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COLORADO NEEDS A CONSTITUTIONAL AND EFFECTIVE ROADSIDE SIGN LAW

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Billboards and other outdoor advertising signs are adjuncts of trade and commerce. They have a proper and necessary place in the industrial and commercial areas of the country. Reputable sign companies and advertisers have long recognized that signs are out of place in residential, scenic or recreational areas, and have included in their association codes of ethics prohibitions against the erection of signs in or adjacent to such areas.[1]

No useful purpose would be served by a detailed examination of the many and conflicting decisions of courts of last resort on the validity of prohibitions and restrictions on outdoor signs. Two principal lines of conflicting decisions will be noticed, but, in general, this discussion will be limited to the rights of property owners, advertisers and sign companies to erect and maintain outdoor advertising signs, including billboards, in the business, industrial and commercial areas of Colorado.

Colorado now has a weak, unenforced and unenforceable roadside sign law.[2] Irresponsible advertisers and sign companies can and do erect roadside signs, often without permission of the landowner, and disappear before their acts are discovered. The signs they erect, unless removed at the property owner's expense, remain, unattended, to rust and decay and become offensive to passers-by. There are areas along our highways, commonly called "sign patches," in which signs are so numerous as to be worthless because each detracts from

1 Public Policy — Outdoor Advertising Association of America, Inc. (1938). Includes regulations prohibiting advertising structures within rights-of-way of public roads or upon private property without consent of the owner; upon the inside of curves or in the vicinity of railroad crossings or road intersections so as to obstruct the view; or which obstruct beautiful vistas or panoramic view of natural beauties of rural landscapes; or which encroach upon an historical monument, shrine, relic, object, or place; or which intrude upon the beauty and dignity of approaches or entrances to national, state, or county parks, or on residential streets, facing parks, or on residential streets where resentment of reasonable-minded persons would be justified; or which are not in good physical condition. These regulations also prohibit signs on rocks, trees, fences, or barricades. They also condemn illegal, immoral, false, misleading, or deceptive signs.

2 Colo. Rev. Stat. ch. 120, art. 5 (1953). This law provides for neither funds nor personnel for its enforcement.

the value of the others. Signs which offend the sense of propriety of the viewer are worthless as advertising. Responsible advertisers and advertising companies have long sought legislation to remedy this situation,[3] realizing the harm that is being done to the industry by unruly and unlawful elements. A workable, enforceable law is a necessity, but differences as to the type of law required have so far proved irreconcilable.

I. CONFLICTING DECISIONS IN OTHER JURISDICTIONS

There are two principal lines of decisions on billboards and outdoor advertising signs. One line considers billboards as offensive land uses and rules that signs may be drastically regulated, prohibited, or taxed out of existence. The other line of decisions declares that outdoor advertising signs are lawful and may be regulated under the police power, but cannot be prohibited.

a.) The Minority View: Signs are Tolerated, But may be Prohibited.

Illustrations of the first line of decisions are found in a number of cases decided by the United States Supreme Court. In these cases, constitutional objections were raised that the regulation or law in question authorized the taking of private property for public or private use without compensation, and constituted a denial of due process of law and the equal protection of the laws.

In *Thomas Cusack Co. v. Chicago*,[4] the United States Supreme Court approved the placing of billboards in a classification separate from that of other commercial and industrial structures on the ground that they were offensive uses and in the same class as garages and saloons. This case went beyond the question involved, namely, the validity of a municipal regulation prohibiting billboards in the residential areas of Chicago. Later, the same court in *St. Louis Poster Advertising Co. v. St. Louis*,[5] decided that if a city desired to discourage billboards by taxing them at an exorbitant and discriminatory rate, there was nothing to hinder it from so doing.

Still later the same court, in *Packer Corp. v. Utah*,[6] affirmed a decision of the Supreme Court of Utah which had approved a statute prohibiting tobacco advertising on billboards, placards and car cards, but permitting such advertising when contained in a newspaper or magazine, or on the front of the place of business of a tobacco dealer. Speaking of billboards and car cards, the court said, "Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part."[7] This is the "captive audience" argument.

The reasoning in which the Court indulged to support the distinction between such signs merits particular comment because it is contrary to everyday experience. No one is compelled to look at

3 E.g., House Bill 469, 42nd Gen. Assembly of Colo., 1st Sess. (1959). Outdoor advertising firms and sign contractors in Colorado collaborated in the drafting of this bill. It died in committee. In general, this bill required persons erecting and maintaining outdoor signs to be bonded and licensed, and required annual permits for all outdoor signs. It limited the areas in which such signs could be erected, and required visibility distances between signs so as to eliminate sign patches. It especially prohibited signs in scenic, recreational and residential areas, with exemptions for charitable, religious, official,and similar signs.

4 242 U.S. 526 (1917).

5 249 U.S. 269 (1919).

6 285 U.S. 105 (1932).

7 *Id.* at 110.

billboards. We pass them every day without being aware of their existence. But even if the court's statements were true, where do billboards threaten or contravene public peace, public health, public morals, and public safety?

In this same decision, the court declared, "In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement."[8] Everyday practice indicates the Court had its facts twisted. In most newspapers and magazines, the reader must search through the advertisements to find the news items. Again, the Court says, "The radio can be turned off, but not so the billboard or street car placard."[9] No one turns off a radio or television in the midst of an interesting program to avoid seeing or hearing the customary mid-program commercial.

In *Kelbro, Inc. v. Myrick*,[10] the Supreme Court of Vermont said:

> "Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence, we can see that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares."[11]

Notably absent from the decisions supporting the "proximity argument" is any discussion on the origin or validity of the assumed superior right of the highway traveler to have the lands abutting

8 *Id.* at 110.
9 *Id* at 110.
10 113 Vt. 64, 30 A.2d 527 (1942).
11 *Id.* at 67, 30 A.2d at 529.

such highways restricted in use so as to please his individual tastes. Except in scenic, recreational, and similar areas, the primary purpose of a highway is to facilitate travel, and not to please the aesthete. There are few industries or businesses whose value is not in part, at least, measured by their proximity to arteries of public transportation. Yet, under this "proximity argument" and by pretending to regulate highway traffic, every filling station or motel could be subjected to discriminatory treatment or even prohibited since, like billboards, their value depends upon travel on public streets and highways. Based upon the "proximity argument" and under the guise of regulating sidewalks, all stores on Sixteenth Street in Denver could be compelled to board up their show windows because the value of show windows lies solely in their proximity to public sidewalks. The "proximity doctrine" has no relation to the public peace, health, safety, morals, or welfare.[12]

A further argument in support of the prohibition of roadside advertising signs is that they distract the attention of drivers of automobiles, and so endanger public safety. A California case, *Los Angeles v. Barrett*,[13] involved the validity of an ordinance prohibiting outdoor advertising signs visible from a freeway, which created a hazard to vehicles or endangered the safety of persons on the freeway. Proponents of the ordinance offered proof regarding the frequency of traffic, the distance in seconds between cars, and the distance in seconds required to recognize a sign. This proof was introduced to support the contention that by the time a driver of an automobile read a billboard and turned his attention again to the road ahead, he would have collided with the car in front of him. This line of reasoning, sustained by the California court, is open to serious criticism. For instance, it is common practice for automobile drivers to keep their eyes on the road and leave the observation of roadside signs and scenery to passengers. The reasoning in this case falsely assumes that while the driver is scanning the sign, the car ahead is illegally slowing down or stopping in the roadway. This decision also presumes that the driver scanning the sign has no peripheral vision, which, experience teaches us, is seldom the case.

The extent to which some jurisdictions have gone to prohibit or restrict outdoor signs is perhaps best illustrated by *Railway Express Agency, Inc. v. New York*,[14] which concerned a traffic regulation prohibiting any advertising vehicle from being operated on city streets, but permitting business notices on delivery vehicles engaged in the business of the owner. This regulation was sustained not because of its relation to public peace, health or safety, but on the basis of whose truck was carrying the advertising.

The foregoing decisions are numbered among the more prominent anti-sign authorities. They illustrate how outdoor signs were first removed by court decree from the general class of commercial and industrial structures and relegated to a class of activities existing by sufferance which can claim no constitutional protection. They further demonstrate how signs themselves were then divided into signs erected as a part of the advertising business and signs

12 Curran Bill Posting and Distributing Co. v. Denver, 47 Colo. 221, 107 Pac. 261 (1910).
13 153 Cal. App. 2d 776, 315 P.2d 503 (Dist. Ct. App. 1957).
14 336 U.S. 106 (1948).

accessory to a particular business—the latter being tolerated and the former being prohibited.

b.) The Majority Rule:

Signs May Be Regulated But Not Prohibited Under the Police Power

The second line of decisions sustains the regulation of outdoor signs and billboards under the police power, but condemns the prohibition of such signs. This is the majority rule and is followed by the Supreme Court of Colorado.

In 1954, the Ohio case of *Central Outdoor Advertising Co. v. Village of Evendale,*[15] declared unconstitutional a village ordinance providing that no advertising sign or billboard should be erected within the limits of the village except to advertise the business or product of the owner or occupant of the premises on which the sign was located. The ordinance stated that it was enacted as an emergency measure, necessary to the public safety and welfare. It announced it was made necessary because signs and billboards constituted a menace to the lives of travelers on the highways, by diverting the attention of motor vehicle drivers. The court had this to say:

> "With few exceptions, the rule is well established that any law is unwarranted and invalid, which prohibits altogether an occupation or business which does not necessarily injure the public in that it is detrimental to the health, safety or general welfare. In other words, no trade or occupation can be prohibited absolutely unless it is inherently a nuisance or has become such. Billboard advertising is not inherently a nuisance, whether used as accessory and incidental to the main business conducted on the premises, or is the exclusive use to which the premises are put."[16]

The Ohio court also stated that outdoor advertising under the Ohio code was classified as a business use and permitted in all districts zoned for industry, business, trade or agriculture; that the ordinance prohibiting outdoor advertising except for accessory uses, *gave no specific reason for the inhibition,* unless the reason could be found in the term "safety," as used in the preamble of the ordinance. The court found evidence that these billboards and signs are located on property so near the highway that they may be seen by those traveling on the highway. There was also evidence as to the great amount of traffic on the highways of the defendant village. The court mentioned the strong presumption in favor of the validity of an ordinance enacted under a police power, but then held:

> "[C]omplete prohibition throughout a municipality of a conduct of a legitimate business must be based upon the fact that such business is inherently a nuisance and a detriment to safety, or has become so. A particular business, recognized by the statutory law of the state as a legitimate business, cannot be made a nuisance by mere legislative fiat of the council of a municipality."[17]

The court said there was no substantial reason for declaring

15 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954).
16 *Id.* at 356, 124 N.E.2d at 193.
17 *Id.* at 357, 124 N.E.2d at 194.

billboards and signs, other than those advertising products manufactured or sold on the premises, such a menace to life as to require their prohibition, and concluded:

> "Regulations of a business under the police power must be impartial and must have a real and substantial relation to the safety, health, morals or general welfare of the public. This limitation upon the power to regulate obviously applies to a prohibition of a legitimate business; in fact, the restrictions upon the power to prohibit are even more stringent than those upon the power to regulate."[18]

An ordinance of the Village of Colonie, New York, prohibiting the erection of billboards within the village, was declared to be invalid and an improper exercise of the statutory powers conferred upon the village trustees to enact ordinances necessary for the protection of property and life.[19] In another New York case,[20] an ordinance of the City of Troy, New York, was challenged. The Troy ordinance differed from the ordinance in the *Village of Colonie* case in that it excepted signs advertising the sale of the property upon which placed, or of merchandise sold on the premises, but it prohibited all other signs. It was declared void on its face, on the ground that it was not an attempt by zoning to exclude billboards from localities where they might mar natural scenery or distract travelers. The Court of Appeals of New York stated that even though it be assumed that outdoor advertising on private property might without compensation be restricted for aesthetic reasons alone, this prohibition without any definition of the structures proscribed or other standard of regulation, cannot be sustained consistently with constitutional principles.

In 1956, a New York appellate decision[21] ruled that a statute which prohibited outdoor advertising signs other than those advertising the business conducted on the premises or concerning the sale of such premises, or which were more than ten (10) feet in height or within 500 feet of the Brooklyn Battery Bridge, or its approaches or connections, was unconstitutional. The court noted that "the statute does not prohibit all signs, but only those referring to a subject 'other than actually conducted on the premises or to the sale or rent of such premises'." The court stated that the allegation that such signs imperiled public peace, safety and health was refuted by the very exceptions recited in the statute; that while a ban on all signs might be said to have some reasonable connection with the police power of the state, nevertheless, since certain signs were permitted regardless of their size or height or potentialities for distraction, it was apparent that the prohibition was based on factors that had no relation to the public health. The court concluded that, "A prohibition which cannot be equated with the evil to be remedied is arbitrary and unreasonable."

It is pertinent here to point out that the dicta so often encountered in decisions mentioning the baneful effects of outdoor signs upon traffic safety have little or no basis in fact. David M. Baldwin,

18 *Id.* at 358, 124 N.E.2d at 194-95.
19 Ruth v. Incorporated Village of Colonie, 198 Misc. 608, 99 N.Y.S.2d 471 (Sup. Ct. 1950).
20 Mid-State Advertising Corp. v. Bond, 274 N.Y. 82, 8 N.E.2d 286 (1937).
21 Tri-Borough Bridge and Tunnel Authority v. B. Crystal & Son, 2 App. Div. 2d 37, 153 N.Y.S.2d 387 (1956), *aff'd* 2 N.Y.2d 961, 142 N.E.2d 426 (1957).

Executive Secretary of the Institute of Traffic Engineers, in an article entitled "Frankly Speaking" in the official publication of that Institute, stated in part:[22]

> "No one denies that a billboard located at an intersection or a curve so as to obstruct the view, or a sign which confuses a driver by its message, color or illumination is a hazard. On the other hand, there are no facts which show any hazard resulting from advertising signs in general. Attempts by opponents of outdoor advertising to assume such a relationship are unfair and are not condoned by engineers, who will insist on seeing evidence of any such relationship.
>
> "This does not mean that traffic engineers favor outdoor advertising. Undoubtedly some do—but certainly many do not. Their reasons for opposing billboards, if this is their position, are those of aesthetics or personal opinion, however, not because there are facts about accidents.
>
> "It is unfortunate that the billboard arguments have been identified in so many minds as ones which can be resolved on the basis of traffic safety. In effect, the opponents of billboards have tied their case to the coat-tails of safety. This misleading identification has been confusing to the general public, which is not aware of the facts of the case."

And in *Central Outdoor Advertising Co. v. Village of Evendale,*[23] the Ohio court stated: "There is no evidence of injuries caused to persons or property by such signs."

Uncontroverted testimony in the case of *General Outdoor Advertising Co. v. Harter*[24] stated there was no record of a traffic accident caused by an outdoor advertising sign.

The Supreme Court of Illinois, in the case of *Haller Sign Works v. Physical Culture Training School,*[25] stated: "There is nothing inherently dangerous to the health or safety of the public in structures that are properly erected for advertising purposes." In that case, the Illinois court also said:

> "Again, it is to be observed that the application of this statute is limited to structures placed within five hundred feet of boulevards and public parks. If the placing of such structures within five hundred feet of boulevards and public parks is dangerous or otherwise detrimental to the public welfare, it is difficult to see why the same structures would not be equally so if placed within the same distance from any other public street or public grounds."[26]

In contrast with the line of decisions prohibiting or drastically restricting billboards, segregating them from the general classification of commercial structures and declaring they exist only by suf-

22 27 Traffic Engineering 311 (1954).
23 54 Ohio Op. 354, 357, 124 N.E.2d 189, 194 (C.P. 1954).
24 No. B-19469, Dist. Ct. City and County of Denver, Colo., Sept. 25, 1958.
25 249 Ill. 436, 94 N.E. 920 (1911).
26 *Id.* at 442, 94 N.E. at 922-23.

ferance, is a recent case in which the Supreme Court of Illinois said:[27]

> "Statutory classifications can only be sustained where there are real differences between the classes, and where the selection of the particular class, as distinguished from others, is reasonably related to the evils to be remedied by the statute or ordinance. . . . Similarly, an ordinance cannot be sustained which permits designated uses of property while excluding other uses not significantly different."

II. THE COLORADO DECISIONS

As hereinafter shown, the Colorado Supreme Court has followed the majority rule that outdoor advertising signs may be regulated, but not prohibited, under the police power. The following cases will also show that while our Supreme Court has time and again approved the validity of proper zoning laws,[28] it has condemned discrimination in zoning codes between outdoor signs and other commercial structures in industrial and commercial districts.[29]

Colorado statutes empower municipalities to adopt zoning ordinances.[30] These statutes also authorize county commissioners to adopt county zoning resolutions for the unincorporated areas of the county.[31] Zoning resolutions or ordinances, by creating zoning districts specifying the uses permitted in such districts, exclude other

27 Chicago v. Sachs, 1 Ill. 2d 342, 115 N.E.2d 762 (1953).
28 DiSalle v. Giggal, 128 Colo. 208, 261 P.2d 499 (1953); Colby v. Board of Adjustment, 81 Colo. 344, 255 Pac. 443 (1927).
29 General Outdoor Advertising Co. v. Goodman, 128 Colo. 344, 262 P.2d 261 (1953).
30 Colo. Rev. Stat. ch. 139, art. 60 (1953).
31 Colo. Rev. Stat. ch. 106, art. 2 (1953).

uses.[32] The constitutionality of such ordinances and zoning resolutions has been upheld.[33] In this discussion, we are concerned with the prohibition, rather than the regulation, of outdoor advertising signs, including billboards, under the police power. We are also concerned with discriminations against outdoor advertising signs and billboards, or between outdoor advertising signs and billboards, under the police power or in zoning ordinances or resolutions.

Probably the basic decision in Colorado concerning outdoor signs and billboards was handed down in 1910 in the case of *Curran Bill Posting & Distributing Co. v. Denver.*[34] This case involved an ordinance prohibiting billboards or advertising structures without a permit from the fire and police board of Denver. It prohibited a billboard or advertising structure any portion of which was within 10 feet of any street or alley line, or was more than 25 feet in length or 8 feet in height, or was within 10 feet of any building. The following quotations are from the opinion in that case:

> "The natural right, one may have, to use his own property as he wills, is subject always to the limitation that in its use, others shall not be injured. That which is hurtful to the comfort, safety and welfare of society may always be prohibited, under the inherent or plenary power of the state, notwithstanding the incidental inconvenience of loss individuals may suffer thereby."[35]
>
> "It is equally true, however, that the owner of property has the right to put it to any use he desires, provided in so doing, he does not imperil or threaten harm to others. Legislative restrictions of the use of property are imposed only upon the theory of necessity; that is, they are necessary for the safety, health, comfort or general welfare of the public."[36]
>
> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."[37]

The court commented that no case had been cited authorizing the taking of a man's property because his tastes were not those of his neighbor, and then stated:

> "The restrictions imposed are not against the material, the height, the length, nor the location of the structure, but solely as means of advertisement. It prohibits such structures without regard to their being safe or sanitary. . . . In what way can the erection of safe structures, of proper material, within certain limits, for advertising purposes, endanger the public health or safety any more than like structures erected and used for other lawful purposes? If the owner has the right to erect upon the lot line buildings

32 Denver, Colo., Rev. Municipal Code, Sec. 612.1 — .17.
33 DiSalle v. Giggal, 128 Colo. 208, 261 P.2d 499 (1953); Colby v. Board of Adjustment, 81 Colo. 344, 255 Pac. 443 (1927).
34 47 Colo. 221, 107 Pac. 261 (1910).
35 Id. at 224, 107 Pac. at 263.
36 Id. at 225, 107 Pac. at 263.
37 Id. at 226, 107 Pac. at 264.

> or other structures of proper material, in a substantial manner, as he undoubtedly has, it is certainly an unwarranted invasion of his rights to prohibit the erection or use of such structures for proper advertising purposes."[38]

In *Willison v. Cooke*,[39] the court stated that a store building in a residential section, while not desirable from an aesthetic point of view, could not be prohibited. Such a prohibition would have no relation to any object which the municipality in the exercise of its police power might legally accomplish. The court, in deciding that such restrictions violated Sections 3, 15 and 25 of the Colorado Bill of Rights,[40] said:

> "One of the essential elements of property is the right to its unrestricted use and enjoyment; and as we have seen, that use cannot be interfered with beyond what is necessary to provide for the welfare and general security of the public. Enforcing the provisions of the ordinances in question does not deprive the petitioner of title to his lots . . . . He would still have the power to dispose of them; but, although there would be no actual or physical invasion of his possession, he would be deprived of the right to put them to a legitimate use, which does not injure the public, and this, without compensation or any provision therefor. This would clearly deprive him of his property without compensation, and without due process of law. . . ."[41]

While the *Curran*[42] and *Willison*[43] cases were decided prior to the advent of municipal[44] or county zoning[45] in Colorado, the Supreme Court of Colorado in *Cross v. Bilett*,[46] involving the validity of a portion of a Denver zoning ordinance, stated:

> "[W]e do not challenge the rule declared in the *Curran* and *Willison* cases. In the absence of a zoning ordinance, where the right of a municipality is strictly limited to the general police power for protection of the public health and welfare, it is commonly held that only such buildings and occupations may be restricted as are shown to be injurious under such police power; . . . In the absence of zoning ordinances, restrictions as to use of property are viewed with hostility by the courts."[47]

Again, in 1953, in the case of *General Outdoor Advertising Co. v. Goodman*,[48] which questioned the validity of a portion of an Arapahoe County zoning resolution,[49] the court held:

38 Id. at 228, 107 Pac. at 264.
39 54 Colo. 320, 130 Pac. 828 (1913).
40 Colo. Const. art. II.
41 54 Colo. at 330, 130 Pac. at 832.
42 47 Colo. 221, 107 Pac. 261 (1910).
43 54 Colo. 320, 130 Pac. 828 (1913).
44 Colo. Sess. Laws 1923, at 649.
45 Colo. Sess. Laws 1939, at 294.
46 122 Colo. 278, 221 P.2d 923 (1950).
47 *Id.* at 284, 221 P.2d at 926.
48 128 Colo. 344, 262 P.2d 261 (1953).
49 Arapahoe County Zoning Resolution, § 6, as amended October 23, 1950, reads:
"11. Signs, when approved by the combined action of the Arapahoe County Board of Adjustment and the Board of County Commissioners of Arapahoe County."
In General Outdoor Advertising Co. v. Goodman, 128 Colo. 344, 346, 262 P.2d 261, 262 (1953) the court observed:
"To make easy reading in the discussion of the matters herein presented, it is well to observe at the outset that for some reason, unexplained, the county commissioners singled out 'signs' as objects for different and specific treatment . . . . Curiosity is naturally aroused when it is seen that 'signs' are the only commercial structures falling within this unusual procedure."

> "It would be difficult to find a more direct grant of arbitrary discretion and unlimited power than is here vested, and, of course, the freedom to use such power as it might relate to *lawful enterprises* and the uses of property, permits uncontrolled regulation and dictatorial powers of *commercial and industrial enterprises* in the area involved and therefore is repugnant to the Constitution of the United States and that of the State of Colorado."[50]

This case is noteworthy for several reasons. It is the latest pronouncement of the Colorado Supreme Court on this subject. It is based upon a zoning code and not upon the general police power. Contrary to the decisions of the U. S. Supreme Court in *Cusack v. Chicago*[51] and *Packer Corp. v. Utah*,[52] the Colorado Supreme Court in this case recognized the erection of advertising signs as a lawful enterprise,[53] thus affirming the position taken in the *Curran* case, wherein billboards were classed with "like structures erected and used for other lawful purposes."[54]

Under the *Goodman* decision,[55] there was at least a chance that the Arapahoe County Commissioners and Board of Adjustment would refrain from arbitrary action and grant sign permits where proper. Hence, it would seem that any statutory prohibition of outdoor signs under the police powers of the state, such as that proposed by the amendments to the Federal Interstate Highway Law[56] would be invalid. Under this amendment to the Federal Interstate Highway Law, the prohibition is absolute; it cannot be tempered by official action. It prohibits all roadside signs with very few exceptions and it discriminates between signs.[57]

In the *Goodman* case, the Supreme Court of Colorado adhered to the general law which requires that regulation of lawful businesses cannot be had unless the rules are prescribed by the legislature. The supreme court stated:

> "The danger . . . lies in the fact that there are no uniform rules prescribed, thereby making it possible for arbitrary and capricious discriminations, depending upon no qualifications whatever other than the unrestrained and unregulated arbitrary will of the members of the two boards . . ."[58]

This decision follows *Walsh v. Denver*,[59] *LaJunta v. Heath*,[60] *People v. Stanley*,[61] and *May v. People*.[62] In the last case, the Colorado Court of Appeals said:

> "If the city council can say that certain individuals may pursue a certain vocation and that other individuals of the same class, of equal repute and citizens of that community, shall not, then the one great principle conferred upon the citizens of the United States, to wit; the right to

50 128 Colo. 344, 348, 262 P.2d 261, 262. (Emphasis added.)
51 242 U.S. 526 (1917).
52 285 U.S. 105 (1932).
53 128 Colo. at 348, 262 P.2d at 263.
54 47 Colo. 221, 228, 107 Pac. 261, 264 (1910).
55 128 Colo. 344, 262 P.2d 261 (1953).
56 Federal-Aid Highway Act, 23 U.S.C. §131 (1958).
57 Federal-Aid Highway Act, 23 U.S.C. §131 (a) (1958).
58 128 Colo. at 349, 262 P.2d at 263.
59 11 Colo. App. 523, 53 Pac. 458 (1898).
60 38 Colo. 372, 88 Pac. 459 (1906).
61 90 Colo. 315, 9 P.2d 288 (1932).
62 1 Colo. App. 157, 27 Pac. 1010 (1891).

pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others which may increase their prosperity or develop their faculties so as to give them the highest enjoyment is disallowed."[63]

In each of these cases, public officials or the legislative body were given the right without any rules to guide them, to grant or to withhold certain privileges or licenses to engage in lawful businesses. The cases indicate that no sign legislation can be adopted in this state which, at the very outset, arbitrarily denies to individuals the right to pursue a lawful business or occupation.

The difference between signs advertising business conducted or products sold on the premises and those which do not is one of degree. In the former instance, the proprietor of the business or the owner of the market erects or causes his own signs to be erected. In the latter case, the proprietor of the business or the owner of the market rents advertising space from those engaged in the business of erecting and renting outdoor advertising signs. The Denver Sign Code has attempted to distinguish between these signs.[64] This distinction may be based on the case of *Railway Express Agency, Inc. v. New York*.[65] There is no decision of the Colorado Supreme Court in point on this matter, but its decisions in other cases would indicate that the distinction is too trivial to be sustained.

In *Champlin Refining Co. v. Cruse*,[66] decided in 1946, involving the motor fuel excise tax statute, a ruling of the director of revenue

63 *Id.* at 162, 27 Pac. at 1012.
64 Denver, Colo., Rev. Municipal Code, § 508.6-10 (2).
65 336 U.S. 106 (1948).
66 115 Colo. 329, 173 P.2d 213 (1946).

that a two per cent allowance to cover losses caused by evaporation and spillage should be allowed on fuel shipments from a refinery but not on fuel shipped from a bulk station, was held unconstitutional. In that decision, the Supreme Court of Colorado, citing other authorities, said in part:

> " 'Equal protection in its guaranty of like treatment to all similarly situated permits classification which is reasonable and not arbitrary and which is based upon substantial differences having a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved. . . . In all cases, however, where a classification is made for the purpose of conferring a special privilege on a class, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. . . . In cases involving the equal protection clause of the Constitution, the fundamental principle involved in classification is that it shall meet the requirement that it must affect alike all persons in the same class and under similar conditions.' "[67]

There is no essential difference between a sign which says, "Coca-Cola sold here" and an adjacent sign which says, "Coca-Cola sold next door." Yet, under the Denver Sign Code,[68] it is the invisible property line between the signs, and not the public welfare, which renders one sign legal and the other illegal.

Finally, the Colorado Supreme Court, as if to emphasize its concern over the pressures for further restrictions upon the use and enjoyment of private property, said in the 1949 case of *Jones v. Board of Adjustment*:[69]

> "We consider briefly some basic fundamentals. The right to the use and enjoyment of property for lawful purposes is the very essence of the incentive to property ownership. The right to thus use property is a property right fully protected by the due process clause of the federal and state Constitutions. The use to which an owner may put his property is subject to a proper exercise of the police power. . . . Thus, under the police power, zoning ordinances are upheld imposing limitations upon the use of land, provided, however, that the regulations are reasonable, and provided further that the restrictions in fact have a substantial relation to the public health, safety, or general welfare."[70]
>
> "Moreover we are confronted with a further and all-important legal principle, which is that rule which requires a strict construction of such an ordinance in favor of the right of a property owner to an unrestricted use of his property. We stated in Chamberlain v. Roberts, 81 Colo. 23, 253 Pac. 27: '. . . We consider the rule that the scope of an ordinance restricting one's powers over his own property

67 *Id.* at 333-34, 173 P.2d at 215-16.
68 Denver, Colo. Rev. Municipal Code, § 508.6-10(2).
69 119 Colo. 420, 204 P.2d 560 (1949).
70 *Id.* at 427, 204 P.2d at 563-64.

ought not to be extended, but rather restricted by interpretation.' "[71]

Colorado is a tourist state. Not every one of its scenic or recreational areas is adjacent to a main highway. Legislation which distinguishes between signs advertising the product sold or the business conducted on the premises on which the sign is located and signs which do not, harms our tourist industry.[72] Such legislation grants a preference to those segments of the industry which are located on main highways and discriminates against those which are not so favorably situated. Legislation which attempts to distinguish between signs as accessory to a particular business and the business of erecting and renting outdoor signs, does a great disservice to the tourists. Other forms of advertising attempt to direct a tourist to a particular place by publicizing the address of such place. Frequently a strange address is meaningless to the tourist, but there is no mistaking the simplicity or directness of an outdoor sign which advertises a place of rest or refreshment so many miles distant, with an arrow or other appropriate directional sign pointing the way.

It would seem from the decisions of the Supreme Court of Colorado noted above, that a law which prohibits billboards and outdoor advertising in the commercial and industrial areas of Colorado is unconstitutional. Additionally, it would seem that court approval would be denied legislation such as Senate Bill 150,[73] which, under the pretext of regulation, prohibits all but a few types of signs along the interstate and primary highways in Colorado.

What may evolve from present discussion on this subject is legislation similar to that proposed by the advertising industry in House Bill 469.[74] However, before any remedial legislation can be enacted, the extremists on both sides—those who would prohibit all outdoor signs and those who profess to see in any sign legislation the opening wedge for the supervision and control of all rural activities—must face realities. It is ironic that these opposing groups have in the past successfully joined efforts to defeat more effective and workable sign legislation in Colorado.

71 *Id.* at 429, 204 P.2d at 564-65.
72 *E.g.*, Federal-Aid Highway Act, 23 U.S.C. §131 (1958); Denver, Colo. Rev. Municipal Code, § 508.6-10 (2).
73 42d Gen. Assembly of Colo., 1st Sess. (1959).
74 42d Gen. Assembly of Colo., 1st Sess. (1959).