

MEMORANDUM

To: Benicia Sign Committee
Via: City Attorney Heather McLaughlin
From: Randal R. Morrison, consultant on the sign ordinance update project
Date: September 21, 2012
Re: Legal Guidance re: Policy Choices for Digital Signs

I. INTRODUCTION

“Digital Signs” is one of several terms used to describe signs that use LED (light emitting diodes) to project a bright, color image to public view. Other terms include “message center” (used in the California Outdoor Advertising Act), CEVMS (Commercial Electronic Variable Message Signs – used by Federal Highway), electronic signs (a term that can be broader than just LED signs), EMCs (electronic message centers), dynamic signs, and perhaps others. Background info: http://en.wikipedia.org/wiki/Digital_signage.

Modern LED digital signs look like computer monitors or flat screen television sets, and indeed the display technology is essentially the same. With increased brightness, fine detail, and range of color, they represent a huge advance from the old black-and-white “score board” and “traffic info” signs that have been around for many decades. Most digital display faces are capable of full motion video, as can be seen on the Las Vegas strip, although a “slide show” presentation, with a series of stills, is the most common use.

The move to digital signage is a world-wide phenomenon. Competition and economies of scale, primarily from new manufacturers in China, have driven prices down; it appears the trend will continue. When I first started dealing with digital billboards, about six or seven years ago, a billboard operator told me that a digital screen in the standard size for freeway display (14x48) would cost between \$450,000 and \$500,000 to design, build, transport, install, and test. Last year I heard a different billboard executive tell a city council that he could replace a static display face on a billboard with a 14x48 digital display screen for \$200,000. I’ve read reports and estimates stating that when a static billboard is converted to digital, the cash flow increase to the billboard company is generally in the range of 8 to 12 times. The most common marketing model for digital billboards is 8 images (“slides”) in a sequence, with each image on screen for 8 seconds (some companies use 6 seconds). It is easy to change the image on a digital sign; most are remote controlled by computers.

Sign shops design and install custom signs for stores and offices. In the past their trade group has kept distance between them and the offsite/billboard industry. However, on the question of social, political and legal acceptance of digital signage, the sign shops and the billboard companies are on the same page. Many stores, shops and offices are interested in using at least some of their signage area for digital displays.

II. DEFINITION: FLASHING, BLINKING AND INTERMITTENT LIGHT

For many decades, most city sign ordinances have banned signs that use “flashing, blinking, or intermittent light.” There have been disputes about whether digital signs are within that phrase. A policy memo from the Federal Highway Administration states that FHWA does not consider digital billboards to violate such a phrase. However, an Arizona appellate court recently (last November) disagreed with Fed Hiway and held that under Arizona state law, digital billboards were banned as using intermittent light.

In drafting a new sign ordinance for Benicia, I will create a special definition just for digital signs, that does not turn on “flashing, blinking or intermittent” light.

III. POLICY ARGUMENTS

The prospect of digital signage often provokes strong debate.

A. The PRO position usually emphasizes these points:

- * Be business friendly. Let us compete in the most modern way. Do not lock us into obsolete technology.
- * Digital signs can be used for Amber Alerts, emergency messages, civil defense info, and other kinds of “public service” announcements.
- * Today’s customers are accustomed to watching digital televisions and computer monitors; they expect this kind of high brilliance and fine detail.
- * See: <http://www.oaaa.org/press/news/news.aspx?NewsId=1490>
- * See: <http://www.daktronics.com/SearchCenter/pages/Results.aspx?k=digital%20billboards>
- * See: <http://www.alibaba.com/countrysearch/CN/digital-billboard.html>

B. The CON position usually emphasizes these points:

- * Digital signs carnivalize the town. We don’t want to look like the Vegas strip.
- * This is just more visual clutter and landscape / viewscape pollution.
- * Digital signs increase driver distraction, leading to more accidents.
- * Digitals waste energy, increase glare, and destroy “dark skies at night.”
- * See: <http://banbillboardblight.org>
- * See: <http://sfbeautiful.org/>
- * See: <http://www.scenic.org/billboards-a-sign-control/digital-billboards>

IV. POLICY CHOICES

Can a city completely ban all digital signs throughout the city? Three reported court cases have all answered YES, so long as there are no exceptions based on message. One of the three even approved the city-wide ban in spite of a “time and temperature” exception. None of the cases are from California, but there is no reason to assume that California courts would rule differently.

As with other sorts of “display technology” rules, a digital rule does not have to be the same in all parts of the city. Digitals could be allowed only in certain defined areas, and could be subject to TPM (time, place and manner) rules such as limits on size, height, setback from property lines, location (no roof mountings, for example), maximum light output, operational hours, percentage of total signage that may use digital display, and so on. Other possible rules: still images only; hold or dwell time (how long is a given image on display); whether transitions must fade in and out or may be “hard cuts”; minimum size of the pixel elements; power consumption factors; maximum light emission levels, *etc.*

And of course exceptions based on message content create significant legal risk. When speaking as a regulator, the city cannot completely ban ads for products and services that are legal for adults, such as alcohol, tobacco, adult uses *etc.* However, when speaking as the owner of its own property, as a landlord to billboards or other signs, the city can exclude certain categories of commercial messages that are deemed inappropriate for display on city property.

The onsite/offsite distinction, traditionally used to put billboards in a different legal class from store signs, is not considered to be “content based regulation.” Courts view onsite/offsite as a location criterion that is selected by the sign owner or message sponsor.

“On-site” usually means the same land parcel, same building, or the same store/office space. However, it need not be so restricted. “Onsite” could also be defined to include all stores and establishments within a shopping center, mall, or even a city block. With such a definition, a rule could be created allowing all stores within a shopping center, or mall, or block, to share display time on a single digital sign. In that manner, all stores have a chance at digital display, but the proliferation factor is kept under control.

Can a city allow local retailers to have digital signs on their stores, and still have a “no digital billboards” policy? No reported case yet answers that question. However, the U.S. Supreme Court’s *Metromedia* decision (1981) held that cities can ban billboards while allowing large signs on stores. Part of the rationale was that billboards use periodically changing message content, and that factor could be seen as creating a greater esthetic impact on the city. Today, with digitals making it easy to change the image on a sign, whether it is mounted on a store front or a billboard display face, then the “changing image” factor no longer distinguishes billboards from store signs. However, the *Metromedia* decision also gave other reasons for allowing a

billboard ban. When this issue comes before a court, a key question will be whether the other reasons are still sufficient to justify the rule.

I have heard reports that some car dealers, with large lots located aside major freeways, have been converting their digital signs to hybrid use: promoting the dealer on alternative slides, and using the others in the sequence for “general advertising for hire.” This practice blurs the distinction between onsite and offsite signs. In my view, a rule that says “digital signs in a specified area can only be used for onsite commercial messages” should be valid. Of course, the message substitution principle—automatic allowance of noncommercial messages anywhere that any sort of commercial messages are allowed—will apply.

V. CONSEQUENCES

The city’s policy choice(s) about digital signs will likely have long term consequences on the overall appearance of the city. I suggest that in forming a digital policy recommendation, the sign committee should focus on large scale, cumulative effects of digital signage, rather than individual situations.