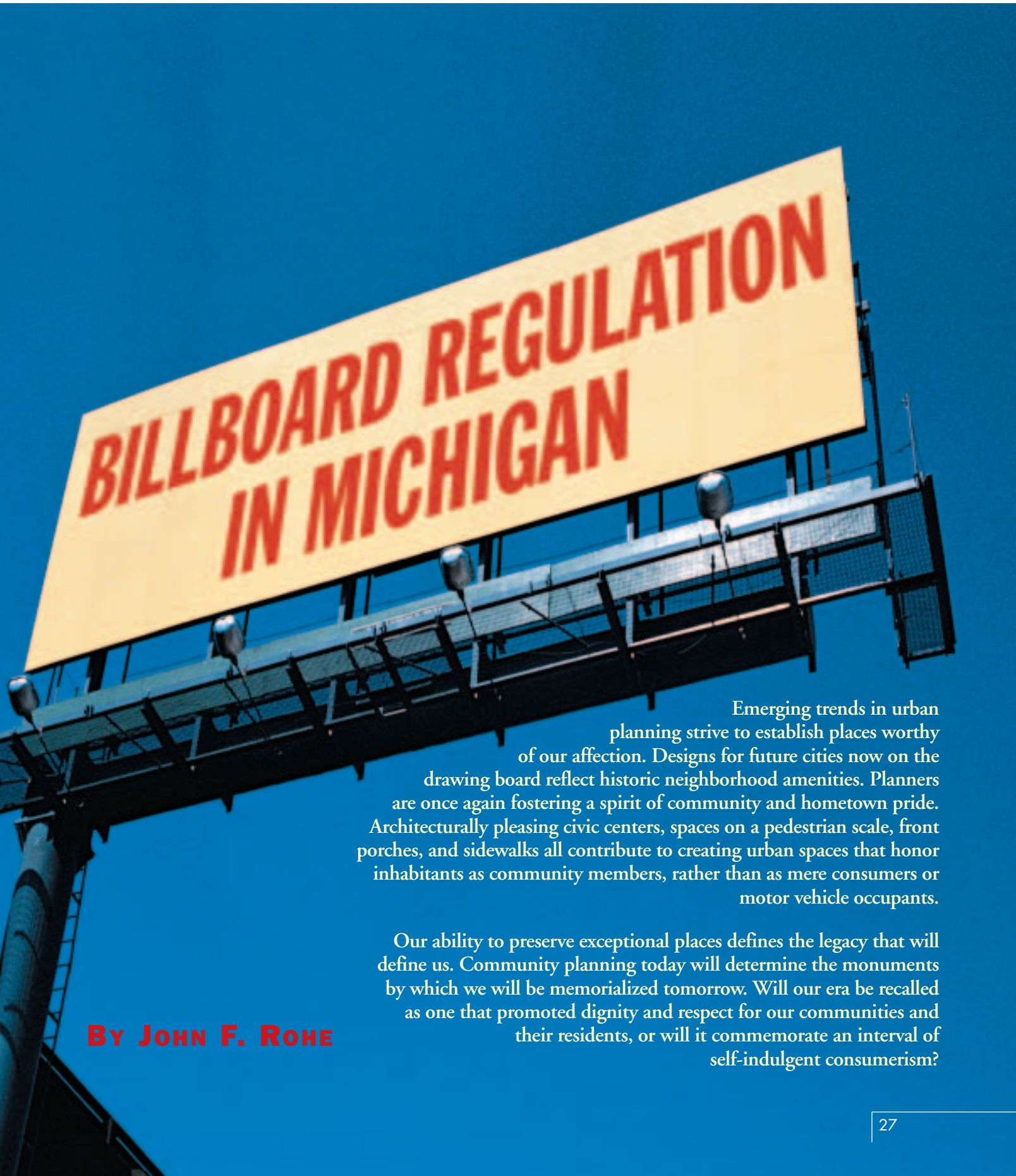
# *Navigating the line between free speech and aesthetic considerations.*




Emerging trends in urban planning strive to establish places worthy of our affection. Designs for future cities now on the drawing board reflect historic neighborhood amenities. Planners are once again fostering a spirit of community and hometown pride. Architecturally pleasing civic centers, spaces on a pedestrian scale, front porches, and sidewalks all contribute to creating urban spaces that honor inhabitants as community members, rather than as mere consumers or motor vehicle occupants.

Our ability to preserve exceptional places defines the legacy that will define us. Community planning today will determine the monuments by which we will be memorialized tomorrow. Will our era be recalled as one that promoted dignity and respect for our communities and their residents, or will it commemorate an interval of self-indulgent consumerism?

**By John F. Rohe**

**"We shape our buildings, and afterwards our buildings shape us."** —Winston Churchill

The question "where are you" has often lost historic and geographic significance. Lost is the view of life from a unique place called home. Oversized signs for the same franchised fast food and lube shops meet the eye in Everytown, U.S.A. The growing uniformity of our cityscapes signals a need for greater resourcefulness and ingenuity. A treasured future hangs in the balance.

Frank J. Kelley, board member of Scenic Michigan and former Attorney General, observes:

> *Humankind has been given the ability to plan and thereby affect its future lifestyle and environment. Other creatures have been denied this foresight; therefore, our ability to plan should be cherished and encouraged throughout our society. Instead of being fearful of planning for the future, as too many are, educators should cater to those who have the imagination to plan.*[1]

Urban plans can either nurture a sense of place or merely pay a tribute to transience.

Communities are becoming increasingly aware that signage has a subtle, yet profound, impact on our "pride of place."[2]

Imagine returning to the well-preserved historic section of your alma mater only to find billboards for super-sized fat grams overrunning the rooftops and scrambled along the roadsides. The loss is palpable.

Meanwhile, our sensitivities are numbed by the 14,000 billboards already lining Michigan's corridors. When one more sign creeps into view, nary a whimper is heard. Michigan's pride of place silently suffers the death of a thousand cuts.

Billboards honor us as good consumers. They provide explicit instructions on how to become better shoppers. Aesthetically pleasing communities and vistas, on the other hand, honor our humanity.

Michigan municipalities understand the inverse relationship between the allowable size of signs and the ingenuity of signage: When unregulated, advertisers freely compete over sign size, the consumer is served the largest, gaudiest, and least imaginative form of advertising. But when signs are constrained to communicate on smaller spaces, a burst of inventive energy will be unleashed.

Limitations on sign size prompt competition in creative landscaping, artistic displays, and attractive amenities. There are no losers in a regulated environment; community aesthetics are improved. The inhabitants are treated to signage reflecting the artistic ingenuity required to convey the desired message in a limited space. And the advertisers' creative genius has a place to flourish.

Communities inclined to regulate signs will, however, quickly find themselves confronted by the formidable billboard lobby. Regulators also will encounter a series of treacherous First Amendment hurdles.

This article describes some of the contemporary legal issues affecting sign regulations in Michigan.

## Police Power and Aesthetics

In 1954, U.S. Supreme Court Justice William O. Douglas observed:

> *The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.*[3]

In 1981, the U.S. Supreme Court determined that a municipality's interest in preserving aesthetics was sufficient to prohibit off-premises signs.[4] Three years later, it held that aesthetic considerations justified a prohibition of signs posted on public property.[5]

Dispiriting unsightliness is not a constitutionally protected municipal condition. The courts have moved well beyond the view expressed in 1905 by a New Jersey court:

> *Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is a necessity alone which justifies the exercise of the police power. . .*[6]

## First Amendment—*Central Hudson* Test

On its face, the First Amendment appears to brook no compromise: "Congress shall make no law abridging the freedom of speech." Nevertheless, the courts have permitted certain restrictions on signage, particularly in commercial speech. In 1980, the U.S. Supreme Court established constitutional criteria for commercial speech, known as the *Central Hudson* Test:[7]

1. The speech must concern "lawful activity" and not be "misleading,"
2. The restriction must implement a substantial government interest,
3. It must directly advance that interest, and
4. Reach no farther than necessary to accomplish the objective.

Applying the *Central Hudson* Test, the Michigan Supreme Court has upheld a ban on home occupation signs to preserve the character of a residential area.[8]

On November 28, 2001, Hon. Edward M. Thomas of the Wayne County Circuit Court upheld the city of Livonia's ban on all billboards by applying this test.[9] Judge

### FAST FACTS:

**The *Central Hudson* Test has been used to successfully ban billboards.**

**Although regulation of noncommercial speech is subject to strict scrutiny, commercial speech is subject to the less exacting "intermediate scrutiny" test.**

**Although municipalities may enforce the removal of a billboard, a claim for just compensation can arise under the Fifth Amendment, Michigan law, and federal legislation.**

Thomas relied on observations of the U.S. Supreme Court[10] in finding the ban directly advanced traffic safety, a valid governmental interest:

> *We likewise hesitate to disagree with the accumulated, common sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety.*

Judge Thomas also found an acceptable "fit" between the billboard ban and the city's interest in traffic safety. He found that "billboards by their inherent nature present problems to traffic." Therefore, Judge Thomas concluded that the city's billboard ban was narrowly tailored to achieve the city's legitimate concerns over aesthetics, even in industrial areas: "Obviously the most direct and perhaps only effective approach to solving the problems they create is to prohibit (billboards)."

A ban of off-premises billboards in the city of Clawson also passed the *Central Hudson* Test.[11] The circuit court relied on aesthetics and "common sense" in concluding that billboards presented traffic hazards.

An appeal has been abandoned in the Livonia case. The court of appeals found Clawson's size limitation did not constitute exclusionary zoning. It also upheld the regulatory distinction between on-premises and off-premises signs. A distinction based on "readily changeable" signs was, however, prohibited.

In 1974, the Michigan Supreme Court remanded a case for further fact-finding, suggesting that a ban on billboards might exceed a home-rule city's authority.[12]

## Content Neutrality

The U.S. Supreme Court explained the First Amendment interest in content neutrality in 1984:

> *The general principle . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.*[13]

Justice Stephens identified "two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs."[14] Some claim the ordinance "in effect regulates too little speech because its exemptions discriminate on the basis of the signs' messages." Challenges based on content neutrality claim the ordinance regulates "too little" speech. Stephens recognized that other "provisions are subject to attack on the grounds that they simply prohibit too much protected speech."

In 2002, Judge Lawson, of the U.S. District Court for the Eastern District of Michigan, excised several portions of the Thomas Township sign ordinance based on the content neutrality requirement.[15] He relied upon an Ohio federal decision[16] that found use regulations to have been content-based, while regulations of a sign's physical structure were content-neutral. The impermissible regulations created exceptions for churches, nonprofit service clubs, charitable organizations, time, temperature, and acknowledgments for donors, schools, and parks.

Although regulation of noncommercial speech is subject to strict scrutiny,[17] commercial speech is subject to the less exacting "intermediate scrutiny" test.[18] In 1989, the U.S. Supreme Court defined standards for intermediate scrutiny:

> *Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interest but that it need not be the least restrictive or the least intrusive means of doing so.*[19]

In 1988, the U.S. Supreme Court struck down another example of unconstitutional content-based regulation.[20] Here, the District of Columbia prohibited any sign within five hundred feet of a foreign embassy that tended to bring a foreign government into "public odium" or "public disrepute." As this regulation attempted to restrict "the direct impact of the speech on its audience" it was found to be content-based, and thus breached the First Amendment.

So-called TPM (time, place, manner) regulations of signage will be upheld if they are "not substantially broader than necessary" and can be justified without reference to the content of the speech.[21]

## Substantive Due Process

Sign regulations have been assailed on substantive due process grounds. The challenger shoulders the burden of proving: "first, that there is no reasonable governmental interest being advanced by the present zoning classification itself . . . or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question."[22] Ordinances are cloaked with a presumption of validity.[23]

Livonia's city-wide ban on billboards survived just such a substantive due process attack, because, as noted above, Judge Thomas found the ban to be reasonable.[24]

## Exclusionary Zoning

Billboard bans have been assailed under Michigan's exclusionary zoning statute.[25]

City-wide billboard bans have, however, withstood exclusionary zoning attacks in

Livonia[26] and in Clawson.[27] The court of appeals quoted Circuit Judge Gene Schnelz in upholding Clawson's billboard ban by finding Viacom's signs tantamount to stocking whales in a trout pond.[28]

The Michigan Supreme Court recently determined that a ban on new billboards in the city of Holland did not constitute exclusionary zoning.[29]

## Amortization and Takings

A 1975 East Lansing Sign Code called for offending signs to be removed within 12 years. The Michigan Supreme Court found that the home-rule act[30] authorizes cities to "amortize" billboards, i.e., to eliminate non-conforming billboards over a reasonable period of time, in *"Adams I."*[31] A subsequent appeal in the same case, known as *"Adams II,"*[32] found the amortization was not a compensable taking under the Fifth Amendment. The sign owner could not invoke non-conforming use analysis because the ordinance was a municipal police power regulation of public health and safety, not a zoning ordinance. The Supreme Court drew an analogy to non-zoning ordinances regulating "hazardous or dangerous activities."

Although municipalities may enforce the removal of a billboard, a claim for just compensation can arise under the Fifth Amendment, Michigan law, and federal legislation.[33]

## Conclusion

The website of a prominent billboard company boasts that its signs are "virtually impossible to avoid."[34] This chilling promise captures the virtue and the vice of billboards.

The virtue for billboard companies is clear. The public's captive, road-bound gaze is served up to advertisers and translated into profits for billboard owners.

The haunting vice is also manifest. Billboard companies, unlike other advertisers, do not pay for the communication medium. TV, radio, magazine, and newspapers advertisers pay for airwaves and paper as a cost of doing business. It is the price of accessing the consumer's stream of consciousness. Taxpayers, however, pay for the roads. We buy the cars. We supply the gas. Billboard companies acquire a sliver of the adjoining land and presume to invite themselves onboard as the motorists' guest. Their vanity has no mute button. There is no off switch. Our eyes cannot be averted. One billboard company's website promises that: "outdoor boards are unavoidable, unstoppable." In short, the motorist's personal freedom of thought involuntarily becomes a billboard company's merchandise.

Interest in preserving aesthetics and improving traffic safety has prompted municipalities to regulate signs.

There have been templates for a variety of Michigan ordinances, but only recently for sign codes. In 2002, Scenic Michigan released *Recommended Elements of a Sign Ordinance.*[35]

Although the decisions make it clear that sign regulators must consider principles of content-neutrality, they also recognize that there is a narrow, but definable, zone between regulating *too much* and *too little* speech.

By focusing on size, height, location, and setback requirements, regulators can meet the constitutionally-permitted aesthetic and safety purposes without trespassing on the First Amendment. ✦

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### Footnotes

1. Excerpt from a letter to this writer. Mr. Kelley is a member of the Board of Directors of Scenic Michigan.
2. Governor Jennifer Granholm drew upon this image, "pride of place," in her first State of the State Address.
3. *Berman v Parker,* 348 US 26, 33; 75 S Ct 98, 99 L Ed 27 (1954).
4. *Metromedia, Inc v City of San Diego,* 453 US 490; 101 S Ct 2882; 69 L Ed 2d 800 (1981). "Off-premises" signs advertise goods or services not made or sold on the subject property.
5. *Members of the City Council v Taxpayers for Vincent,* 466 US 789; 104 S Ct 2118; 80 L Ed 2d 772 (1984).
6. *City of Passaic v Paterson Bill Posting, Advertising & Sign Co,* 72 NJ L 285; 62 A 267 (1905).
7. *Central Hudson Gas & Electric Corp v Public Service Commission,* 447 US 557; 100 S Ct 2343; 65 L Ed 2d 341 (1980).
8. *City of Rochester v Schultz,* 459 Mich 486; 592 NW2d 69 (1999).
9. *Nichols & Vann v Livonia,* Wayne Co. Circ. Ct., Case No. 01-112795-NZ, Hon. Edward M. Thomas.
10. *Metromedia, Inc v City of San Diego,* supra, 453 US at 508, 509.
11. *Outdoor Systems, Inc v Clawson,* 2004 Mich App Lexis 1863, ___ Mich App ___, ___ NW2d ___ (2004).
12. *Central Advertising Co v Ann Arbor,* 391 Mich 533; 218 NW2d 27 (1974). The home-rule act authorizes a charter provision "[f]or licensing, regulating, restricting and limiting the number and locations of billboards within the city." MCL 117.4(i)(5) ; MSA 5.2082(5).
13. *Members of the City Council of the City of Los Angeles v Taxpayers for Vincent,* 466 US 789, 804; 104 S Ct 2118; 80 L Ed 2d 772 (1984).
14. *Ladue v Gilleo,* 512 US 43, 50, 51; 114 S Ct 2038; 129 L Ed 2d 36 (1994).
15. *King Enterprises, Inc v Thomas Township,* 215 F Supp 2d 891 (ED Mich 2002).
16. *North Olmstead Chamber of Commerce v City of North Olmstead,* 86 F Supp 2d 755 (ND Ohio 2000).
17. *Simon & Schuster, Inc v Members of New York State Crime Victims Board,* 502 US 105; 112 S Ct 501; 116 L Ed 2d 476 (1991).
18. *Central Hudson,* supra, 447 US at 566.
19. *Ward v Rock Against Racism,* 491 US 781, 798; 109 S Ct 2746; 105 L Ed 2d 661 (1989).
20. *Boos v Barry,* 485 US 312; 108 S Ct 1157; 99 L Ed 2d 333 (1988).
21. *Ward v Rock Against Racism,* 491 US 781, 800; 109 S Ct 2946; 105 L Ed 2d 661 (1989); *Clark v Community for Creative Non-Violence,* 468 US 288; 104 S Ct 3065; 82 L Ed 2d 221 (1984).
22. *Kropf v Sterling Heights,* 391 Mich 139, 158; 215 NW2d 179 (1974).
23. *A & B Enterprises v Madison Township,* 197 Mich App 160, 162; 494 NW2d 761 (1992).
24. *Nichols & Vann v Livonia,* supra.
25. MCL 125.592; MSA 5.2942.
26. *Nichols & Vann v Livonia,* supra.
27. *Outdoor Systems, Inc v Clawson,* supra.
28. *Outdoor Systems, Inc v Clawson,* supra.
29. *Adams Outdoor Advertising, Inc v City of Holland,* 463 Mich 675; 625 NW2d 377 (2001).
30. MCL 117.4i(5); MSA 5.2082(5).
31. *Adams Outdoor Advertising v East Lansing,* 439 Mich 209; 483 NW2d 38 (1992).
32. *Adams Outdoor Advertising, Inc v City of East Lansing,* 463 Mich 17; 614 NW2d 634 (2000).
33. MCL 252.304(a); MSA 9.391(104) and 23 USC 131(g). *Lamar Advertising Co v Charter Township of Clinton,* 241 F Supp 2d 793 (ED Mich, 2003).
34. Adams Outdoor Advertising website:http://www.adamsoutdoor.com.
35. The Recommended Elements of a Sign Ordinance can by accessed at http://www.scenicmichigan.org.