ILLEGALLY DISGUISING TAXES AS PERMIT FEES

presented to

The Third Annual
National Signage Research Symposium

Mandalay Bay Hotel & Convention Center
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by

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I. Escalating costs and decreasing revenues in cities

Local governments are currently confronting a seemingly irreconcilable conflict of escalating costs and decreasing revenues.

A. Reasons for escalating budgets

There are several legitimate reasons for escalating municipal budgets, including the federal government's cutbacks and reallocation of costs to local governments, the increase of crime, and the welfare and social costs associated with drug abuse. At the same time, the economic downturn causes municipalities to realize lesser sales and ad valorem taxes than in previous years. One remedy to bridge the gap between the revenue and costs is to raise taxes, but the astute modern politician will scrupulously avoid the appearance of doing so.

B. Permits and license fees as a way to help city finances

Municipalities have been forced to confront the conflict between the need to raise revenue and the need to keep taxes low by creating new – and increasing existing – permit and license fees. These are often referred to as "user fees" because the recipient pays for the cost of the service. For example, the golfer pays a greens fee for the use of the golf course, which in turn, is maintained by the city through revenues generated from these greens or user fees.

C. Permits and license fees as an alternative to taxes

This apparently logical and equitable approach to municipal finance is also politically expedient. Politicians do not have to use the dreaded "T" word when they raise or create new regulatory fees. Our American system of accountability also supports the notion that those who receive the services pay for them.

D. Permits and license fees as a non-tax for citizens

It also follows that most citizens, at least superficially, do not seem to bear a tax increase because the user fee is targeted only at the regulated industry. Of course, the average consumer is ultimately affected when the fee is inevitably passed on in the form of higher costs.

E. Permits and license fees vs. payment for services out of general funds

In contrast to the fee and permit system, cities pay for general citizen services (as opposed to specific user services) out of general funds. Common examples include police and fire protection. General funds are typically financed by ad valorem real and personal property taxes.

F. Vulnerability of unpopular groups to permits and license fees

Perhaps most importantly, permit and license fees become even more favored for the politician when levied against business groups lacking in public sympathy or political power. The on-premise sign and billboard industries are especially vulnerable targets for taxation illegally disguised as permit fees.

II. Revenue neutrality: is it a permit and license fee or a tax?

A. Revenue neutrality

Permit and license fees are illegal, and will be struck down by the courts, if they are really taxes disguised as fees, that is, if the fees are not "revenue neutral." The courts have articulated the so-called "purpose test" for determining whether an exaction is a legitimate permit fee or a tax: if the primary purpose of the measure is to raise revenue, as opposed to merely recouping reasonable costs of regulation, it is a tax. Stated differently, 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.

B. Examples of cases - revenue neutrality

For examples of courts considering the question whether an exaction was a legal fee or a tax, see *City of Fort Worth v. Gulf Refining Co.*, 83 S.W.2d 610 (Tex. 1935) (challenge to validity of ordinance providing annual charge of $24 for the right to operate each gasoline filling station in city); *Hurt v. Cooper*, 110 S.W.2d 896 (Tex. 1937) (on certified question) (law providing for license fees according to number of stores owned by merchant); *Producers Ass'n of San Antonio v. City of San Antonio*, 326 S.W.2d 222 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.) (action by milk producers to enjoin enforcement of ordinance establishing license and inspection fees to be paid by milk producers selling milk in city); *B & B Vending Co. v. City of El Paso*, 408 S.W.2d 545 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.) (challenge to ordinance regulating billiard tables); *H. Rouw Co. v. Texas Citrus Comm'n*, 247 S.W.2d 231 (Tex. 1952) (statute exempting natural persons from tax imposed by statute upon citrus fruit grown in state and packed or placed in containers violates federal and state constitutions); *Prudential Health Care Plan v. Commissioner of Ins.*, 626 S.W.2d 822 (Tex. App.—Austin 1981, writ ref'd n.r.e.) (Health Maintenance Organization Act, which provided charges levied against corporate HMOs would be kept in separate fund for carrying out regulations, imposed regulatory fees, not tax); *Houston Credit Sales Co. v. City of Trinity*, 269 S.W.2d 579 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.) (license charge for itinerant merchants, vendors and peddlers so excessive as to be confiscatory.)

III. Factors in the purpose test

The courts determine revenue neutrality under the "purpose test" by considering the following factors in distinguishing between permit fees and taxes.

A. Comparison of cost of service vs. revenue from fee

To apply the purpose test, courts make a direct comparison of a city's: (1) cost in rendering the services and regulation attendant to the permit; with (2) the revenue generated from the permit fee.

1. In *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) [hereinafter *City of Houston v. Harris County*], the billboard owners introduced into evidence a study prepared by the City of Houston's own accountants, which showed that the cost associated with an off-premise sign operating permit fee was $19.73 compared to revenue of $89.50, a recovery of 430%, and $171,916.00 in average annual revenue in excess of cost. *Id. at 329.* Even in the face of its own accountants' report, Houston still proceeded to double the fee on the billboard operators.

2. For another analysis of the revenue neutrality of an outdoor advertising ordinance, read *Lamar Advertising of Tennessee, Inc. v. City of Knoxville*, No. 03A01-9407-CH-00253, 1997 WL 170304 (Tenn. App. Apr. 11, 1997) (unpublished) (license fee for inspection of ground and portable signs was tax and imposed double taxation).

Practice note:

Under the purpose test for determining whether a fee is really a tax, courts will consider whether the primary purpose of the measure is to raise revenue, as opposed to merely recouping reasonable costs of regulation. If the purpose is revenue, the measure is a tax. Stated differently, 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. See generally City of Houston v. Harris County Outdoor, 879 S.W.2d at 322; *Lamar Advertising of Tennessee, Inc. v. City of Knoxville*, No. 03A01-9407-CH-00253, 1997 WL 170304 (Tenn. App. Apr. 11, 1997).

B. Waste and inefficiency

Courts also consider the waste and inefficiency of the municipality in providing the regulation, thereby establishing that whatever the municipality actually incurs is excessive.

1. In *City of Houston v. Harris County Outdoor*, 879 S.W.2d at 322, it was established that the Houston Sign Administration employed 77 individuals, utilized even more City-owned vehicles, leased expensive office space in a privately owned building, and had annual budgets in excess in of $3,000,000.00. *Id.* at 331-32.

2. By contrast, before the Houston Sign Administration was established in 1980, signs were regulated by the City's Building Department, which operated out of City Hall with only two employees, and charged only $1.00 for a permit fee (as compared to the $278.00 charged by the Sign Administration). *Id.*

Practice note:

To challenge a fee under the purpose test, the party challenging the fee must offer detailed evidence, including financial evidence, to show the variation between the cost to the city in providing the service and the amount actually earned by the fee. See generally City of Houston v. Harris County Outdoor, 879 S.W.2d at 322.

C. Municipalities' services to individuals outside sign industry

If the recipients of the services that are performed by the municipality are individuals other than the sign industry, such services should be paid for out of the municipality's general fund or sources other than sign permit fees.

1. In *City of Houston v. Harris County Outdoor*, 879 S.W.2d at 322, the billboard owners established that the Houston Sign Administration performed several tasks benefiting the general citizenry on an equal basis, such as collecting and disposing of illegal paper garage sale and political signs, but charged the cost of rendering such services exclusively to the billboard operators through off-premise sign permit fees. *Id.* at 330-31.

2. The City of Houston even attempted to recoup, through the off-premise sign operating permit fees, the settlement funds and attorney fees of more than $500,000.00 the City paid to settle a lawsuit alleging mistakes and errors by the Houston Sign Administration. *Id.* at 332.

D. Burdens on sign industry

Another factor considered by the courts is the burden placed on the sign industry as a result of repeated and dramatic increases in the city's permit fee schedule. For example, it was established in *City of Houston v. Harris County Outdoor*, 879 S.W.2d at 322, that, while the City's Building Department charged only $1.00 for a permit fee before 1980, its Sign Administration raised sign permit fees seven times between 1980 and 1989, for a total increase of 450%, and a $278.00 charge for a 14' x 48' billboard. *Id.* at 328.

IV. Other grounds of illegality

Having demonstrated that the permit fee is actually a tax, it may also be illegal on several other grounds:

A. The First Amendment

The guarantee of free speech and freedom of the press by the First Amendment of the federal constitution could be violated by the imposition of a tax on the sign industry, if such a tax imposes an impermissible impediment in suppressing protected expression.

See generally Leathers v. Medlock, 499 U.S. 439, 111 S. Ct. 1438, 113 L.Ed.2d 494 (1991) (unsuccessful challenge to imposition of sales tax on cable television services); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L.Ed.2d 295 (1983) (imposition of use tax on cost of paper and ink products consumed in production of publications violated First Amendment by imposing significant burden on freedom of the press); *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810 (9th Cir. 2003) (court of appeals vacated injunction obtained by outdoor advertising companies who alleged city program imposing fee on owners of off-site billboards to cover city's cost of inspecting of same abridged free speech and equal protection rights).

B. The Fourteenth Amendment and due process

The due process clause of the fourteenth amendment of the U.S. Constitution is violated if a municipality fails to provide a "clear and certain" remedy for a taxpayer to challenge the accuracy and legal validity of the assessment.

1. *See, e.g., generally McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 at 2247, 110 L.Ed.2d 17 (1990) (Due Process Clause of the Fourteenth Amendment obligates State to provide meaningful backward-looking relief to rectify unconstitutional deprivation).

2. The City in *City of Houston v. Harris County Outdoor*, 879 S.W.2d at 322, had no provision for the refund of illegally collected sign permit fees, yet the City established criminal penalties for the failure to timely pay such fees. *Id.* at 333-34.

C. Fourteenth Amendment and equal protection

The equal protection clause of the Fourteenth Amendment of the federal constitution is violated if the tax is not rationally related to a legitimate governmental interest. Specifically, equal protection is denied, unless: (1) the government has a legitimate purpose for distinguishing among the groups affected by the tax, and (2) the means chosen to affect that purpose are reasonably related to it, and are not arbitrary and capricious. *See generally Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 101 S. Ct. 2070, 68 L.Ed.2d 514 (1981) (unsuccessful challenge to California's retaliatory tax on foreign insurers whose State of incorporation imposes higher taxes on California insurers doing business in that State than California would otherwise impose on that State's insurers doing business in California); *Zobel v. Williams*, 457 U.S. 55, 102 S. Ct. 2309, 72 L.Ed.2d 672 (1982) (successful equal protection challenge to Alaska's dividend distribution program, which favored established residents over new residents); *Allegheny Pittsburgh Coal Co. v. County Comm'r*, 488 U.S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989) (successful challenge to assessments on real property in West Virginia county).

D. The Fifth Amendment and substantive due process

The substantive due process clause of the Fifth Amendment of the federal constitution is violated if the tax is so arbitrary and excessive as to be confiscatory. *See generally Gwinn Area Community Schs. v. State of Michigan*, 741 Fed. 2d 840 (6th Cir. 1984), *overruled in part, Lapides v. Bd. of Regents*, 535 U.S. 613, 122 S. Ct. 1640, 152 L.Ed.2d 806 (2002) (unsuccessful challenge by student and taxpayer in school district to state aid formula, as administered by state superintendent of instruction, and to act providing for reduction in state funding to school districts receiving federal impact aid).

E. Statutory state authority

Many states, including Texas, prohibit a municipality from imposing taxes without State statutory authority to do so.

1. Under the Texas Constitution, Article VIII, Section 1(f), a municipality may not impose taxes on an occupation unless the State has already done so.

2. Because the State of Texas had not established an occupation tax on the billboard industry, the City of Houston's purported permit fee was, in actuality, an illegal occupation tax, according to the court in *City of Houston v. Harris County Outdoor*, 879 S.W.2d at 326-27; *see also Hoefling v. City of San Antonio*, 20 S.W. 85, 88-89 (Tex. 1982) (suit to recover the amount of a tax enforced by defendant by criminal proceedings); *Pierce v. City of Stephenville*, 206 S.W.2d 848, 850 (Tex. Civ. App—Eastland 1947, no writ) (challenge to ordinance levying occupational tax on itinerant or transient photographers).

V. Remedies

Several legal and equitable remedies are available upon a showing that the exaction is an illegal tax:

A. Declaration of maximum constitution fee

A court may order, or declare a judgment, that the maximum constitutional fee is a specified amount. In *City of Houston v. Harris County Outdoor*, 879 S.W.2d 322, for example, the Court declared that $40.00, instead of the $278.00 previously charged for a 14' x 48' billboard, was the reasonable tri-annual fee. *Id.* at 335.

B. Injunction

A court may enjoin the city's imposition of the permit fee, especially if it results in a deprivation of constitutional rights. *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 234 F. Supp.2d 1127 (C.D. Ca. 2002), *vacated*, 340 F.3d 810 (9th Cir. 2003).

1. Prior restraint

Injunctions are particularly helpful -- and appropriate -- for relief from content based ordinances that allow authorities "unfettered discretion" to accept or reject signs. Such ordinances may constitute an impermissible prior restraint on speech because they create a system in which "speech is conditioned upon the prior approval of public officials that may work to inhibit or suppress communication before it reaches the public." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S. Ct. 1239, 43 L.Ed.2d 448 (1975) (denial of use of municipal facilities for musical production, when denial was based on board member's judgment of musical's content, constituted prior restraint). In other words, they may constitute censorship. Several very recent cases tackle the issue of prior restraint in the outdoor advertising context, explaining the requirements for showing prior restraint and how they mix with the requirements for injunctive relief. *See, e.g., Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 32 Fed. Appx. 831, 2002 WL 460840 (9th Cir. 2002) (unpublished) (advertisers unsuccessful in obtaining preliminary injunction against ordinance because of failure to show law was content based or that enforcers enjoyed unfettered discretion); *B & B Coaster Enter., Inc. v. Demers*, 276 F. Supp.2d 155 (D. Me. 2003) (restaurant in Town of Kennebunk moved unsuccessfully for preliminary injunction against town ordinance).

2. Varying standards for injunctive relief

It is important to check the requirements for issuance of preliminary (or temporary) injunctions in the relevant jurisdiction. They are similar everywhere, but may incorporate important, subtle distinctions.

a. In the Fifth Circuit, for example, four requirements must generally be met to obtain a preliminary injunction: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff

will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest. *Canal Auth. v. Callaway,* 489 F.2d 567, 572 (5th Cir.1974) (listing prerequisites).

b. The Ninth Circuit employs two tests for a preliminary injunction, one of which must be satisfied. The first requires a strong likelihood of success on the merits coupled with the possibility of irreparable injury to the plaintiff if the preliminary relief is not granted. The second demands a showing of a balance of hardships favoring the plaintiff and advancement of the public interest in certain cases. *See Clear Channel Outdoor, Inc. v. City of Los Angeles*, 234 F. Supp.2d 1127, 1130 (C.D. Ca. 2002), *vacated*, 340 F.3d 810 (9th Cir. 2003) (setting out legal standard for injunction in challenge to municipal sign ordinance).

Practice note:

Many cases outline the terms of the order of injunction in the opinion, offering a guide for practitioners seeking to draft injunctions in their own cases. See, e.g., *City of Los Angeles*, 340 F.3d 810, 813.

C. Actual damages

Actual damages, namely the amount of permit fees in excess of the reasonable and constitutional amount, may be recovered under the Civil Rights Act, 42 U.S.C. §1983, upon proof that the fee ordinance violates any provision of the federal constitution or laws.

1. Compare the amount of permit fees actually paid during the statute of limitations before the filing of the complaint with the constitutional amount the court declares should have been paid, and the difference is the illegal tax and amount of recoverable actual damages.

2. More than $3,000,000, with attorney fees and interest, was actually collected in *City of Houston v. Harris County Outdoor*, 879 S.W.2d at 335.

D. Attorney fees

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

VI. Cases

In addition to the previously discussed *City of Houston v. Harris County Outdoor*, 879 S.W.2d at 322, there are several other cases involving illegal permit and license fees imposed on the sign industry. The following cases review the various grounds raised, whether successful or not, by parties challenging sign ordinances.

A. First Amendment

The First Amendment of the Federal Constitution is the real battleground in the fight to save – or to prohibit – outdoor advertising. The First Amendment offers broad, flexible free speech protections. These are enforced through procedures that are often more favorable to the challenger than are found in a non-constitutional case. Moreover, these protections are often mirrored in state constitutions, thus allowing remedies to be sought under both federal and state constructions, and in either the federal or state judicial systems.

1. Revenue neutrality and the First Amendment

A fee that is not revenue neutral may not only violate state law, but may run afoul of federal constitutional First Amendment protections. The First Amendment requires that a fee burdening speech must: (1) reach no further than necessary to achieve the government's purpose; and (2) be revenue neutral, that is, not exceed the costs of defraying expenses. *See Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980) (regulation which completely banned promotional advertising by electrical utility was more extensive than necessary to further state's interest in conservation and thus violated the First and Fourteenth Amendments); *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14, 63 S. Ct. 870, 87 L.Ed. 1292 (1943) (ordinance imposing license fees on Jehovah's Witnesses held to abridge freedom of press and religion).

2. The First Amendment and the offsite-onsite, commercial-noncommercial controversy

Many recent cases focus on ordinances that distinguish between off-site and on-site signs and the commercial or noncommercial messages on those signs.

a. *Metromedia*

The leading case is *Metromedia v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L.Ed.2d 800 (1981). In *Metromedia*, a plurality of the U.S. Supreme Court struck a San Diego sign ordinance that permitted onsite commercial advertising – a sign advertising goods or services on the premises where the sign was located – but prohibited off-site commercial advertising, as well as on-site and off-site noncommercial advertising. 453 U.S. at 521.

Practice note:

The San Diego ordinance challenged in Metromedia would have prohibited the display of a message proclaiming "Save the Whales," unless the Save the Wales Association maintained its office at the same site as the sign. Why? The ordinance prohibited "[a]ny sign identifying a use, facility or service which is not located on the premises." See Metromedia, 453 U.S. at 494.

b. *CCO v. City of Los Angeles* -- District Court

The case to watch is *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 234 F. Supp. 2d 1127 (C.D. Ca. 2002), *vacated*, 340 F.3d 810 (9th Cir. 810 (2003). *City of Los Angeles* is the most comprehensive recent case involving constitutional challenges to billboard permit fees. The case is important enough to merit a discussion of both the lower court and the court of appeals' decisions.

i. Viacom and Clear Channel challenged the annual permit fee of $314.00 imposed by Los Angeles on off-site signs, signs advertising goods or services not offered on the location of the sign. (There was no corresponding fee assessed against on-premise signs.)

ii. The district court enjoined enforcement of the fee ordinance on several grounds. First, the court decided the fee ordinance violates the First Amendment of the U.S. Constitution because it favors commercial speech over noncommercial speech. The court reasoned that a noncommercial sign is more likely to fall within the off-site definition because such signs are less likely than a commercial sign to relate to the site on which the structure is located. Since the fee ordinance applies only to off-site signs, it burdens noncommercial speech more than commercial speech, and violates the First Amendment. *Id.* at 1131-32.

iii. Second, the court decided the fee ordinance impermissibly differentiates between different types of noncommercial speech based on the content of the signs. The court noted the ordinance imposes a "fee on off-site non-commercial sign structures, and the determination as to whether a structure is off-premise or on-premise depends upon the content of the sign." *Id.* at 1133. The court concluded that, because regulations which permit the government to discriminate on

the basis of the content of the message cannot be tolerated under the First Amendment, the fee is unconstitutional. *Id.*

iv. Third, the court found the fee impermissibly discriminates between different types of commercial speech. Specifically, even though on-premise signs comprise only 2.5% of Los Angeles' outdoor sign structures, they are the only target of the fee ordinance. Accordingly, the court ruled that "imposing a fee to inspect such a small percentage of the City's signs will not materially and directly advance the City's interests." *Id.* at 1134.

v. Finally, the court decided the fee ordinance is unconstitutionally vague and overbroad. The court gave a few examples illustrating it would be impossible to determine whether a sign would be classified as on-premise or off-premise, and whether the fee would be imposed. For example, if a restaurant erects a sign that states: "Joe's Café Supports the City's No-Smoking Laws," it is unclear if such a sign would be considered on-site or off-site. The restaurant may be simply making a political statement, or it may be promoting itself to non-smoking diners. *Id.* at 1135.

vi. Having concluded Los Angeles' fee ordinance violates the First Amendment, the court easily found that the fee threatened irreparable harm to Clear Channel and Viacom, justifying imposition of a preliminary injunction, since "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury for the purposes of issuance of a preliminary injunction." *Id.* at 1135-36.

c. *CCO v. City of Los Angeles* – on appeal

On appeal, the Ninth Circuit vacated the district court's preliminary injunction, holding that Clear Channel Outdoor had little chance of success on the merits of the case. *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 817-18 (9th Cir. 2003)

i. The court noted that, during the appellate process, the City had amended the ordinance to exclude noncommercial signs from the definition of off-site signs. The court nevertheless analyzed the lower court's analysis with regard to noncommercial messages on off-site signs, rejecting it for several reasons. First, decided the court of appeals, considerable precedent supports the on-site, off-site distinction, accepting it as a permissible content-based regulation. *Id.* at 813. Second, the ordinance contained a "substitution clause" that permitted any properly erected sign, whether on-site or off-site, to contain noncommercial messages in lieu of any other message. *Id.* at 814. The fee,

therefore, was not directed at, and did not discourage, noncommercial messages. Nor did it favor commercial over noncommercial messages. *Id.* at 815.

ii. The court also rejected the argument that the ordinance impermissibly restricted commercial speech. The court decided, in part, that the ordinance implements the substantial government interest in traffic safety and general aesthetics, and that the ordinance does so with a "reasonable fit between the ends and the means...." *Id.*

iii. Finally, the court rejected the notion that the statute was unconstitutionally vague, stating that guidance in implementing the statute would be facilitated by previous case law. *Id.* at 816.

d. Other on-site/off-site cases

i. In *Lombardo v. Warner*, 391 F.3d 1008 (9th Cir. 2004) (en banc order), the Ninth Circuit rendered a decision sustaining a sign law against a challenge, but vacated that decision and certified questions regarding the law to the Oregon Supreme Court. The case was brought by a homeowner who wanted to advertise "For Peace in the Gulf" on a 32-square-foot sign on his house. Like the *Los Angeles* and other statutes, the Oregon Motorist Information Act of 1971 (OMIA), distinguished between on-site and off-site signs, prohibiting all outdoor advertising signs, with grandfathered exceptions for certain commercial signs and exceptions for advertisement of on-site activities.

In its first opinion, the court rejected the plaintiff's argument that the OMIA prevented him from freely expressing his political beliefs in his own home. *See* 353 F.3d 774 at 777. The court then followed its precedent in *City of Los Angeles* to decide that the law is content neutral, that is, it allows noncommercial messages, such as the plaintiff's, on signs that are either on-site or off-site. *Id.* at 779.

The court then took the case *en banc* to seek the guidance of the Oregon Supreme Court. First the Ninth Circuit addressed the variance provisions of the law, which had been challenged by the plaintiff. The federal appellate court asked the Oregon court to define a term and clarify deadlines regarding variances in the OMIA. *See* 391 F.3d 1008 at 1010. Second, the court cited five pending Oregon cases addressing challenges to the OMIA provision that distinguishes between on-premise and off-premise signs. The court held decision in *Lombardo* pending decision in these five cases. *See id.* at 1010-1011.

None of the Oregon cases have yet been decided.

Practice note:

An off-site sign is one that advertises activities that are not conducted at the place where the sign is erected. An on-site sign is one that advertises activities that are conducted at the place where the sign is erected. Sounds easy. But suppose the bait shop has a sign in its parking lot that says "Buy bait here. Support our troops." The sign seems to be on-site because it advertises bait being sold at the location of the sign. But what about the "troops" message? Does it make the sign an off-site sign? For an answer, study the precise restrictions in the ordinance itself, then go to the Metromedia line of cases including the recent Clear Channel Outdoor, Inc. v. City of Los Angeles case discussed in this section.

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ii. In *Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg*, 667 A.2d 21 (Pa. Commw. 1995), *appeal denied*, 544 Pa. 661, 676 A.2d 1201 (1996), a group of sign owners challenged an ordinance that taxed off-premises, but not on-premises, signs. Because it was conceded that the ordinance established a tax, rather than a license fee, the court did not address whether the assessment exceeded the reasonable costs of the administration of the ordinance. The sign owners challenged the ordinance, in part, on the grounds that it: (1) violated the Equal Protection Clause of the federal constitution and the Uniformity Clause of the Pennsylvania Constitution; and (2) was an unlawful infringement upon First Amendment rights. The court upheld the ordinance against these challenges. The court decided there was a real and non-arbitrary distinction between off-premises and on-premises signs which permitted the Borough to classify the two differently for taxation purposes. As to the First Amendment argument, the court held that the ordinance did not suppress any particular idea and was content neutral. *Id.* at 27.

iii. In *Clear Channel Outdoor, Inc. v. The City of St. Paul*, 2003 WL 118253 (D. Minn. 2003), the court decided the statute at issue impermissibly favored commercial over noncommercial speech and therefore violated the First Amendment. 2003 WL 118253 at *5.

Practice note:

Noncommercial speech is afforded greater protection than commercial speech. Content-based restrictions on noncommercial speech are subject to strict scrutiny. See Arkansas Writer' Project, Inc. v. Ragland, 481 U.S. 221, 231, 107 S. Ct. 1722, 95 L.Ed.2d 209 (1987). Content-based restrictions on commercial speech must be justified by a four-prong test before they can be imposed. See Central Hudson, 447 U.S. at 566.

3. Content neutral ordinances

One basis for challenge to an ordinance is the lack of revenue neutrality, thereby establishing the exaction a tax instead of a permit fee. This may also be the basis for an attack under the First Amendment.

a. In *Combined Communications Corp. v. City of Bridgeton*, 939 S.W.2d 460 (Mo. Ct. App., 1996), the plaintiff attacked an ordinance imposing a "business license tax on the business of operating a billboard." *Id.* at 462 (citing ordinance). The tax was $5,000.00 on each billboard. The plaintiff argued, in part, that the ordinance violated the free speech amendments of the both the Missouri and Federal Constitutions. The trial court agreed, but the court of appeals reversed, basing its decision on *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438, 113 L.Ed.2d 494 (1991), in which the U.S. Supreme Court upheld a tax on cable television subscribers that did not affect newspaper and magazine subscribers. Like the *Leathers* Court, the Missouri Court of Appeals viewed the billboard tax as one that: (1) was one of general applicability which did not target the billboard businesses with the intention to interfere with their First Amendment rights; (2) did not select a narrow group fully to bear the tax burden; and (3) did not threaten to suppress particular ideas. In other words, "[n]one of the businesses are taxed by reference to the content of a message." *Id.* at 463-64.

Practice note:

As the discussions in this paper show, the First Amendment of the federal constitution is the real battleground in the fight to save – or to prohibit – outdoor advertising. There are many reasons why parties challenging an ordinance would want to proceed under the First Amendment. Its protections are broad and flexible. They are

explained in numerous opinions, giving guidance to jurists everywhere. The injunctive remedy available in First Amendment actions is immediate and powerful. The burden of proof is favorable to parties asserting violation of their First Amendment protections.

B. Fourteenth and Fifth Amendment challenges

The First Amendment is at the forefront of recent cases challenging sign ordinances, and decisions are being made on First Amendment grounds. However, complaints of due process and equal protection violations are never far behind.

1. *See, e.g, Clear Channel Outdoor, Inc. v. City of Los Angeles*, 234 F. Supp.2d at 1127, *vacated*, 340 F.3d 810 (9th Cir. 2003). Both the district court and the appellate court decided this case on First Amendment grounds, but the case is back in the district court, where Fourteenth Amendment challenges are being raised. *See* Order Denying Defendants' Motion for Judgment on the Pleadings, p. 2, *Clear Channel Outdoor, Inc. v. City of Los Angeles*, CV 02-7586-SVW (FMOx) (C. D. Ca., Mr. 11, 2004).

2. *See also, e.g., Lamar Advertising of Tennessee, Inc. v. City of Knoxville*, No. 03A01-9407-CH-00253, 1997 WL 170304 (Tenn. App. Apr. 11, 1997) (unpublished) (challenged under both amendments but decided under the First Amendment).

Practice note:

The Federal Constitution is not alone in providing due process, equal protection, and free speech protections. Many state constitutions offer relief to those challenging a restrictive ordinance. See, e.g., The City of St. Paul, 2003 WL at 118253. Some state constitutions offer even greater protection to litigants. Note, for example, the Texas Constitution's taking clause at art. II, §17. It not only affords protection from taking, but from damaging, too.

C. Vagueness, overbreadth, and unbridled bureaucratic discretion

Some litigants complain that ordinances are so vague as to subject outdoor advertisers to the unfettered discretion of city inspectors. Whether based on due process, First Amendment, or other grounds, these complaints have gained attention in judicial opinions. *See, e.g., Clear Channel Outdoor, Inc. v. City of Los Angeles*, 234 F. Supp.2d 1127, 1134 (C.D. Ca. 2002) (complaint about vagueness of law), *vacated*, 340 F.3d 810, 816 (9th Cir. 2003) (potential difficulty of classifying billboards as on-site or off-site does not make law unconstitutionally vague).

D. Legitimate fee or illegal tax under state law?

The primary issue in a state law challenge to licensing fees and permits is whether the fee is really a fee, or a disguised attempt to earn revenue and thus a tax.

1. In *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), the owner of 62 billboards located within the Township of Hempfield challenged the validity of an ordinance which assessed a $100.00 annual license fee for the "inspection and regulation of billboards." The court reviewed the evidence presented at the trial level and concluded that the Township's evidence in regard to the actual costs of its billboard administration was "in substantial portion inflated or improperly included." *Id.* at 1217. The sign owner met its burden of showing that the fee was disproportionate to the actual costs and therefore was revenue producing and invalid. *Id.*

2. In *Lamar*, 1997 WL at 170304, Lamar Advertising, the owner of 350 outdoor signs in Knoxville, challenged the validity of an ordinance which assessed annual "inspection fees" for each outdoor sign. It was shown that the fee per sign was more than the actual expense incurred by the inspection. The court decided the fee did not bear a reasonable relationship to the service rendered by the city and was in reality a tax. The Court further decided that, since Lamar also paid a gross receipts tax based on revenue, the ordinance impermissibly subjected Lamar to double taxation. *Id.* at 1997 WL 170304 at *4.

3. In *New York Tel. Co. v. City of Amsterdam,* 200 A.D.2d 315, 613 .T.S. 2d 993 (N.Y. App. Div. 3d 1994), a utility company sought a declaration of invalidity of an ordinance that required applicants for street excavation permits to pay the city $13.00 per square foot of excavation occurring within certain specified areas. The evidence showed that the "fee" was being enacted for revenue purposes and that the charge was disproportionate to the costs associated with issuing the permits and subsequent inspections and enforcement. The court therefore held that the "fee" was in reality a "tax" and that the ordinance was invalid. 200 A.D.2d at 318.

VII. Negotiation

Finally, in lieu of the expense and inconvenience of litigation, efforts should be undertaken to communicate the constitutional problems often attendant to excessive permit fees, and to negotiate fair and reasonable charges with city leaders.

A. The specific amount of a particular sign permit fee requires a factual analysis of the cost of regulation, so a case by case approach is necessary, rather than a general "reasonable" fee applicable to all governmental entities and all signs.

B. However, the OAAA has compiled an excellent survey of the annual operating permit fees imposed by the various states on billboard operators, and it is attached as Addendum A.

VIII. Conclusion and comments

Outdoor advertising remains under attack by municipalities that seek more and greater revenue sources. Efforts to hide a tax scheme behind and within a licensing or permit program will continue, but a solid body of case law now exists to assist those who challenge such efforts. More recent challenges to restrictive fee and permit programs are based on the First Amendment of the Constitution of the United States, with less popular arguments focusing on the Fourteenth Amendment. At issue in these cases is not only the right to demand fair fees for a valid, well-managed government program, but the right to the protections of the First Amendment. In the end, however, a trip to the courthouse should be the last resort. A cooperative relationship with municipal governments, including a willingness to negotiate and to help provide information about the implementation of fair sign programs across the country, can help avoid the lengthy, expensive, and often unsatisfactory experience of litigation.

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ILLEGALLY DISGUISING TAXES AS PERMIT FEES

(Presented to National Signage Research Symposium;
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I. Local governments are currently confronting a seemingly irreconcilable conflict of escalating costs and decreasing revenues.

A. There are several legitimate reasons for escalating municipal budgets, including the federal government's cutbacks and reallocation of costs to local governments, the increase of crime, and the welfare and social costs associated with drug abuse. At the same time, the economic downturn causes municipalities realize to less sales and ad valorem taxes. One remedy to bridge the gap between the revenue and costs is to raise taxes, but the clever modern politician will scrupulously avoid the appearance of doing so.

B. Municipalities have been forced to confront this conflict by creating new—and increasing the existing—permit and license fees. These are often referred to as "user fees," because the recipient pays for the cost of the service. For example, the golfer pays a greens fee for the use of the golf course, which in turn, is maintained by the city through revenues generated from these greens or user fees.

C. By contrast, cities pay for general citizen services (as opposed to specific user services) out of general funds. Common examples include police and fire protection. General funds are typically financed by ad valorem real and personal property taxes.

D. This apparently logical and equitable approach to municipal finance is also politically expedient. Politicians don't have to use the dreaded "T" word when they raise or create new regulatory fees. Our American system of accountability also supports the notion that those who receive the services pay for them.

E. It also follows that most citizens at least superficially do not bear a tax increase, because the user fee is targeted only at the regulated industry. Of course, the average consumer is ultimately affected as well when the fee is inevitably passed on in the form of higher costs. Perhaps most importantly, permit and license fees become even more favored for the politician when levied against business groups lacking in public sympathy or political power. The on-premise sign and billboard industries are especially vulnerable targets for illegally disguising taxes as permit fees on them.

II. The courts have articulated the so-called "Purpose Test" for determining whether an exaction is legitimate permit fee or illegal tax: if the primary purpose of the measure is to raise revenue, as opposed to merely recouping reasonable costs of regulation, it is a tax. Stated differently, if there is no reasonable relationship between the purported fee and costs, or if it 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.

A. *City of Fort Worth vs. Gulf Refining Co.*, 83 S.W.2d 610 (Tex. 1935); *Hurt vs. Cooper*, 110 S.W.2d 896 (Tex. 1937); *Producers Association of San Antonio vs. City of San Antonio*, 326 S.W. 2d 222 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.); *B&B Vending Company vs. City of El Paso*, 408 S.W.2d 545 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.); *H. Rouw Co. vs. Texas Citrus Commission*, 247 S.W.2d 231 (Tex. 1952); *Prudential Health Care Plan vs. Commissioner of Insurance*, 626 S.W.2d 822 (Tex. App.—Austin 1981, writ ref'd n.r.e.); *Houston Credit Sales Co. vs. City of Trinity*, 269 S.W.2d 579 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.).

III. The courts make a factual comparison of regulatory costs and fee revenue under the "Purpose Test," and consider the following factors in distinguishing between permit fees and taxes:

A. Direct comparison of city's (1) cost in rendering the services and regulation attendant to the permit, with (2) the revenue generated from the permit fee.
   1. For example, in *Houston v. Harris County Outdoor Advertising Association*, 879 S.W.2d 322 (Tex. App.—Houston [14 Dist.] 1994, writ ref'd), the billboard owners introduced into evidence a study prepared by the City of Houston's own accountants, which showed that the cost associated with an off-premise sign operating permit fee was $19.73 compared to revenue of $89.50, a recovery of 430%, and $171,916.00 in average annual revenue in excess of cost. Even in the face of its own accountants' report, Houston still proceeded to double the fee on the billboard operators.

B. The waste and inefficiency of the municipality in providing the regulation, thereby establishing that whatever the municipality actually incurs is excessive.
   1. In the *Houston* case, for example, it was established that the Houston Sign Administration employed 77 individuals, utilized even more City-owned vehicles, leased expensive office space in a privately owned building, and had annual budgets in excess in of $3,000,000.00.
   2. By contrast, before the Houston Sign Administration was established in 1980, signs were regulated by the City's Building Department, which operated out of City Hall with only two employees, and charged only $1.00 for a permit fee (as compared to the $278.00 charged by the Sign Administration).

C. If the recipient of the services that are performed by the municipality are individuals other than the sign industry, such services should be paid for out of the municipality's general fund or sources other than sign permit fees.

1. In the *Houston* case, the billboard owners established that the Houston Sign Administration performed several tasks benefiting the general citizenry on an equal basis, such as collecting and disposing of illegal paper garage sale and political signs, but charged the cost of rendering such services exclusively to the billboard operators through off-premise sign permit fees.
2. The City of Houston even attempted to recoup through the off-premise sign operating permit fees the settlement funds and attorneys' fees of more than $500,000.00 it paid to settle a lawsuit alleging mistakes and errors by the Houston Sign Administration, namely *City of Houston v. Detrapani*, 771 S.W.2d 703 (Tex. App.—Houston [14 Dist.] 1989, writ denied).

D. The burdens placed on the sign industry as a result of repeated and dramatic increases in the city's permit fee schedule.

1. For example, it was established in the *Houston* case that, while the City's Building Department charged only $1.00 for a permit fee before 1980, its Sign Administration raised sign permit fees seven times between 1980 and 1989, for a total increase of 450%, and a $278.00 charge for a 14' x 48' billboard.

IV. Having demonstrated that the permit fee is actually a tax, it may also be illegal on several grounds:

A. Many states, including Texas, prohibit a municipality from imposing taxes without State statutory authority to do so.

1. Under the Texas Constitution, Article VIII, Section 1(f), a municipality may not impose taxes on an occupation unless the State has already done so.
2. Therefore, since the State of Texas had not established an occupation tax on the billboard industry, the City of Houston's purported permit fee was in actuality an illegal occupation tax, according to the Court in the *Houston* case.
3. See also: *Hoefling vs. City of San Antonio*, 20 S.W.2d 80 (Tex. 1892); *Pierce vs. City of Stephenville*, 206 S.W.2d 848 (Tex. Civ. App—Eastland 1947, no writ).

B. The Fourteenth Amendment procedural due process clause is violated if a municipality fails to provide a "clear and certain" remedy for a taxpayer to challenge the accuracy and legal validity of the assessment.

1. *McKesson Corp. vs. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).
2. For example, the City in the *Houston* case had no provision for the refund of illegally collected sign permit fees, and it established criminal penalties for the failure to timely pay such fees.

C. The First Amendment guarantees of free speech and freedom of the press are violated by the imposition of the tax on the sign industry, because it imposes an impermissible impediment in suppressing protected expression.
   1. *Leathers vs. Medlock*, 499 U.S. 439 (1991); *Minneapolis Star & Tribune Co., vs. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 234 F. Supp. 1127 (C.D. Ca. 2002).

D. The Equal Protection Clause of the Fourteenth Amendment is violated if the tax is not rationally related to a legitimate governmental interest; specifically, that (1) the government has a legitimate purpose for distinguishing among the groups affected by the tax, and (2) the means chosen to affect that purpose are reasonably related to it, and are not arbitrary and capricious.
   1. *Western & Southern Life Insurance Co. vs. State Board of Equalization*, 451 U.S. 648 (1981); *Zobel vs. Williams*, 457 U.S. 55 (1982); *Allegheny Pittsburg Coal Co., vs. County Commissioner*, 488 U.S. 336 (1989).

E. The substantive due process clause of the Fifth Amendment is violated by demonstrating that the tax is so arbitrary and excessive to be confiscatory.
   1. *Gwinn Area Community Schools vs. State of Michigan*, 741 Fed. 2d 840 (6th Cir. 1984).

V. Several legal and equitable remedies are available upon establishing the exaction is an illegal tax:

A. A court order, or declaratory judgment, that the maximum constitutional fee is a specified amount.
   1. In the *Houston*, for example, the Court declared that $40.00, instead of the $278.00 previously charged for a 14' x 48' billboard, was the reasonable tri-annual fee.

B. A court may enjoin the city's imposition of the permit fee, especially if it results in a deprivation of constitutional rights. *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 1127 F. Supp. 1127 (C.D. Ca. 2002).

C. Actual damages, namely the amount of permit fees in excess of the reasonable and constitutional amount, may be recovered under the Civil Rights Act, 42 U.S.C. §1983, upon demonstrating the violation of any provision of the federal constitution or laws by the fee ordinance.
   1. Compare the amount of permit fees actually paid during the statute of limitations before the filing of the complaint, with the constitutional amount the court declares should have been paid, and the difference is the illegal tax and amount of recoverable actual damages.
   2. More than $3,000,000, with attorneys' fees and interest, was actually collected in the *Houston* case.

D. Attorneys' fees are also recoverable, under §1988 of the Civil Rights Act and State or Federal Declaratory Judgment Acts.

VI. In addition to the previously discussed *Harris County Outdoor Advertising Association v. City of Houston* case, there are several other cases involving illegal permit and license fees imposed on the sign industry.

A. The most recent and comprehensive case involving billboard permit fees is *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 234 F. Supp. 2d 1127 (C.D. Ca. 2002).

1. Viacom and Clear Channel challenged the annual permit fee of $314.00 imposed by Los Angeles on off-premise signs (there was no corresponding fee assessed against on-premise signs)
2. The court enjoined enforcement of the fee ordinance on the following grounds:
   a. The fee ordinance violated the First Amendment, because it favored commercial speech over non-commercial speech. The court reasoned that a non-commercial sign is more likely to fall within the off-premise definition, because such signs are less likely than a commercial sign to relate to the site on which the structure is located. Further, since the fee ordinance applied only to off-premise signs, it therefore burdened non-commercial speech more than commercial speech, and was violative of the First Amendment.
   b. The fee ordinance impermissibly differentiated between different types of non-commercial speech based on the content of the signs. The court noted the ordinance imposes a "fee on off-site non-commercial sign structures, and the determination as to whether a structure is off-premise or on-premise depends upon the content of the sign." The court concluded that because regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment, the fee is unconstitutional.
   c. The fee also impermissibly discriminates between different types of commercial speech. Specifically, even though on-premise signs comprised only 2.5% of Los Angeles' outdoor sign structures, they were the only target of the fee ordinance. Accordingly, the court ruled that "imposing a fee to inspect such a small percentage of the City's signs will not materially and directly advance the City's interests."
   d. The fee ordinance was unconstitutionally vague and overbroad. The court gave a few examples where it was impossible to determine whether a sign would be classified as on-premise or off-premise, and whether the fee would be imposed. For example, if a restaurant erects a sign that states: "Joe's Café Supports the City's No-Smoking Laws," it is unclear if such a sign would be considered on-site or off-site, as the restaurant may be simply making a political statement, or it may be promoting itself to non-smoking diners.

3. Having concluded Los Angeles' fee ordinance violated the First Amendment, the court easily found that the fee threatened irreparable harm to Clear Channel and Viacom justifying imposition of a preliminary injunction, since "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury for the purposes of issuance of a preliminary injunction."
4. Los Angeles has appealed the ruling to the Ninth Circuit Court of Appeals.

B. *Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg, 667 A.2d21 (Pa. Commw. 1995).* A group of sign owners challenged an ordinance that taxed off-premises, but not on-premises signs. Because the owners conceded that the ordinance established a tax, rather than a license fee, the court did not address whether the assessment exceeded the reasonable costs of the administration of the ordinance. The sign owners did challenge the ordinance on the grounds that it (1) violated the Equal Protection of the United States Constitution and the Uniformity Clause of the Pennsylvania Constitution, and (2) was an unlawful infringement upon their First Amendment rights. The court upheld the ordinance against these challenges. It found that there was a real and non-arbitrary distinction between off-premises and on-premises signs which permitted the Borough to classify the two differently for taxation purposes. As to the First Amendment argument, the court held that the ordinance did not suppress any particular idea and was content neutral.

C. *Martin Media v. Hempfield Township Zoning Hearing Board, 671 A. 2d 1211 (Pa. Commw., 1996).* The owner of sixty-two billboards located within the Township of Hempfield challenged the validity of an ordinance which assessed a $100.00 annual license fee for the "inspection and regulation of billboards." The court reviewed the evidence presented at the trial level and concluded that the Township's evidence in regard to the actual costs of its billboard administration was "in substantial portion inflated or improperly included." The sign owner met its burden of showing that the fee was disproportionate to the actual costs and therefore was revenue producing and invalid.

D. *Combined Communications Corp. v. City of Bridgeton, 939 S.W.2d 460 (Mo. Ct. App., 1996).* The Missouri Court of Appeals reversed a lower court's judgment which held that an ordinance imposing a yearly tax of $5,000.00 on each billboard was unconstitutional. In reversing, the Court found that (1) the tax was a "proper exercise of authority to raise revenue by taxation," and (2) was not unreasonable because the billboards were "earning annual net revenues far in excess of the $5,000 tax."

E. *Lamar Advertising of Tennessee v. City of Knoxville, (Tenn. Ct. App., April 11, 1997) [not published].* Lamar Advertising, the owner of 350 outdoor signs in Knoxville, challenged the validity of an ordinance which assessed annual "inspection fees" for each outdoor sign. It was shown that the fee per sign was more than the actual expense incurred by the inspection. The court therefore held that Lamar had established that the fee did not bear a reasonable relationship to the service rendered by the city and was in reality a tax. The Court further held that since Lamar paid a gross receipts tax based on revenue, the ordinance subjected Lamar to double taxation.

F. *New York Telephone Company v. City of Amsterdam, 200 A.D. 315, 613 .T.S. 2d 993 (N.Y. App. Div. 3d 1994).* A utility company sought a declaration that an ordinance requiring applications for street excavation permits to pay the city $13.00 per square foot of excavation occurring within certain specified areas was invalid. The evidence showed that the "fee" was being enacted for revenue purposes and that the charge was disproportionate to the costs associated with issuing the permits and subsequent inspections and enforcement. The court therefore held that the "fee" was in reality a "tax" and that the ordinance was invalid.

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