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**Victory for Billboard Control:  
The Fourth Circuit Vacates and Remands Waynesville**

by Thomas P. Cody

On April 11, 1990, the Court of Appeals for the Fourth Circuit vacated and remanded Georgia Outdoor Advertising, Inc. v. City of Waynesville.<sup>1</sup> The court held that a municipal ordinance prohibiting new billboards and phasing out existing billboards does not on its face affect a taking of property interests in violation of the fifth and fourteenth amendments of the United States Constitution. A regulatory taking may only be determined, stated the court, after a detailed factual inquiry into a specific claim. This decision is a victory for proponents of billboard control.<sup>2</sup>

**Background of the Case**

In November, 1985, the City of Waynesville, North Carolina, passed a comprehensive sign ordinance under the city's general zoning authority.<sup>3</sup> The ordinance restricts the number, size, and spacing of all signs within the jurisdiction and prohibits the installation of off-premise outdoor advertising signs

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<sup>1</sup> Georgia Outdoor Advertising, Inc. v. City of Waynesville, No. 89-1005 (4th Cir. Apr. 11, 1990).

<sup>2</sup> The Southern Environmental Law Center (SELC), located in Charlottesville, Virginia, and Chapel Hill, North Carolina, has assisted the City of Waynesville throughout the defense of its sign ordinance. SELC is a regional, non-profit, environmental law firm which provides free legal assistance to communities and environmental organizations working to improve the southern environment in the areas of coastal and wetlands protection, improvement of water quality, and protection of national forests, scenic rivers, and other public lands. SELC has also devoted a substantial amount of time to billboard and sign control.

<sup>3</sup> Waynesville, N.C., Ordinance 24-85 (Nov. 26, 1985).

(billboards).<sup>4</sup> The ordinance also requires the removal of all nonconforming signs, including existing billboards, within four years of passage of the ordinance.<sup>5</sup>

In February, 1986, Georgia Outdoor Advertising, Inc. (Georgia Outdoor), a billboard company operating in the Waynesville area, brought suit in the United States District Court for the Western District of North Carolina.<sup>6</sup> In November, 1986, District Court Judge David B. Sentelle granted summary judgment in favor of Waynesville. Judge Sentelle held that the fifth and fourteenth amendment takings claim was not ripe for adjudication.

In November, 1987, the Fourth Circuit<sup>7</sup> affirmed the district court's ruling on the first amendment claim,<sup>8</sup> finding it consistent with its own prior decisions and those of the United

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<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> The suit alleged that the Waynesville ordinance violates Georgia Outdoor's first amendment rights to free speech by outlawing a protected form of expression, commercial off-premise advertising; that the stated objectives of the ordinance, traffic safety and aesthetics, are neither rationally related to nor adequate to support the ordinance; that the ordinance violates due process of law, in violation of the fourteenth amendment of the United States Constitution; and that the ordinance constitutes a taking of private property for public use without just compensation, in violation of the fifth and fourteenth amendments of the United States Constitution.

<sup>7</sup> The United States Court of Appeals for the Fourth Circuit encompasses the states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

<sup>8</sup> Georgia Outdoor Advertising, Inc. v. City of Waynesville, 833 F.2d 43 (4th Cir. 1987) (Waynesville I).

States Supreme Court.<sup>9</sup> The ordinance did not favor commercial speech over noncommercial speech, and thus cured the infirmity found in a San Diego ordinance challenged in Metromedia, Inc. v. San Diego.<sup>10</sup> The Fourth Circuit also affirmed the district court's finding that traffic safety and aesthetics are valid justifications for the ordinance.<sup>11</sup> Finally, the Fourth Circuit affirmed the district court's decision that the ordinance did not violate fourteenth amendment due process merely because it completely destroys some businesses.<sup>12</sup>

The Fourth Circuit disagreed, however, with the district court's treatment of the fifth and fourteenth amendment takings question. Writing for the court of appeals, Judge Widener stated that the district court erred when it declined to reach this issue:

The question of whether a particular zoning ordinance is so onerous as to require just compensation under the Fifth and Fourteenth Amendments to the federal constitution obviously presents a federal question, and this question was properly before the district court. Since the court had jurisdiction to hear that claim, which was essentially related to the other claims of the plaintiff in this case, it was improper to require plaintiff to file another action solely to determine

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<sup>9</sup> See Major Media of the Southeast, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986). "The Supreme Court . . . determined in Metromedia . . . that a city may justifiably prohibit all off-premise signs or billboards for aesthetic and safety reasons . . ." Id. at 1272.

<sup>10</sup> 453 U.S. 490 (1981). The city's general ban on signs carrying noncommercial advertising was invalid under the first and fourteenth amendments because it was not a reasonable "time, place and manner" restriction. Distinguishing on-site commercial messages from off-site commercial messages did not justify prohibiting the display of noncommercial messages. Id. at 491.

<sup>11</sup> Waynesville I, 833 F.2d at 46. The court noted that in City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984), the Supreme Court held that aesthetics alone is a sufficient justification for an exercise of the police power. Id.

<sup>12</sup> Id.

the taking or just compensation issue. The fact that plaintiff may have a remedy in the state courts does not excuse a federal court from deciding a case in which it has jurisdiction.<sup>13</sup>

The court remanded the case for consideration of the takings claim.

On remand to the district court, both parties renewed their motions for summary judgment. Judge Robert D. Potter, assigned to the case in lieu of Judge Sentelle, granted summary judgment for the plaintiff Georgia Outdoor and enjoined enforcement of the ordinance, holding that it was unconstitutional as written.<sup>14</sup> Based on affidavits, answers to interrogatories, and depositions that had been filed, Judge Potter made sixteen "findings of fact" as to which no genuine issue of material fact existed.<sup>15</sup> These findings were sufficient, in his opinion, to determine that the ordinance takes all of Georgia Outdoor's property without just compensation and is therefore unconstitutional on its face.<sup>16</sup>

On April 11, 1990, the Fourth Circuit vacated the district court's orders and remanded the case for a detailed factual examination to determine whether the ordinance affects a taking of Georgia Outdoor's property.<sup>17</sup> Consistent with the Fourth Circuit's earlier decision in the case (Waynesville I), Judge Widener wrote that, because the ordinance advances a legitimate state interest, it is not facially unconstitutional.<sup>18</sup> The record was not sufficiently developed, however, to conduct the

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<sup>13</sup> Id. at 47.

<sup>14</sup> Georgia Outdoor Advertising, Inc. v. City of Waynesville, 690 F. Supp. 452 (W.D.N.C. 1988) (Waynesville II).

<sup>15</sup> Id. at 454-55.

<sup>16</sup> Id. at 458.

<sup>17</sup> Georgia Outdoor Advertising, Inc. v. City of Waynesville, No. 89-1005 (4th Cir. Apr. 11, 1990) (Waynesville III).

<sup>18</sup> Id., slip op. at 14-15.

fact-specific inquiry that would be essential to a final determination of Georgia Outdoor's claim, thus requiring remand of the case.<sup>19</sup>

#### The Fourth Circuit's "Taking" Analysis

The Fourth Circuit analyzed the fifth and fourteenth amendment takings issue in two steps. First, the court briefly examined whether the city had a legitimate interest in the ordinance.<sup>20</sup> Waynesville clearly had such an interest, as the court had already concluded in Waynesville I.<sup>21</sup> The court then focused on the more important issue: Whether the ordinance denies Georgia Outdoor economically viable use of its property.<sup>22</sup> The court found its earlier decision in Naegele Outdoor Advertising, Inc. v. City of Durham<sup>23</sup> to be controlling on this issue.

In Durham, the court remanded for a determination of the maturity of the takings claim and for further factual

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<sup>19</sup> Id. 15-16.

<sup>20</sup> Id. at 10. The court restated the Supreme Court's rule that a land use regulation can effect a taking if it "'does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.'" Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (quoting Agins v. Tiburon, 447 U.S. 255 (1980)).

<sup>21</sup> Waynesville III, No. 89-1005, slip op. at 10.

<sup>22</sup> Id.

<sup>23</sup> 844 F.2d 172 (4th Cir. 1988). Durham is factually similar to Waynesville and Raleigh. The City of Durham adopted a billboard ordinance which prohibits all commercial, off-premise advertising signs except those along interstate or federally-aided primary highways. The ordinance provides a five and one-half year amortization period for the removal of all non-conforming signs, which is substantially similar to the four year amortization period adopted by Waynesville.

investigation should the claim be found ripe.<sup>24</sup> The required factual development involves two inquiries.<sup>25</sup> First, the court must determine the appropriate unit of the plaintiff's property affected by the ordinance.<sup>26</sup> In the billboard context, this includes examining the extent of the plaintiff's business and determining whether removal of certain billboards affects the marketability of billboards in other locations.<sup>27</sup>

Second, the appropriate unit of property must be considered in light of three factors enunciated in Penn Central Transp. Co. v. New York City: "The economic impact of the regulation on the claimant . . . the extent to which the regulation has interfered with distinct investment-backed expectations . . . . [and] the character of the governmental action."<sup>28</sup> The court stated that a full evidentiary hearing would be necessary, and that resolution of the issue by summary judgment should be approached warily.<sup>29</sup> On remand, the district court was directed to make findings pertaining to every aspect of Naegele's business that would be

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<sup>24</sup> Id. at 174-75. The court discussed how recent Supreme Court decisions such as Pennell v. San Jose, 485 U.S. 1 (1988), and Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), require ad hoc factual inquiries to determine whether the plaintiff's claim is mature.

<sup>25</sup> Durham, 844 F.2d at 176.

<sup>26</sup> Id. The court cited the Supreme Court's decisions in Keystone and Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), for the authority that its review should focus on the nature of the interference with property rights in the parcel as a whole and not merely on a discrete segment of the rights held.

<sup>27</sup> Durham, 844 F.2d at 176. Naegele argued that the Durham regulations would adversely affect business outside of Durham because of a "sharing" method of marketing. Id. This involves sale of advertising at numerous locations for saturation of an area and, presumably, a total return that is greater than the sum of returns from individual billboards.

<sup>28</sup> Penn Central, 438 U.S. at 124.

<sup>29</sup> Durham, 844 F.2d at 176-77.

affected by the ordinance.<sup>30</sup>

With respect to the remand of Waynesville III, not all of the Durham factors may be relevant. For example, none of Georgia Outdoor's billboards may be used for noncommercial advertising since the Waynesville ordinance contains no exception for noncommercial speech.<sup>31</sup> Most of the Durham factors are relevant, however, and should be analyzed more completely on remand.<sup>32</sup> The

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<sup>30</sup> Id. at 178. The specific factors include:

[T]he number of billboards that can be economically used for noncommercial advertising, the number that are economically useless, the terms of Naegele's leases for billboard locations, the land Naegele owns for locations and whether it has any other economic use, the cost of billboards that cannot be used, the depreciation taken on these billboards and their actual life expectancy, the income expected during the grace period, the salvage value of billboards that cannot be used, the loss of sharing revenue, the percentage of affected signs compared to the remaining signs in Naegele's business unit, the relative value of affected and remaining signs, whether the amortization period is reasonable, and any other evidence presented by the parties that the court deems relevant.

Id.

<sup>31</sup> Waynesville III, No. 89-1005, slip op. at 11. In addition, Waynesville differs from Durham in that Georgia Outdoor apparently does not own any of the land on which its billboards are installed. Thus, subleasing and assignment should be considered along with Georgia Outdoor's obligations to honor the leases. Also, the "sharing revenue" factor may not be relevant if Georgia Outdoor does no business outside of Waynesville. Id. at 12.

<sup>32</sup> Id. at 12-13. Another important issue that must be reviewed on remand is the effect of section 136-131.1 of the North Carolina General Statutes, requiring payment of cash compensation for the forced removal of billboards along interstate or federal aid primary highways. The statute was enacted in compliance with the Federal Highway Beautification Act, 23 U.S.C. § 131(b) and (g), and will expire on June 30, 1994. The takings analysis -- particularly consideration of the percentage of affected signs within the business unit -- is affected by the statute to the extent that Georgia Outdoor retains billboards along these highways or is paid cash



district court's conclusions in Waynesville II are simply "too imprecise to meet the standard the Supreme Court consistently has emphasized is so important in adjudicating claims of regulatory taking."<sup>33</sup>

#### **Amortization of Nonconforming Signs**

An important part of the necessary factual inquiry is determining how the amortization provision within the Waynesville ordinance affects Georgia Outdoor's business.<sup>34</sup> In Major Media of the Southeast v. City of Raleigh,<sup>35</sup> the Fourth Circuit considered an ordinance that severely restricts billboards and contains a five and one-half year amortization period. The court affirmed summary judgment for the city because the plaintiff did not present sufficient evidence to create a triable issue of fact.<sup>36</sup> In Durham, the court considered a similar ordinance that severely restricts billboards and contains a five and one-half year amortization period. On appeal, the Fourth Circuit vacated the district court's entry of summary judgment for the city and remanded for further proceedings because the plaintiff presented genuine issues of material fact concerning the effect of the ordinance on the plaintiff's business.

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compensation for their removal through operation of the statute. Id. at 13-14.

<sup>33</sup> Id. at 13.

<sup>34</sup> Id. at 6-10. The court defined an amortization provision as a "period of time in which a new land use ordinance will not be enforced, during which time a property user either can make a use conform to the ordinance, or, if a user cannot or chooses not to conform, during which a user can recover all or a part of his investment before the use must be discontinued." Id. at 6.

<sup>35</sup> 792 F.2d 1269 (4th Cir. 1986).

<sup>36</sup> Id. at 1274.

In Waynesville III, the court clarified its analysis of amortization and found that a remand of the case is not inconsistent with Raleigh or Durham.<sup>37</sup> The case falls under the Durham rule precluding summary judgment for the city because Georgia Outdoor has presented triable issues of fact. The court concluded that the presence or absence of an amortization provision is not dispositive of the ordinance's constitutionality, but is merely one aspect of determining the character of the government action:

Thus, the often-stated majority rule that "provisions for the amortization of nonconforming uses are valid if they are reasonable," in a sense both overstates and understates the role of amortization. That is, because an ordinance without such a provision may be constitutional, in rare cases even the briefest amortization period would not be unreasonable. Conversely, because an ordinance could accomplish a taking after the expiration of a very long amortization period, in other rare cases an amortization provision would not be reasonable. Therefore, amortization periods cannot be viewed in isolation.<sup>38</sup>

The analysis of amortization and the remand for additional factual development thus renders the district court's analysis of the takings issue incomplete. The district court placed great weight on its finding that "[t]he ordinance eventually will prevent Plaintiff and other billboard companies from operating within the town's zoning jurisdiction."<sup>39</sup> The district court's entry of summary judgment for Georgia Outdoor hinged on its finding of an "eventual taking." Under this flawed analysis, additional factual development was not necessary because all billboards would be banned at some point in the future.

In Waynesville III, the Fourth Circuit stated clearly that

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<sup>37</sup> Waynesville III, No. 89-1005, slip op. at 6-10.

<sup>38</sup> Id. at 9-10 (quoting Annotation, Validity of Provisions for Amortization of Nonconforming Uses, 22 A.L.R.3d 1134, 1139 (1968) (citation omitted)).

<sup>39</sup> Waynesville II, 690 F. Supp. at 454.

amortization, along with numerous other facts, are relevant to the question of whether Georgia Outdoor has lost all economically viable use of its property due to the operation of the ordinance. This is consistent with Durham, and echoes the Supreme Court's preference for more intensive ad hoc factual inquiries when analyzing takings claims.<sup>40</sup> The court quoted the Supreme Court's decision in MacDonald, Sommer & Frates v. Yolo County: "[A] court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. . . . This is a question of degree -- and therefore cannot be disposed of by general propositions."<sup>41</sup>

#### **The Future of Billboard Control in the Fourth Circuit**

In the short term, Waynesville III is good news for the proponents of billboard control. Affirmation of the district court's finding in Waynesville II would have dealt a near-fatal blow to the phasing out of existing billboards within the jurisdiction of the Fourth Circuit. Under Waynesville III, local governments may restrict new billboard installation and phase out existing billboards with carefully crafted ordinances.<sup>42</sup> Even if the district court finds on remand that the Waynesville ordinance affects an unconstitutional taking of Georgia Outdoor's property, the holding will necessarily be limited to its facts. The

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<sup>40</sup> See D. Mandelker & W. Ewald, Street Graphics and the Law 161-77 (1988) (discussion of the constitutional review of the amortization of nonconforming signs).

<sup>41</sup> Waynesville III, No. 89-1005, slip op. at 15 (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986)).

<sup>42</sup> For complete discussions of ordinances that pass constitutional muster, see three publications of the Southern Environmental Law Center, Charlottesville, Virginia: Visual Pollution and Sign Control: A Legal Handbook on Billboard Reform (1988); Visual Pollution and Billboard Reform in Tennessee (1988); and A Road With a View: A Legal Handbook on Billboard Reform in North Carolina (1989).

framework for takings analysis that was created in Durham and affirmed in Waynesville III confirms that each sign ordinance must be reviewed with respect to its specific factual context.

The extended future of billboard control in light of Durham and Waynesville III is more troubling, however. Although ad hoc factual inquiries have theoretical appeal, they may produce inequitable results in practice. Almost all of the information relevant to the Durham analysis is in the hands of the billboard industry.<sup>43</sup> Although plaintiffs bear the initial burden of proving the facts necessary to establish a taking, successful defense of an ordinance will require extensive discovery on the part of the local government. This will prove time-consuming and costly, and may have a chilling effect on jurisdictions contemplating such legislation. The Supreme Court's admonition against resolution of takings claims with less than a thorough factual analysis<sup>44</sup> cuts in two directions. Although summary judgment for plaintiffs will be rare,<sup>45</sup> summary judgment for defendants will also be infrequent because of the ease of raising an issue of material fact. This suggests that local governments should be prepared for lengthy battles to uphold their billboard control ordinances.

Other aspects of this framework for takings analysis are also troubling. The Fourth Circuit did not directly address what standards should be used when determining the appropriate unit of property affected by the ordinance. Rather, the court jumped to

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<sup>43</sup> E.g., terms of billboard leases, cost of billboards that cannot be used, depreciation taken on billboards, expected income during the grace period, salvage value, loss of "sharing revenue," and relative value of affected and remaining signs.

<sup>44</sup> See Pennell v. San Jose, 485 U.S. 1 (1988).

<sup>45</sup> Summary judgment for plaintiffs will be limited to those few instances where the ordinance does not even advance a legitimate state interest and is therefore invalid on its face.

the application of the Penn Central factors.<sup>46</sup> This ignores a crucial question in Waynesville: Is it relevant that a sign company has segmented its corporate structure, thereby enhancing the takings posture of its interests within any one jurisdiction?

In Waynesville, Georgia Outdoor maintained that it did business exclusively in the City of Waynesville, and that the Waynesville ordinance affected a taking of its entire business.<sup>47</sup> The city alleged, however, that Georgia Outdoor may have been part of a larger corporate structure consisting of other entities in other jurisdictions.<sup>48</sup> The existence of these corporate relationships is relevant to the extent that regulation in Waynesville may not affect a taking of the entire business interest of George Allison, owner of Georgia Outdoor.<sup>49</sup> Determining the appropriate unit of the affected property interest is crucial to such a flexible, fact-specific takings analysis.

#### Conclusion

In Waynesville III, the most recent chapter in the history of Georgia Outdoor Advertising's suit against the City of Waynesville over its sign ordinance, the Fourth Circuit vacated and remanded the district court's entry of summary judgment against Waynesville. The decision is a victory for advocates of billboard control. The decision is consistent with the Fourth Circuit's earlier decisions in Raleigh and Durham, holding that district courts must engage in an intensive factual investigation

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<sup>46</sup> Waynesville III, No. 89-1005, slip op. at 11.

<sup>47</sup> Brief for Appellee at 31, Georgia Outdoor Advertising, Inc. v. City of Waynesville, No. 89-1005 (4th Cir. Apr. 11, 1990).

<sup>48</sup> Brief for Appellant at 7, Georgia Outdoor Advertising, Inc. v. City of Waynesville, No. 89-1005 (4th Cir. Apr. 11, 1990).

<sup>49</sup> Id.

when presented with a genuine issue of material fact in a takings claim. The decision is also consistent with the Supreme Court's preference for ad hoc factual inquiries in the analysis of takings claims.

For local governments and other proponents of billboard control, however, the pattern of decisions in the Fourth Circuit is cause for concern. The increasingly rigorous standard of review being applied to sign control places a great burden on local governments. This may discourage some cities and counties from implementing ordinances restricting billboards. On the other hand, one may argue that aggressive billboard control, particularly the phasing out of existing billboard structures, represents an unprecedented attack on the property interests of an established industry and thus warrants more demanding constitutional scrutiny. If Waynesville I and Durham did not clearly enunciate the type of factual inquiry necessary to assess the constitutionality of ordinances phasing out existing billboards in the Fourth Circuit, Waynesville III certainly leaves no doubt for the future.