oriented in an east-west direction.

When the affected business owners attempted to repair their signs, they were asked to pay hefty permit fees, which the City calculated based on each sign face – making the fees twice as expensive where signs were oriented perpendicular to the roadway with a face on each side. In addition to the standard fee, business owners were charged an additional \$5 surcharge that funded

a home-buying assistance program. Repair permits for illuminated signs also included an extra electrical fee, regardless of whether the signs’ illumination had been damaged.

Business owners who were struggling to attract customers following the disaster were incensed to learn that in their time of need the City was attempting to raise money from them for non-emergency programs unrelated to signage while at the same time accepting from the Federal Emergency Management Agency (FEMA) several million dollars in national disaster assistance that had been earmarked to assist businesses in their recovery. Further, at the time of the storm, the City already had in reserve several million dollars in unspent fee collections that were being eyed as a revenue source for other projects. Ultimately, homeowners and businesses

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worked together and succeeded in securing an injunction against the City to prevent its unlawful use of those fees for unrelated purposes.

### *Jackson, Tennessee*

A few months earlier, in Jackson, TN, a town 80 miles away, the City undertook an entirely different approach when a tornado ripped through its business district. The City, in an effort to help its businesses recover as quickly as possible, waived all fees on permits related to storm damage for a period of six months. According to Jim Campbell, Director of the City’s Building and Codes Department,<sup>13</sup> the City was “trying to get people back into business and get their lives back to normal.” To get permits processed and help businesses recover, he said, “we were working after hours, at night and on the weekends.”

### *A Mid-Size Town in Florida*

The 2004 Hurricane season hit Florida particularly hard, with four hurricanes wreaking havoc over a



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*Only the message portion of this sign has been damaged; its structure remains sound and intact. Even if this sign was a legal nonconforming sign, it would still be in the city's best interests to help the business get back in operation as soon as possible. Charging excessive permit fees, requiring conformity, or forcing the business to endure a lengthy content-review process in order to replace the faces in its sign would be harmful both to the business and to the community.*

six-week period of time. The first of these, Hurricane Charley, hit on August 13. Most of the area businesses suffered sign damage, but the experience of one business<sup>14</sup> in particular following the disaster demonstrates the problems that can occur when not all city employees share the same understanding of a code.

The severe winds shifted and damaged the business's large sign, a metal and stone structure measuring 40 feet in height and integrated with the building. Due to the shifting of the sign, the stone block wall to which it was attached was damaged, causing the stone to delaminate, the wall to tilt, and the roof to gape open. The sign was in danger of falling, which would not only have severely damaged the building, but also posed a danger to

passing traffic. No one questioned the need to secure permits to repair the building and sign, and extraordinary efforts were undertaken to secure the sign in order to avoid endangering the passing public until it could be repaired.

Once the storms abated, the general contractor and the sign company began working with the City Administrator on a plan to repair the sign, which was nonconforming. Both the general contractor and the sign company agreed that the sign should be repaired on the building rather than removed and repaired. Because it was grandfathered, they were concerned that if it were removed, the business would not be allowed to reinstall it. The City Administrator, however, recommended the



*A particularly icy, windy winter can severely damage awning signs like this one. Though tourist season was well underway at the time this photograph was taken, the awning was still torn, detracting from the aesthetic quality of the tourist town's business district and harming the ability of the business to attract customers. Clearly, prompt repair of signage should be a priority for businesses and cities alike.*

sign be removed and repaired for “safety reasons.” In the permit he issued to the business, he stated that the situation was an “emergency situation and an act of God,” and that upon repair, the sign could be reinstalled even though it was nonconforming.

Three months and \$17,090 later, the sign was ready for reinstallation. The City Development Services Director and the City Manager, however, informed the business that despite the permit that had been issued and the assurances of the City Administrator, the code did not allow replacement of the sign. The situation was unfortunate, the business was told, but “Rules are rules.”

In desperation, the business's concerns were brought to the attention of the Mayor, whose commitment to small businesses prompted him to act. He met with the involved City officials and was able to convince them to honor the business's permit and the sign was successfully reinstalled.

## **In Conclusion**

When a small business is damaged in a natural disaster, the owner's livelihood – and that of the business's employees – is at stake. Small business owners can turn to insurance, SBA loans, or other sources of aid to cover their losses. Even when they do, however, they are usually only moderately compensated. Instead, the owners of these businesses most commonly turn to personal savings, loans from friends or family, or personal loans – or simply absorb the losses into the business<sup>15</sup> When these financial hits are combined with a loss of customers and sales, the results can be fatal to the business.

A study of business health following flooding in Des Moines, Iowa in 1993 showed that nine months later, 12 percent of the surviving businesses were still worse off than before the flood. The same study looked at the 1994 Northridge earthquake in Los Angeles, California

and found that after sixteen months, 24 percent of surviving businesses had still failed to fully recover from that disaster. In both cases, small businesses were more likely to have failed to recover, while large businesses were more likely to be doing better at the time of the survey than they had been at the time of the disaster.<sup>16</sup>

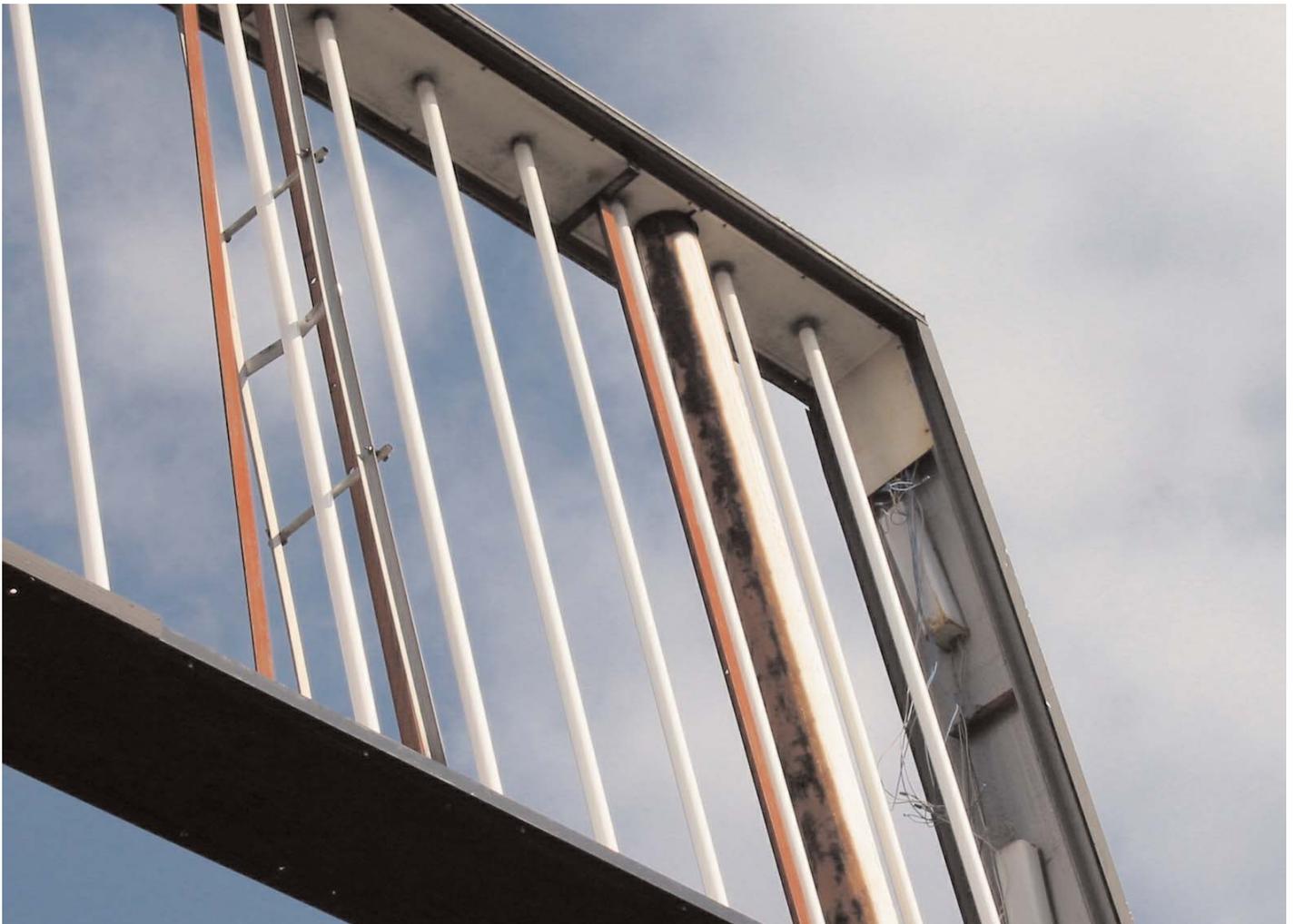
The earlier referenced Florida example demonstrates how a small business was very fortunate to have had responsive elected officials to step in and help in its time of need. Many others have not been as fortunate. These business owners look to their government's ordinances and from them deduce an understanding of their local public policies. If the sign ordinance requires excessive payment of fees for restoration of constitutionally protected speech following a natural disaster, what public policy understanding will they infer? On the other hand, how will business owners feel about the public policies of their local government when they find public officials willing to work into the night to help them get their businesses back up and running?

*At the most basic level, prompt replacement of sign faces when no damage has occurred to the structure should be allowed without any extensive procedural or fee requirements. The structure is fully intact, and no public safety issue is involved in a face change on the sign. Quick re-installation of a face in this instance can help prevent serious business losses by letting potential customers know the business is open and ready to serve them.*

Today's businesses have many options for reaching potential customers with their message, but most independent merchants do not have the means to take advantage of those options. Without their on-premise sign, they can have difficulty competing with businesses whose on-site communication systems are more comprehensive and synergistic and better able to continue functioning despite disruptions such as natural disasters. A strong disaster preparedness plan will include clear guidelines for speedy replacement of damaged on-premise signage as a feature of its economic recovery plan. Not only will a solid plan help protect the civil rights of business owners, but it will also help ensure a healthy economic future for the community.

### **Endnotes:**

1. National Federation of Independent Businesses, "Disasters," National Small Business Poll, Vol. 4, Issue 5, William J. Dennis, Jr., Series Editor (Washington, DC: NFIB Research Foundation, 2004), 1. This survey of existing busi-



nesses did not include any businesses that may have closed their doors for good following a natural disaster.

2. NFIB, "Disasters," quoting Herbert Mitchell, Associate Administrator, Office of Disaster Assistance at the U.S. Small Business Administration, 2.

3. Kathleen J. Tierney, "Impacts of Recent Disasters on Businesses: The 1993 Midwest Floods and the 1994 Northridge Earthquake" (Newark, DE: Disaster Research Center, Dept. of Sociology and Criminal Justice, University of Delaware, 1997), 6.

4. NFIB, "Disasters," 10.

5. Charles R. Taylor, Thomas Claus, and Susan L. Claus, "On-Premise Signs as Storefront Marketing Devices and Systems" (Sherwood, OR: The Signage Foundation, 2005), chapters 4 and 5.

6. See *Budget Inn of Daphne, Inc. v. City of Daphne*, 2000 WL 184245 (Ala.); *Rogers v. Zoning Bd. Of Adjustment of the Village of Ridgewood*, 309 N.J. Super. 630, 707 A.2d 1090 (App.Div. 1998), aff'd, 158 N.J. 11, 726 A.2d 258 (N.J. 1999); *Ray's Stateline Market, Inc. v. Town of Pelham*, 140 N.H. 139, 665 A.2d 1068 (1995); *C.F. Royal Food Systems, Inc. v. Missouri Highway and Transp. Com'n*, 876 S.W. 2d 38 (Mo.App. 1994); and *Motel 6 Operating Ltd. Partnership v. City of Flagstaff*, 195 AZ 569, 991 P.2d 272 (1999).for a similar ruling.

7. 566 N.Y.S.2d (N.Y. App. Iv. 1991).

8. Richard L. Rothfelder, "Illegally Disguising Taxes as Permit Fees," a report to the Third Annual National Signage Research Symposium (March 30, 2005), 5. Mr. Rothfelder is Certified in Civil Trial Law by the Texas Board of Legal Specialization and is a partner in the Houston business litigation firm if Rothfelder & Falick, L.L.P. He is currently serving his third term as the Mayor of the City of Southside Place.

9. See *City of Houston v. Harris County Outdoor Advertising Ass'n*, 879 S.W.2d 322 (Tex. App.- Houston [14th Dist.] 1994, writ denied), cert. Denied, 516 U.S. 822, 116 S. Ct. 85, 133 L.Ed.2d 42 (1995); *Martin Media v. Hempfield Township Zoning Hearing Bd.*, 671 A.2d 1211 (Pa. Commw., 1996), appeal denied, 546 Pa. 650, 683 A.2d 887 (1996); and *New York Tel. Co. v. City of Amsterdam*, 200 A.D.2d 315, 613 .T.S.2d 993 (N.Y. App. Div. 3d 1994).

10. Richard L. Rothfelder, "Illegally Disguising Taxes as Permit Fees," 8. See *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810 (9th Cir. 2003).

11. See *Clear Channel Outdoor v. Los Angeles*, supra.

12. Attorney fees are also recoverable under §1988 of the Civil Rights Act and state or federal declaratory judgment acts. See for example, Tex. Civ. Prac. & Rem. Code § 37.009.

13. Jim Campbell has agreed to provide assistance to cities wishing to find out more information on the approach used in Jackson. He may be contacted at (731) 425-8262.

14. This business wishes to remain anonymous.

15. Kathleen Tierney, "Impacts of Recent Disasters on Businesses," 25.

16. Kathleen Tierney, "Impacts of Recent Disasters on Businesses," 12, 26.

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