Outdoor Advertising Association of America

Issue Briefs

Permit Fees

Message Points

- The outdoor industry supports reasonable permit fees
- Permit fees are designed to pay for the costs of regulation
- Excess permit fees – which generate more than the cost of administering regulation – are taxes disguised as fees and raise constitutional issues
- There is no universal fee schedule; fees vary by jurisdiction

Background

State permit fees, user fees, and licensing fees are designed to cover the costs of maintaining regulatory and administrative compliance of the business community.

The outdoor advertising industry supports fair and equitable permit fees and licensing fees as the basis for the government to regulate the outdoor advertising medium.

Position

Outdoor operators pay their fair share of a myriad of fees. Reasonable fees should cover the cost of regulation, period. Fees that generate government revenue in excess of the cost of regulation are taxes

Message Points

- Permit fees are formulated to cover regulatory and administrative costs only. The law requires that regulatory fees be related to the cost of regulation. Excessive fees are deemed taxes.
- There is no universal fee schedule at the state and local levels. (See Appendix A for state permit/fee list)
- Billboard companies pay permit fees and other administrative fees for which they are obligated under law to localities, the state, and federal government.
- Protections exist when constitutional violations occur:
    - First Amendment guarantees are violated if a tax imposes a financial impediment to suppress expression;

- The Fifth Amendment substantive due process clause is violated if the tax is arbitrary and excessive as to be confiscatory;
- The Fourteenth Amendment procedural due process clause is violated if a locality fails to provide a “clear and certain” remedy for a taxpayer to challenge the accuracy and legal validity of the assessment.

A disturbing trend has emerged throughout the country that seeks to disguise taxes as permit fees, also known as “user” fees, or licensing fees. As state and county officials have been forced to implement more and more creative ways of providing revenue and outdoor industry opponents have initiated campaigns against the industry through the use of “fee” legislation, the trend toward “disguising” taxes as fees has emerged as a real threat.

Resources

OAAA chart showing initial state permit fees, renewal fees, and the time basis for renewal

Illegally Disguising Taxes and Permit Fees, Richard L. Rothfelder of Rothfelder & Falick, presentation to the National Signage Research Symposium, Las Vegas, NV, April 2-3, 2003

Excessive Permit Fees and the First Amendment, OAAA Legal Report, OAAA Counsel Eric Rubin, February 2004

California State Outdoor Advertising Association v State of California, United States District Court, Eastern District of California, No. Civ. S-05-0599 FCD/DAD, United States District Judge Frank C. Damrell Jr., August 29, 2005

U.S. District Court Decision Invalidates St. Paul, MN, Billboard Inspection Fee, OAAA Legal Report, OAAA Counsel Eric Rubin, August 2003

Exactions and the Industry lawsuit against new inspection fees in Los Angeles, OAAA Legal Report, OAAA Counsel Eric Rubin, November 2002

Inspection without Introspection, OAAA Legal Report, OAAA Counsel Eric Rubin, October 2002

It’s Never Over, OAAA Legal Report, OAAA Counsel Eric Rubin, July 2007 (describing a settlement in Philadelphia that reduced fees)

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ILLEGALLY DISGUISING TAXES AS PERMIT FEES

(Presented to National Signage Research Symposium;
Mandalay Bay Convention Center, Las Vegas, Nevada; April 2-3, 2003)

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

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

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

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

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

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

II. The courts have articulated the so-called "Purpose Test" for determining whether an exaction is legitimate permit fee or illegal tax: if the primary purpose of the measure is to raise revenue, as opposed to merely recouping reasonable costs of regulation, it is a tax. Stated differently, if there is no reasonable relationship between the purported fee and costs, or if it is more than reasonably necessary to cover the cost of regulation, such an exaction becomes more than mere recoupment of reasonable regulation costs, its primary purpose is the raising of revenue, and it is illegally excessive as an unauthorized tax.

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

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

A. Direct comparison of city's (1) cost in rendering the services and regulation attendant to the permit, with (2) the revenue generated from the permit fee.

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

B. The waste and inefficiency of the municipality in providing the regulation, thereby establishing that whatever the municipality actually incurs is excessive.

1. In the *Houston* case, for example, it was established that the Houston Sign Administration employed 77 individuals, utilized even more City-owned vehicles, leased expensive office space in a privately owned building, and had annual budgets in excess in of \$3,000,000.00.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Viacom and Clear Channel challenged the annual permit fee of $314.00 imposed by Los Angeles on off-premise signs (there was no corresponding fee assessed against on-premise signs)

2. The court enjoined enforcement of the fee ordinance on the following grounds:

a. The fee ordinance violated the First Amendment, because it favored commercial speech over non-commercial speech. The court reasoned that a non-commercial sign is more likely to fall within the off-premise definition, because such signs are less likely than a commercial sign to relate to the site on which the structure is located. Further, since the fee ordinance applied only to off-premise signs, it therefore burdened non-commercial speech more than commercial speech, and was violative of the First Amendment.

b. The fee ordinance impermissibly differentiated between different types of non-commercial speech based on the content of the signs. The court noted the ordinance imposes a "fee on off-site non-commercial sign structures, and the determination as to whether a structure is off-premise or on-premise depends upon the content of the sign." The court concluded that because regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment, the fee is unconstitutional.

c. The fee also impermissibly discriminates between different types of commercial speech. Specifically, even though on-premise signs comprised only 2.5% of Los Angeles' outdoor sign structures, they were the only target of the fee ordinance. Accordingly, the court ruled that "imposing a fee to inspect such a small percentage of the City's signs will not materially and directly advance the City's interests."

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

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

4. Los Angeles has appealed the ruling to the Ninth Circuit Court of Appeals.

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

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

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

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

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

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

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

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

Richard L. Rothfelder

Mr. Rothfelder is Board Certified in Civil Trial Law, and a partner in the Houston business litigation firm of Rothfelder & Falick, L.L.P. He is a 1979 cum laude graduate of the University of Houston Law School, and graduated in 1976 from the University of Kansas with distinction. Mr. Rothfelder is currently serving his second term as the Mayor of the City of Southside Place, and he is Vice-President of the Harris County Mayors and Councils Association.

OAAA Counsel Legal Reports

(The February 2004, August 2003, October and November 2002, and July 2007 Legal Reports prepared by Eric Rubin, Counsel to OAAA, analyzes the legal aspects of the Permits and Licensing Fee issue)

Excessive Permit Fees and the First Amendment

(From the February 2004 Legal Report)

Tight budgets are prompting government to scramble for "new" money, including higher fees. This month's Legal Report provides a constitutional tutorial on fees levied on the outdoor medium.)

In their search for revenue to plug budget shortfalls, some state and local governments have begun to eye outdoor advertising permit and license fees as one potential means for raising revenues. The issue of arbitrary increases in state and local license and permit fees was a central focus of the 2004 OAAA Legal Seminar. In the course of those panel discussions, a number of questions were raised concerning the constitutional theory for challenging an exorbitant revenue-based fee schedule under the First Amendment where it can be demonstrated that the annual fees being imposed exceed the actual expenses incurred by the state or local regulatory agency to which they are being paid.

Initially, it is important to note that a challenge involving excessive fees raises an entirely different set of legal issues than a fee schedule that bears at least some relationship to the expenses actually incurred by a regulatory agency. The *OAAA Legal Report* for August, 2003, discussed two recent permit fee cases involving St. Paul, Minnesota, and Los Angeles that pertain to such revenue-neutral fees. In those cases, the First Amendment analysis turned on the fact that while revenue-neutral, the permit fees at issue were only levied on off-premise signs. On-premise signs paid nothing. This created the classic circumstances under Metromedia v. San Diego of a content-based regulation that in effect favored commercial on-premise signs over off-premise signs that disseminate both commercial and noncommercial messages. A revenue-based excessive fee case involves a different analysis under the First Amendment.

The Supreme Court has emphasized that, "The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas." Metromedia, Inc. v. San Diego, 453 U.S. 490, 501(1981). As a result, a state or local agency's exercise of regulatory authority over outdoor advertising, including regulations that impose permit and license fees, are subject to First Amendment restrictions. A regulatory agency is not free to set fees arbitrarily at any level it desires.

It is a settled matter of constitutional law that a regulatory fee on protected expressive activity crosses a constitutional demarcation line when the amount of the fee being imposed exceeds reasonable expenses that are actually incurred by a government agency in the exercise of its regulatory responsibilities. This general principle was first established in two Supreme Court decisions during the 1940's: Cox v. New Hampshire, 312 U.S. 569 (1941) and Murdock v. Pennsylvania, 319 U.S. 105 (1943). The Eleventh Circuit recently reflected on this principle:

Under Murdock and Cox, when core First Amendment freedoms are made subject to a licensing scheme, only revenue-neutral fees may be imposed, so that government is not charging for the privilege of exercising a constitutional right. Fly Fish, Inc. v. City of Cocoa Beach, (11th Cir. 2003).

The bottom line is that government may not profit from a licensing or permit fee imposed upon the exercise of First Amendment rights. The Constitution prohibits a regulatory agency from raising revenue from fees levied on speech under the guise of defraying its administrative costs. In effect, such a revenue-based fee structure would constitute a governmental charge on the exercise of free expression. AAK, Inc. v. City of Woonsocket, 830 F. Supp. 99 (D.R.I. 1993); Sentinel Communications v. Watts, 936 F.2d 1189 (11th Cir. 1991); Bayside Enterprises, Inc. v. Dale Carson, et al., 450 F.Supp, 696 (M.D. Fla. 1978). In order to pass muster under the First Amendment, a regulatory fee must be revenue neutral and not exceed the actual cost incurred by the regulatory agency in the administration of its statutory responsibilities.

The fact that a fee on outdoor advertising licenses or permits falls within the penumbra of the First Amendment also carries other ramifications in litigation. First, in a First Amendment challenge of this nature, the burden of proof rests firmly on the government, and not on the outdoor advertising plaintiff, to demonstrate that its fees are in fact set at a level that is not higher than necessary to recoup the actual costs of regulation. Fly Fish, Inc., 337 F.3d 1314; Sentinel Communications Co. v. Watts, 936 F.2d at 1206 n. 17; AAK, Inc. v. City of Woonsocket, 830 F. Supp at 102. Second, in a First Amendment challenge, the government's proof is subject to strict judicial scrutiny in determining whether the charges are in fact revenue-neutral. That requires a careful accounting by the agency of actual regulatory expenses and not just some "smoke and mirror" budget estimate. Bayside Enterprises Inc. v. Carson, 450 F. Supp. At 704; Kentucky Restaurant Concepts, Inc. v. City of Louisville, 209 F. Supp. 2d 672 (W.D.Ky. 2002); Bright Lights, Inc. v. City of Newport, 830 F. Supp. 378, 385 (M.D.Ky.) 1993); Ellwest Stereo Theater, Inc. v. Boner, 718 F. Supp, 1553, 1574 (M.D. Tenn. 1989); National Awareness Foundation v. Abrams, 812 F. Supp. 431, 433-34 (S.D.N.Y. 1993). Finally, regulatory fees must be directly related to the specific regulatory purpose for which they are being charged. Wendling v. City of Duluth, 495 F.Supp. 1380 (D. Minn. 1980).

This does not mean that every regulatory fee is vulnerable to attack. But in the current fiscal environment, it does help prevent government at all levels from declaring an open budgetary season on outdoor advertising.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA STATE OUTDOOR ADVERTISING ASSOCIATION, INC.,
a California corporation, et al.,

NO. CIV. S-05-0599 FCD/DAD

Plaintiffs,
v.
MEMORANDUM AND ORDER
STATE OF CALIFORNIA,
DEPARTMENT OF TRANSPORTATION,
WILL KEMPTON, in his official
capacity as Director,
CALIFORNIA DEPARTMENT OF
TRANSPORTATION, and DOES 1-50
inclusive,
Defendants.

This matter is before the court on motion for partial summary judgment filed by defendants State of California Department of Transportation and Will Kempton, Director of the California Department of Transportation (collectively "Caltrans"), and motion for partial summary judgment filed by plaintiffs, California Outdoor Advertising Association, Inc., and its members, Arcturus Outdoor Advertising, Bulletin Displays, LLC, Clear Channel 'Outdoor, Inc., Fairway Outdoor Advertising, Inc., Edwards Outdoor Signs, General Outdoor Advertising, Inc., Heywood Company Outdoor, James N. Hoff doing business as Hoff Outdoor Advertising Hunter Media, Lamar central Outdoor, Inc., J.R. Zukin Corporation doing business as Meadow Outdoor Advertising, Sun Outdoor Advertising, Stott Outdoor Advertising, Titan Advertising, United Outdoor Advertising, Van Wagner Communications, Inc., and Viacom Outdoor, Inc. (collectively "CSOAA") . The court, held a hearing on the motions August 26, 2005.[1,2]

After considering the memoranda filed by the parties and arguments made by counsel at the hearing, and for the reasons stated herein, the court GRANTS plaintiff's motion for summary judgment and DENIES defendants motion for summary judgment.

BACKGROUND

Caltrans, a department of the State of California, regulates outdoor advertising pursuant to the Outdoor Advertising Act, California Business & Professions Code § 5200 et seq. ("OAA") and regulations promulgated by Caltrans pursuant to the OAA. (Defs Response to Pls. Sep. Statement of Und. Facts ("RUF") ¶ 5.)

The OAA requires that any person operating an outdoor advertising display in California referred to herein as “sign” or “billboard” obtain a permit (”Billboard permit”) issued by the director of Caltrans or his authorized agent, which must be renewed every five years. Cal Bus. & Prof. Code §§ 5350, 5360(a); RUF ¶ 7. Prior to January 1, 2003, the fee for obtaining a Billboard permit was set by statute , California Business and Professions Code section 5485(a), a t $20.00 per year for each billboard. (RUF ¶ 8.) Under regulations effective in 2002, billboard operators were required to pay the annual $20.00 permit fee for 2003 on or before December 31, 2002. (RUF ¶ 10.)

Effective January 1, 2003, the Legislature amended section 5485 (a),which now provides that the Director of Caltrans shall setthe Billboard permit fee:

(a) (1) The annual permit fee for each advertising display shall be set by the director.

> (2) The fee shall not exceed the amount reasonably necessary to recover the cost of providing the service or enforcing the regulations f o r which the fee is charged, but in no event shall the fee exceed one hundred dollars ($100). This maximum fee shall be increased in the 2007-08 fiscal year and in the 2012-13 fiscal year by an amount equal t o the increase in the California Consumer Price Index.
>
> (3) The fee may reflect the department's average cost, including the indirect costs , of providing the service or enforcing the regulations.

Cal . Bus. & Prof. Code § 5485 (a).

On or about June 2, 2003, Caltrans announced a new annual permit renewal fee of $92.00, which Caltrans indicated it promulgated pursuant to newly-amended section 5485(a). At or around the same time, Caltrans notified permit holders that they were required to, pay within thirty days[3] an additional $72.00 per billboard for their 2003 permits or the permits would be revoked pursuant to California Business and Professions Code §5463[4] (RUF ¶ 11.)

In setting the new Billboard permit fee, Caltrans did not follow the rulemaking provisions of the Administrative Procedures Act, California Government Code section 11340, et seq. ("APA"). According to Caltrans, setting of the Billboard permit fee falls within an exception to the APA for "regulations establishing rates, prices or tariffs. "Cal. Gov't Code § 11340.9(g); RUF ¶¶ 8.)

Instead, Caltrans calculated the new Billboard permit fee by "taking the total costs of its Outdoor Advertising Program ("ODA") of $1,273,824.00 minus projected revenues of $190,000.00 to give an annual net program cost of $1,083.824.00. This net costs was divided by the number of permits, 11,850, to give an annual permit cost of $92.00. The breakdown of costs and revenues in arriving at the $92 permit fee are provided in the ODA Expenditure Summary Data Sheet and related documents." (RUF ¶ 19; Caltrans' response to CSOAA's Interrogatory No. 1.)

Plaintiffs filed their original complaint with the Los Angeles County Superior Court. On November 29, 2004, plaintiffs filed a First Amended Complaint asserting four claims: (1) violation of the APA; (2) violation of California Business and Professions code section 5485(a); (3) violation of Article I,§2(a) of the California Constitution protecting liberty of speech; and (4) against defendant Kempton only, a claim under 42 U.S.C. § 1983 for violation of plaintiff's First Amendment rights.

On January 5, 2005, defendants removed the action to the United States District Court for the Central District of California. Defendants subsequently filed a motion for change of venue which was granted by order dated March 14, 2005. The case was transferred to this court on March 24, 2005.

On June 7, 2005 defendants filed a motion for partial summary judgment on plaintiffs' first claim for violation of the APA. On July 12, 2005 plaintiffs filed a cross motion for partial summary judgment as to the validity of the permit fee.

STANDARD

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a matter of Law." Fed. R. Civ. P. 56(c). Under this standard, an issue is "genuine" if there is sufficient evidence for a reasonable jury to find for the nonmoving party and a fact is "material" when it may affect the outcome of the case under the substantive law that provides the claim or defense. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). The determination is made based solely upon admissible evidence. Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). Furthermore, the court must view inferences made from the underlying facts in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970).

The moving party has the initial burden to demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party is without the ultimate burden of persuasion at trial, it may either produce evidence negating an essential element of the opposing party's claim, or demonstrate that the nonmoving party does not have enough evidence to carry its ultimate burden of persuasion at trial. Nissan Fire & Marine Insurance Co. v. Fritz Companies, Inc., 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party meets this initial requirement, the burden then shifts to the opposing party to go beyond the pleadings and set forth specific facts that establish a genuine issue of material fact remains for trial. Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). Summary judgment should not be granted where "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250.

Following this same rubric, a court may grant summary adjudication on part of a claim or defense, based on the standards applicable to a motion for summary judgment. See Fed. R. Civ. P. 56(a),(b); State of California v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998).

ANALYSIS

I. Violation of the APA

The sole question presented here is whether Caltrans was required t o adhere t o the procedural requirements of APA in setting the Billboard permit fee.[6] According to Caltrans , the APA's exemption for “regulations establishing rates, prices or tariffs" applies to the setting the Billboard permit fee. See Cal. Gov' t Code § 11340.9(g) . Plaintiffs dispute that the "rates, prices or tariffs" exception applies to the Billboard permit fee.

"The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." United States v. Ron Pair Enters., Inc. , 489 U.S. 235, 241 (1989); Chevron USA. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1 9 8 4) . The Supreme Court describes this rule as the "one, cardinal canon before all others." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992). Thus, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Id. (citing , Ron Pair , 489 U.S. a t 241-242; United States v. Goldenberg, 168 U.S. 95, 102-03 (1897). When the language of the statute is plain , the inquiry also ends with the language of the statute , for in such instances "the sole function of the courts is to enforce [the statute] according to its terms.” Ron Pair, 489 U.S. at 24l (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)); Melahn v. Pennock Ins., Inc., 965 F. 2d 1497, 1502 (8th Cir. 1992) (plain meaning of a statute governs over ambiguous legislative history.)

California Government Code section 11340.9(g) provides: [7]

> This chapter does not apply t o any of the following:
> (g) A regulation that establishes or fixes rates, prices, or tariffs...

Initially, the court notes that the word “fee" is not used in the statute. Under the canon of construction, *expressio unius est exclusio alterius*, the mention of one thing in a statute impliedly excludes another. By including a list of exceptions for “rates”, "prices” and "tariffs," the legislature implicitly excluded fees.

The term “fee” is used extensively throughout the California code. In light of this ubiquitous term, it seems likely that the legislature would have expressly referenced “fees” within this statute had it intended the exemption to apply to fees.[8] Interestingly, in other statutes, the legislature did include both the terms "fees" and "rates", indicating that, when it intended to include fees, it the legislature expressly so provided. See e.g. Cal. Gov’t Code § 6557 ("Said indenture may include covenants or other provisions relating to the bonds issued thereunder requiring the entity to fix, prescribe and collect rates, tolls, fees, rentals or other charges...” Cal. Educ. Code §94147 ("The authority may fix, revise, charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by each project...”).

Nor does the court agree with defendants’ argument that the terms “fee” and “rate,” or alternatively “fee” and “price” are synonymous. The common meanings of these terms are quite distinct.

Black's law dictionary defines “rate” as “proportional or relative value, measure or degree. The proportion or standard by which quantity or value is adjusted… Amount of charge or payment with reference to some basis of calculation. A certain quantity of amount of one thing considered in relation to another thing and used as standard or measure." Black's Law Dictionary at 1261 (Sixth Ed. 1990).

By contrast, a “fee” is defined as “a charge fixed by law for services of public officers or for use of a privilege under control of government." Black's Law Dictionary at 614. Unlike a rate, which is measured by reference to something else, a “fee” has a fixed value. A fee is $20.00. A rate is $20.00 per hour or $30.00 per pound. A fee can be set by reference to a rate, but is not synonymous with the term rate.

Similarly, "fee" and "price" are not synonymous.[9] Price is defined as “the cost at which something is obtained. Something which one ordinarily accepts voluntarily in exchange for something else. The consideration given for the purchase of a thing. Amount which a prospective seller indicates as the sum for which he is willing to sell… The term may be synonymous with cost and with value as well as with consideration.” Black’s Law Dictionary at 1188-89.

Unlike "fee", which refers to the charge for a government privilege, i.e., a permit or license, “price” connotes a sale, purchase or commercial transaction. This connotation is apparent in the reference to price setting in the code. See e.g., Cal. Food &Agric. Code § 62062 (authorizing Director of Department of Agriculture to set minimum milk prices); Cal. Educ. Code § 1249(a) (“The county superintendent of schools may sell publications that he or she produces…. The county superintendent of schools,… may fix the price… for the sale of any publication produced by him or her.”); Cal. Fish & Code § 15301 (“The department may sell wild aquatic plants or animals, except rare, endangered, or fully protected species, for aquaculture use at a price approximating the administrative cost tot eh department for the collection or sale of the plants or animals. The commission shall set this price.”); Cal. Gov. Code § 9792 (authorizing Department of General Services to sell copies of laws, resolutions and journals “at such price as it may fix”).

The court thus concludes that the plain meaning of the language in California Government Code section 11340.9(g) excludes fees from the exception. However, even if the language were ambiguous, the legislative history further supports the conclusion that the exception does not cover fees. . When added to former Government code section 11380 in 1945, the exception listed only “rates or tariffs.”[10] See Stats. 1945 c. 111 p. 445 § 3 (“As used in this chapter:… (b) ‘Regulation’ includes any rule or regulation made by any state agency except one which: (2) establishes or fixes rates or tariffs.” In 1949, the legislature added the term “prices” to the section 11380, presumably because the terms “rates” and “tariffs” have unique definitions which do not encompass “prices”. See Stats. 1949 c. 313 § 2 p. 601. If the legislature felt compelled to add the word “prices” because “prices’ were not encompassed within the terms “rates” and “tariffs,” logic suggests that the terms “rates” and “tariffs” also do not encompass other different terms, such as “fees.”

The court also notes that Caltrans has followed the Administrative Procedures Act when promulgating regulations establishing permit fees in other contexts. [11] Plaintiff cites two examples where Caltrans itself followed the APA in setting fees. See 4 C.C.R. § 2424 (describing late renewal process and setting penalty fees); 21 C.C.R. § 2114 (establishing permit fees and other fees for placement of business names on roadside signs placed in rural areas to alert motorists to nearby services). In addition, plaintiffs identify numerous examples where other agencies established fees in conformity with the APA. See e.g., 2 C.C.R. § 2202(c)(2) ($1.00 per acre permit fee for prospecting); 10 C.C.R. § 2604.02(B) ($35.00 application fee for pre-organization permit to organize insurance company; 10 C.C.R. § 225 (fees relating to real estate appraisers); 14 C.C.R. § 13055 (fees for processing permit applications for approval by coastal commission); 12 C.C.R. § 676(b)(9)(B) ($200.00 permit fee fore fallow deer farming).[12]

Defendant distinguishes these regulations on the ground that, unlike here, where the regulation involved solely the setting of a fee with statutory guidance provided by the legislature, these permit fees were part of a broader regulation adopting process. However, defendants' argument ignores the statutory requirement that Caltrans adopt regulations establishing the process for permit renewal. California Business and Professions Code section 5630 provides:

> (a) The director shall establish a permit renewal term of five years, which shall be reflected on the face of the permit. (b) The director shall adopt regulations for permit renewal that include procedures for late renewal within a period not to exveed one year from the date of permit expiration. Any permit that was not renewed after January 1, 1993, is deemed revoked.

Pursuant to that authority, Caltrans promulgated 4 C.C.R. § 2424, which sets forth the process for permit renewal and payment of the fee. While the statutory authority for setting the Billboard permit fee appears in a different code section, it is nonetheless part of a broader permit renewal process. Thus, it is indistinguishable from the other permit fees cited by plaintiff.

In support of its position that the permit fee falls with in the "rates, prices and tariffs" exception, defendants rely on a 1961 California Court of Appeals case, Estate of Setzer, 192 Cal. App. 2d 634 (1961). Neither Setzer, not any other reported case addresses whether "fees" fall with in the "rates, prices or tariffs" exception. [13] Setzer involved a challenge to rates fixed by the Director of Mental Hygiene for the maintenance of incompetent individuals in state hospitals. The conservator for an individual committed to a state hospital challenged the Director's increase in the rates for failure to comply with the APA. The district court upheld the rate increase and the appellate court affirmed, holding that:

> "the rate determinations made by the director were not required to be filed with the secretary of State nor published in the California Administrative Code or Register since they come within the provisions of [former version of section

11340.9(g)], which excepts from such filing any regulation establishing or fixing rates, prices or tariffs."

Id. At 686. Setzer is distinguishable. First, Setzer involved fixing rates, which expressly falls within the ambit of section 11340.9(g).[14] Moreover, the type of charge involved was a rate charged for a service, i.e., maintenance of the committed person at the mental hospital. Here, the fee does is not charged for a service but for a government privilege, i.e., the right to erect a billboard along a highway. It did not involve a regulatory permit.

Finally, defendants argue that the language of California Business and Professions Code section 5485 reveals legislative intent to exempt the fee setting from the APA. Specifically defendants note that he statute itself establishes a "process" by setting a maximum fee of $100.00, limiting the fee to the reasonably necessary to recover the cost of providing the service or enforcing the regulation for which the fee is charged, and providing that the fee can include indirect costs of administering the program. See Cal. Bus. & Prof. Code § 5485. The court disagrees that the statutory language can be interpreted to indicate legislative intent to exempt the fee setting from the APA. The APA applies broadly to agency regulations. Tidewater Marie Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 570 (1996). Specifically the APA provides that

[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual,. Instruction, order, standard of general application, or other rule, which is a regulation..., unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation ad filed with the Secretary of State pursuant to this chapter. Cal Gov't Code § 11340.5(a). Moreover, the APA provides that its provisions "shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly." Cal. Gov't Code, § 11346. The same limitations on the permit fee contained in section 5485 do not constitute an express exemption from the APA. [15] Thus, the APA applies.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for partial summary judgement is granted and defendants' motion for partial summary jusgement is denied.

IT IS SO ORDERED/

DATED: August 29, 2005

/ s / Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

[1] Because oral argument will not be of material assistance, the court orders the matter submitted on the briefs. E.D. Cal. Local Rule 78-230.

[2] The court strikes from the record the Surreply and objections to certain declarations submitted by defendants (docket numbers 28 and 29) filed by plaintiffs on August 22, 2005 as improper and untimely under the Eastern District Local Rule 78-230.

[3] According to Caltrans, it extended the thirty-day period to sixty days on July 17, 2003.

[4] California Business and Professions Code § 5463 provides in relevant part: "The director may revoke, any license or permit for the failure to comply with this chapter and may remove and destroy any advertising display placed or maintained in violation of this chapter after 30 days written notice is forwarded by mail to the permitholder at his or her last known address. If no permit has been issued, a copy of the notice shall be forwarded by mail to the display owner, property owner, or advertiser at his or her last known address."

[5] The court cannot locate in the file the date plaintiffs filed the original complaint.

[6] Parties do not dispute that the permit fee is a "regulation" within the meaning of the APA.

7 The other exceptions contained in section 11340.9 are:
(a) An agency in the judicial or legislative branch of the state government.
(b) A legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization.
(c) A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed t o implement the law under which the form is issued.
(d) A regulation that relates only to the internal management of the state agency.
(e) A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, [etc., which would disclose material to the violator and facilitate violation of the law].
(f) A regulation that embodies the only legally tenable interpretation of a provision of law.
(h) A regulation that relates to the use of public works, including streets and highways, when the effect of the regulation is indicated to the public by means of signs or signals or when the regulation determines uniform standards and specifications for official traffic control devices pursuant t o Section 21400 of the Vehicle Code.
(I) A regulation that is directed to a specifically named person or t o a group of persons and does not apply generally throughout the state.

[8] In fact , the term "fee" appears in the same 1945 statute (different section) that added the "rate or tariffs" exception to the APA. See Stats. 1945 c. 111 p. 445; Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., 224 U.S. 152, 159-160 (1912)(where different language is used in different parts of a statute , it is

presumed that the language is used with a different intent); see also 73 AM. JUR. 2d Statutes § 131 (May, 2005).

[9] Defendants do not contend that the permit fee falls under the exception for “tariffs.”

[10] The earlier versions of this provision, originally codified as Government Code section 11380, provide no definition of the terms “rates,” “prices” or “tariffs”, nor did a search of archival documents reveal any explication of the terms or discussion of the purpose of the 1949 amendment. See Stats. 1949 c. 313 § 2 p. 601.

[11] Caltrans and other agencies’ conduct in setting other fees is of little relevance to the court’s interpretation of the statute. From the materials provided by the parties, the court cannot conclude that agencies consistently establish fees in compliance with the APA. However, the court includes reference to the above cited examples to demonstrate an apparent inconsistency between Caltrans’ position that fees fall within section 11340.9(g) exception and its own conduct in setting other fees in compliance with the APA, and also to defeat any suggestion that requiring agencies to comply with the APA in setting fees would place an undue burden on agencies, since it appears that at least in some instances agencies do comply with the APA in setting fees.

[12] The court grants plaintiffs’ request for judicial notice of the regulations cited.

[13] See California Ass’n of Nursing Homes, Sanitariums, Rest Homes for Aged, Inc. v. Williams, 4 Cal. App. 3d 800 (1970) (concluding that regulation establishing reimbursement rates for MediCal patients in nursing homes did not fall within “rates, prices or tariffs” exception even though it set “rates” because in the authorizing statutes, the scope of the agency’s regulations was broader that the (exemption); State Compensation Ins. Fund. V. McConnell, 46 Cal. 2d 330 (1956) (rating plan for workers’ compensation insurance premium fixed by insurance commissioner fell within “rates, prices, and tariffs” exception to the APA); Winzler &Kelly v. Department of Industrial Relations, 121 Cal. App. 3d 120, 128 (1981) (determination that field surveyors were covered by wage and hour laws was integral to wage rate setting and thus exempt from the APA as a regulation fixing rates, prices or tariffs).

[14] Defendants also rely on two opinions by the California Attorney General, 66 Ops. Cal. Atty. Gen. 505 (1983). That opinion held that the Department of Developmental Services could establish a “parental fee schedule” for services provided to developmentally disabled children without complying with the APA. However, the court disagrees with the Attorney General’s conclusion that “there appears little doub but that a parental fee schedule sets ‘rates’ in common parlance.” 66 Ops. Cal. Atty. Gen. 505 Moreover, the Attorney General’s opinion is distinguishable in that, like Setzer, it involved a government service, specifically, services for developmentally disabled children, and not a regulatory permit. 66 67 Ops. Cal. Atty. Gen. 50.

[15] In Alta Bates Hospital v. Lackner, 118 Cal. App. 3d 614, the appellate court confronted a challenge to a 10% cutback in MediCal reimbursement rates instituted by the director of the Department of Health Services. The cutback was instituted pursuant to a state statute authorizing the director to make emergency cutbacks when it appeared that there would be a budget shortfall. See Cal. Welf. & Inst. Code § 14120. The court determined that the legislature did note intend for the director to comply with the APA because the cutback would be implemented only in specific, emergency situations, and the delay attendant to complying with the APA would undermine the efficacy of the statute. No parallel exigency is present here.

U.S. District Court Decision Invalidates St. Paul, MN, Billboard Inspection Fee

(*From the August 2003 Legal Report)*

A federal court in Minnesota has rejected the City of St. Paul's new billboard inspection fees on First Amendment grounds. However, the U.S. Ninth Circuit Court of Appeals (with jurisdiction over California) reversed a lower court and vacated the injunction of the new Los Angeles inspection fee. This month's OAAA Legal Report analyzes the positive court ruling in the St. Paul case. Future OAAA Legal Reports *will continue to examine the evolving law on permit fees and licenses, including the August 15 appellate decision in the Los Angeles case.*

The United States District Court for the District of Minnesota issued an opinion in Clear Channel Outdoor, Inc. v. City of St. Paul, 2003 WL 21857830, (D. Minn., August 4, 2003), Civil No. 02-1060, granting summary judgment to Clear Channel and invalidating a St. Paul measure that imposed a $145 inspection fee on each off-premise sign face in that city. The fee had been adopted by City Council resolution in March, 2002 based on the recommendation of the zoning administrator pursuant to a city ordinance authorizing the imposition of fees "...adequate to cover the city's costs for staff and contracted services to maintain the billboard inventory and strictly enforce all city regulations for billboards."

The imposition of regulatory fees continues to be an important focus for the outdoor advertising industry. In the final days of its 2003 legislative session, the New Jersey Legislature considered but did not pass) legislation that would have imposed millions of dollars in new state billboard fees directed solely at outdoor advertising. In June, the Massachusetts Outdoor Advertising Board literally doubled all permit and license fees to $200 for each poster and bulletin structure in Massachusetts.

Government does not have complete discretion in setting the amount of a permit or license fee. It is a well established legal principle that regulatory fees may not exceed the reasonable costs of the regulatory activity that they support. Where a regulatory fee does exceed the actual and reasonable regulatory costs incurred by the agency involved, then the fee essentially becomes an unauthorized tax. In some states, this principle has evolved through case law.

Often, as in St. Paul, the regulatory statute itself recites the principle. However, such limitations on regulatory fees do not necessarily resolve the issue where a state or local government imposes a high fee to support an aggressive fee inspection program that is nothing more then a pretext for harassment. In order to justify a specific permit fee level, a regulatory agency is going to lard every possible dime of theoretical expense to justify its fees. And courts may be reluctant to look behind such justifications and second guess whether a governmental agency's justification is reasonable. Given these factors, Clear Channel v. St. Paul is particularly important because this case turns on a First Amendment challenge to St. Paul's outdoor advertising fee and inspection program, rather than whether it is justifiable as a regulatory fee.

In terms of First Amendment analysis, the key fact regarding outdoor advertising permit fees is that they impact on off-premise noncommercial speech in the same manner as an amortization ordinance. Under the Supreme Court's decision in Metromedia v. San Diego, 453 U.S. 490, (1981), a sign ordinance violates the First Amendment where it bans or limits off-premise signs in a manner that favors commercial on-premise speech over off-premise noncommercial speech, or where that measure favors certain categories of noncommercial speech over other categories.

(Note: The first application of that principle to an excessive permit fee occurred in Clear Channel Outdoor, Inc. v. City of Los Angeles, 234 F. Supp. 2d 1127, (C.D. Cal., 2002), where the U.S. District Court for the Central District of California enjoined enforcement of a Los Angeles inspection fee program on First Amendment grounds. That decision, which was the subject of the OAAA Legal Report for March, is presently under appeal to the Ninth Circuit. Clear Channel v. St Paul is noteworthy because it is a final judgment and because the Minnesota Court adopts a different and much broader rationale in striking down the St. Paul fee program.)
In the St. Paul decision, the U.S. District Court makes it clear that the First Amendment principles established by the Supreme Court in Metromedia in the context of land use regulation, apply with equal force to the area of permit fees and taxes.

"Although Metromedia involved a total ban on noncommercial advertising, the Supreme Court has held that “speech cannot be financially burdened any more then it can be punished or banned by reference to its content.” Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123,134-135 (1992). Thus, the reasoning behind Metromedia clearly applies here. There is no question that the City's off-site sign inspection program places a financial burden on off-site noncommercial signs.”

The question for the Court then becomes whether that burden on noncommercial speech is unconstitutional. In order to determine this, the District Court examines the St. Paul inspection regimen under the First Amendment's "strict scrutiny" test, which requires the government to show that its regulation is necessary to serve a "compelling" state interest and is narrowly drawn to achieve that interest. In the most important part of this decision, the District Court tackles head-on a portion of the plurality decision in Metromedia that has posed some difficulty in other outdoor cases.

There, some courts have observed, the Supreme Court recognized at least conceptually that traffic safety and aesthetics could be "substantial interests" that may be served in a billboard prohibition, particularly where there is not a specific factual record to the contrary. However, in St. Paul, the District Court draws the critical distinction that while in Metromedia these interests may have been deemed substantial, “... these goals have not been held to be ‘compelling.’” Therefore, an ordinance that sacrificed noncommercial speech for these goals cannot be justified under the First Amendment *per se.* Moreover, the Court holds that even if it is assumed for argument purposes that safety and aesthetics are compelling goals, the City of St. Paul nonetheless failed to actually prove that its off-site sign inspection program was narrowly tailored to meet those goals. "Specifically, the city does not inspect or monitor on-site noncommercial signs that are equally large in size and may often face the same concerns related to safety and aesthetics as do off-premise signs. Clearly, a 50 foot square on-site sign poses the same danger as a 50 foot square off-site sign."

As a result, the U.S. District Court holds that the off-premise inspection program cannot be found to meet the narrow tailoring test. In essence, the federal court in Minnesota is asking how an ordinance can satisfy what may even be a compelling governmental interest where it exempts one category of sign based on on-premise content despite the fact that those exempt signs have the very same physical characteristics as the off-premise signs that are singled out by St. Paul's fee and inspection program. In other words, the District Court is saying, "a sign is a sign regardless of content." The physical characteristics of a sign are the alleged threats to traffic safety and aesthetics, not its content. If city officials in St. Paul think off-premise noncommercial signs with particular physical characteristics should be singled out, then the city must be able to prove that there is a real factual basis for that distinction other than through the content of the message it disseminates. The importance of the District Court's reasoning here cannot be overstated. In many other cases interpreting Metromedia, courts have simply looked at the Supreme Court's dicta and took it to mean that there was at least a presumption that billboards created traffic safety and aesthetic issues. In St. Paul, the District Court rejects this view and looks behind the ordinance. For this Court, the question is not whether a particular billboard regulation, even when it is in the form of a financial burden, sacrifices noncommerical speech for what might be theoretically singled out as a compelling governmental interest, but rather whether such an interest is factually being served to a sufficient degree to justify that sacrifice.

Although the Court's holding that the St. Paul inspection fee is invalid on the basis of its impact on noncommercial speech ends the case, the Court nonetheless extends its decision and finds that the ordinance also fails the First Amendment test for regulations of commercial speech. As discussed in other OAAA Legal Reports, in Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, (1980), the Supreme Court prescribed a conceptual test for determining whether commercial speech regulations violate the First Amendment. Basically, the Central Hudson test places the burden on government to demonstrate that its restriction on commercial speech will directly advance the purposes it was enacted to serve to a material degree.

Applying Central Hudson to the St. Paul fee, the U.S. District Court emphasizes several facts. The Court points out that although the inspection program is based on the City's concerns regarding the aesthetics and safety of 620 off-premise signs greater then 50 square feet, there are at least *16,000* on-premise business signs in the City. And while the record does not indicate how many of those on-premise signs are larger then 50 square feet, the Court takes judicial notice of the fact that many such on-premise signs actually exist in St. Paul. Thus, the Court reasons that there is no logical reason for the City to have selected only off-premise commercial signs for inspection and imposition of the fee. “Because the City cannot justify this distinction, and because the City's program has a similar "paltry" impact toward achieving the City's interest, the City has failed to meet its burden of demonstrating that the off-site sign inspection program directly and materially advances the City's interesting public safety and aesthetics."

Finally, the District Court considers the question of whether the St. Paul regulation is so lacking in standards for determining when a sign's content renders it subject to the inspection fee that it "...fails to establish standards for the enforcement authorities and public that are sufficient to guard against arbitrary deprivation of liberty interests." In other words, the Court is looking to determine whether the ordinance essentially empowers the City's zoning bureaucracy to act as an unchecked censor to determine in its subjective view when a specific message makes a sign subject to the off-premise inspection fee. In order to make this determination the District Court raises a hypothetical that was suggested in Clear Channel's brief.

"[I]f a grocery store co-op advertises "Shop Here For Organic Food" on its on-site billboard, the fee clearly does not apply. However, if the grocery co-op advertises "Eat Organic Food" or "We Support Organic Farmers" on that same sign, it is questionable whether or not the fee would apply."

The District Court indicates that in oral argument, St. Paul's attorney argued that the fee would not apply to the last two examples. Apparently, his response was unpersuasive. The District Court holds that the St. Paul ordinance ..."provides no criteria by which to make a determination whether or not the fee applies to such 'gray area' billboards. As such, the ordinance was impermissibly vague."

Clearly, Clear Channel v. St. Paul is an important decision. The trial judge was thorough and analyzed what was clearly a careful presentation by Clear Channel's counsel of the actual facts that lay behind the facade of the inspection fee. And having found the fee invalid, the Court entered an order requiring St. Paul to refund approximately $136,000 in permit fees it had collected from the plaintiff. A petition for plaintiff's attorney's fees is being prepared.

"Exactions and the Industry lawsuit against new inspection fees in Los Angeles."

(From the November 2002 Legal Report)

1. Exactions and State Compensation Laws.

St. Mary's County, (MD) has a problem. As we reported earlier, in January, the Maryland Court of Special Appeals issued a comprehensive decision holding that the Maryland outdoor advertising compensation law prohibited localities from compelling the removal of billboards without payment of monetary compensation. The Maryland statute clearly states: "A county or municipality shall pay the fair market value of an outdoor advertising sign, removed or required to be removed by the county or municipality..."

Undeterred, St. Mary's County proceeded to enact a seven-year amortization law. Furthermore, the county included a provision designed to pressure lessors into terminating existing billboard leases even before the amortization period expires.

> *"No site plan or subdivision plat may be finally approved unless all nonconforming signs on the property are brought into full compliance with this Ordinance or, in the case of an off-premise sign that is on property pursuant to a lease with a third party, the applicant executes an enforceable agreement with the County to remove the sign within 30 days of the end of the current lease term."*

How can we attack these types of exactions where government acts indirectly to force the uncompensated removal of property? The immediate tendency is to look first to First and-or Fifth Amendment arguments for relief. But in many states like Maryland, state compensation laws and statutes that create vested rights for nonconforming uses may provide a more concrete platform for challenging certain types of exactions.

Focus on the language of the Maryland compensation law quoted above. A locality must pay monetary compensation for an outdoor advertising sign "…removed, ***or required*** to be removed…" by that locality. And measure St. Mary's amortization/exaction clause against the decision of the Maryland Court of Special Appeals that localities have "…no authority to ban pre-existing lawfully erected billboards without paying the fair market value of the billboards…" If amortization is invalid under Maryland Law, then the St. Mary's County development clause certainly also is a "removal requirement" under the Maryland statute since, as a practical matter, this provision could be applied to force the removal of off-premise signs even before the amortization period expires.

The Maryland statute is not an isolated example. The California compensation law is written even more expansively: "…no advertising display…shall be compelled to be removed, nor shall its customary maintenance or use be limited." The Alabama compensation law provides: "…no removing authority shall remove or cause to be removed, or, cause alteration in any manner …" Illinois states: "The right to just compensation applies to… [any sign] that is compelled to be altered or removed…under any ordinance or regulation of…any unit of local government…" Louisiana: "…should the state or any of its political subdivisions expropriate any off-premise advertising signs…"

Confronted with an exaction, it is important that we're not so smitten with the Fifth Amendment that we ignore the basics of state law.

2. L.A. Inspection Fees

Last month, we reported on litigation initiated by the industry challenging a Los Angeles ordinance that imposed a $314 inspection fee on off-site signs within that city. On October 30, the U.S District Court for the Middle District of California issued a preliminary injunction restraining Los Angeles from enforcing its ordinance pending full adjudication of the case.

The District Court decision closely parallels the industry's First Amendment arguments outlined in the *OAAA October Report*. The Court based its decision on the well-established principle that the potential loss of First Amendment rights, even for a minimal period of time while the validity of a restraint is being adjudicated, is sufficient to support a finding of potential irreparable injury, thus satisfying the first test for issuance of a preliminary injunction.

Applying Metromedia v. San Diego, the Court then surveyed the ways in which the Los Angeles ordinance potentially violates the First Amendment by favoring commercial over non-commercial speech, and by favoring certain categories of noncommercial speech over other noncommercial categories. The Court also cited the likelihood that the city's inspection fee program burdens commercial speech and that the city will not be able to demonstrate that its regulation directly advances its goals since the inspection program does not touch the vastly larger number of on-premise signs that do not comply with local regulations. Finally, the Court found that the ordinance may have been drafted so vaguely that it is not possible to determine which signs are actually subject to the city's restrictions. For now, Los Angeles' new inspection program is dead in the water; the City has filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

"Inspection without Introspection"

(From the October 2002 Legal Report)

It is not very difficult to determine whether a billboard is lawfully constructed. Billboards are not innocuous structures and it is unlikely that anyone has yet discovered how to hide the construction of an unauthorized bulletin or poster panel from detection by code officials. In most jurisdictions each structure or sign face must display a specific permit number. In any event, all a code enforcement officer needs to do is to check the permit files to determine whether a particular sign is authorized at a specific location. It's not exactly detective work, but this apparently does pose a challenge for some.

On September 13, 2002 the City of Los Angeles enacted a new ordinance that requires the "person in control" of an off-site sign annually to provide redundant permit documentation to the authorities for each of their structures. But the law goes much further. It calls for an annual inspection of all off-premise signs and imposes an annual "Off-Site Sign Fee" of $314 on each "off-site" sign structure within the City, creating an annual bill to the industry of more than $3 million in new fees. The justification for this law was an allegation that a large number of billboards in LA do not comply with the City's sign regulations.

Three million plus dollars may seem to some persons just a bit high to cover repetitive annual inspections of the same sign structures year after year - particularly when the vast majority of those signs have been in existence for five, ten, fifteen or more years. It therefore would not come as a surprise that LA's new annual inspection fee program is the culmination of a search by LA for additional ways to burden off-site signs in the City. Confronted with press reports and staff allegations that LA is rife with illegal billboards, the City Council reflexively concluded that it certainly must be confronted with a billboard emergency and that the only remedy was to impose an additional $3 million of annual fees and annual inspections on top of a certification filed by the sign owners themselves.

In general, it is lawful for state and local governments to establish permit fees to offset reasonable regulatory expenses. Likewise, the Supreme Court has held that the imposition of a fee or tax that singles out a particular medium of communication does not automatically run afoul of the First Amendment. But when government imposes a fee that is out of all proportion and is not based on a bona fide regulatory rationale - like a fee that assumes that it takes $314 a year of bureaucratic effort to inspect each sign that has been in existence for years - the Courts have held that such fees exceed the boundaries of reasonableness and in effect become an unauthorized and invalid tax unrelated to a lawful regulatory purpose. And when a fee or tax on media is not content-neutral and rather, is a pretext for regulating speech - like the commercial and noncommercial messages disseminated on "off-site" signs - that tax or fee does run afoul of the First Amendment because it effectively suppresses the expression of particular classes of ideas or viewpoints. See <u>Leathers v. Medlock</u>, 499 U.S. 439 (1991).

On September 27, 2002, Clear Channel Outdoor and Viacom Outdoor Group filed suit in US District Court challenging the LA ordinance on such First Amendment grounds. At the heart of the case is the allegation that the LA inspection law is not a content-neutral regulation. That is because the LA fee is imposed solely on "Off-Site" signs. "On Site" signs are not assessed. As a result of this disparity, the LA inspection fee in effect favors on-site commercial speech, which is not subject to the fee, over off-site noncommercial speech. The LA measure also favors certain forms of non-commercial speech on signs that are not subject to the fee, over other types of non-commercial speech disseminated on outdoor. Finally, the complaint alleges that the inspection law is an invalid regulation of off-site commercial speech. In effect, the complaint alleges that LA's inspection fee has the same content-based impact on speech that the Supreme Court cited in <u>Metromedia v. San Diego</u>.

A second challenge to the inspection fee is being considered by Vista Media Group. Although that complaint has not yet been filed, it would in all likelihood include a challenge to the LA inspection fee on the basis that it is excessive and invalid since it bears no relationship to a reasonable regulatory purpose. Such a fee would violate California state law, which prohibits a locality from levying unjustifiable and unreasonable regulatory fees. The LA regulation would also violate California's famous "Proposition 13" which amended the state constitution to limit the ability of localities to impose additional taxes on property, except under certain narrowly defined circumstances.

The industry's position in both of these suits will be helped considerably by the testimony that an LA building code official provided in a deposition in the federal action. First, this official testified that the report submitted to the LA City Council that formed the rationale for enactment of the inspection fee program in fact was erroneous in its conclusion that 40% of the off-site signs in the City were not in compliance with the law. Rather, this official testified that the "study" actually examined only 51 signs to determine whether those signs had permits according to City records. The official conceded that the study actually showed that all 51 signs in fact did have permits. The official testified that the 40% noncompliance figure that motivated the Council to act in fact was only an "estimate" based on his department's unsubstantiated "experience." Second, this official testified that he estimated that on-site signs actually have a far higher rate of non-compliance-concluding that at least 60% are not lawful. And finally, this official testified that the City Council, which touted its enactment of the inspection fee as necessary to counter the illegal construction of off-site signs, did not have any survey or other empirical data regarding off-site sign compliance before it supporting that conclusion when it voted to enact the Off-Site Inspection Program.

No wonder that it takes $314 per year in bureaucratic effort to inspect a billboard in LA. It is probably a very taxing job.

(Note: Materials and case law regarding outdoor advertising fees can be found in the Volume V, Section III of the OAAA Legal Seminar Materials. The full nine-volume set of OAAA Legal Seminar materials can be ordered from the OAAA.)

It's Never Over

(After settlement of a complex dispute in Philadelphia over regulation of billboards, the local "scenic" group challenged the settlement in federal court. OAAA Legal Counsel Eric Rubin examines the matter of legal "standing," and the on-going nature of these battles.)

> "None of the plaintiffs has alleged any injury in fact which might support an argument that they have standing in this case. . . It should also be noted that, even if any of the plaintiffs could properly be accorded standing, no federal claims of any sort can be discerned from their complaint." Memorandum and Order, Goode et al. v. City of Philadelphia and Romulo L. Diaz, in his official capacity as City Solicitor, No. 07-CV-000901JF (USDC EDPa, June 20, 2007)

These are very sweet or very bitter words, depending on the side of this case that you were on. In this instance, they were bitter words for the Society Created to Reduce Urban Blight ("SCRUB") -- Scenic America's Philadelphia affiliate -- and a group of recruited co-plaintiffs including five City Council members and several community groups. The SCRUB plaintiffs had filed suit in federal court last February, seeking an Order invalidating a comprehensive Settlement Agreement that the City of Philadelphia had negotiated with Clear Channel, CBS Outdoor, and Steen Industries.

In June 2005, Philadelphia enacted a broad menu of new fees and taxes that included a whopping increase in billboard permit fees to $650 per sign face, and a new 7 percent billboard sales tax. These increases had been proposed by the mayor during a political dispute with the city council concerning the city's budget. That dispute also provided SCRUB and other anti-billboard elements in the city with a lobbying opportunity, and so at the same time, the city council enacted a few choice regulatory catch-22s that made it almost impossible to secure permit renewals for lawfully erected nonconforming billboards or to perform even routine maintenance on most structures.

In response, Clear Channel, CBS Outdoor and Steen, together with advertisers Sweet Lucy's restaurant and Heritage for the Blind Inc., formed Free Speech LLC, a not-for-profit corporation. In November 2005, Free Speech LLC filed suit in federal court challenging the constitutionality of the city's permit fees. In its Complaint, Free

Speech alleged that the newly adopted annual permit fees far exceeded the actual cost of administration and thus posed an unconstitutional tax on protected speech. The Complaint also included several separate allegations that challenged the fee requirement and several other substantive code provisions on the basis that they operated as a content-based regulation that favored commercial over noncommercial speech. A separate case was filed in state court challenging the validity of the billboard sales tax.

Billboard issues had been simmering in Philadelphia for several years. The outdoor industry had been the focus of unfavorable articles in the local press. The articles were basically a replay of the SCRUB "party line" which claimed that there were hundreds of illegal billboards in the city and that the industry was continuing to build more illegal signs. The SCRUB website listed the locations of many allegedly illegal signs. However, 90 percent of these were former 3-M junior panels that had long been in contention. Virtually all of the other contested signs were standard poster and bulletin locations that had been in existence for decades.

How did SCRUB know these standard signs were illegal? The group enlisted students to conduct a survey of the city's notoriously sketchy permit records. In fact, the city's website actually included a disclaimer that its property records were not reliable. Nonetheless, the survey concluded that any sign was illegal when a full record could not be found in the city's files. The city's insular sign bureaucracy, ever anxious to demonstrate that it wasn't a career-ending regulatory backwater, also had begun issuing violation Notices for many of the same decades-old locations identified in the SCRUB website.

But on August 9, 2006, City Solicitor Romulo Diaz announced that his office had entered into a Settlement Agreement resolving the Free Speech litigation. The Settlement Agreement was not formally filed with the Court. However, Free Speech moved to have the suit dismissed and that order was entered by the District Court.

The 43-page Settlement Agreement provided that each company would compile a complete inventory of its signs. A specific permit number was required for all signs constructed after 1991. However, "pre-1991" signs could be substantiated either through permit records, to the extent that they still existed, or by information that established the year that a billboard was first constructed at the location, and that the location was within a zone where off-premise signs were a permitted use at the time they were originally developed. Each company was required to certify the accuracy of its inventory. All signs listed on an inventory were deemed to be presumptively lawful and the City was required to issue a permit for each inventoried location. Any signs that were not listed on the inventory would be presumed unlawful and were required to be removed. In the Settlement Agreement, Clear Channel individually guaranteed that it would make arrangements with the owner of junior panels for the removal of these signs. Recognizing the city's history of ambiguous and inconsistent application of its regulatory standards, the Agreement also established certain allowances for the height or size of an existing sign. The Settlement Agreement established a schedule for the progressive reduction of annual permit fees to $50 per face. Finally, the Agreement created an expedited process for arbitration of billboard disputes that circumvented protracted hearings before the Board of Zoning Appeals and the courts.

In the months following the Solicitor's announcement, all of the junior panels were removed. Steen, CBS Outdoor, and Clear Channel filed inventories, and the city issued permits for every outdoor advertising sign listed by the companies.

SCRUB smoldered. The billboard war that SCRUB had worked so hard to inflame had been doused. Then on February 26, 2007, nine months after the Settlement Agreement was announced, SCRUB and its co-plaintiffs filed suit in United States District Court challenging the validity of the Settlement Agreement.

In essence, the SCRUB Complaint alleged that the City Solicitor had exceeded his authority by entering into a Settlement Agreement that, in the plaintiff's view, "modified and even overroad" specific provisions of the Philadelphia Code. The interesting thing was that SCRUB had filed its case in federal court claiming that the City Solicitor had violated the Civil Rights Act. The theory of the Complaint was that by engaging in acts that exceeded his authority, the Solicitor had violated the Plaintiff's Fourteenth Amendment rights to due process. The Complaint alleged that the Solicitor had violated the five plaintiff/council members' due process rights by "usurping" their authority to exercise the legislative powers granted to them under the City Charter. SCRUB and the neighborhood association plaintiffs alleged that because they were activists on the billboard issue, the Solicitor's actions had deprived them of their First Amendment and due process rights to petition the city council, and their "right of access to the courts." The SCRUB Complaint also included pendant state law claims that the Settlement Agreement constituted unlawful "contract zoning," and that the Solicitor had violated the Pennsylvania "Sunshine Law" by negotiating in private with the billboard companies, without inviting SCRUB or other interested members of the public to observe, and even participate in the settlement negotiations. Why did SCRUB file such a jury-rigged complaint? The Civil Rights Act provides for attorneys fees in the event that SCRUB's pro-bono lawyers could win the case.

The SCRUB suit crystallized how alignments had changed in a relatively short period of time. Now, the city was defending its actions and, in essence, the industry's position as well. Although the industry's interests were directly in play, the outdoor companies did not seek to intervene in the litigation. It was SCRUB against the Solicitor.

The Solicitor immediately filed a Motion to Dismiss the SCRUB suit. In his brief, the Solicitor cited specific provisions of the City Charter that vest all legal "power and duty" in his office to "supervise, direct and control" the legal representation of the City. The Solicitor further argued that SCRUB and its co-plaintiffs lacked standing even to bring their case because they had not actually sustained direct injury. Rather, as citizens, they were simply expressing their generalized dissatisfaction with the Solicitor's decisions to settle a lawsuit.

Senior US District Court Judge John Fullam is known not to mince his words. In his Memorandum and Order, he banged SCRUB and its co-plaintiffs on their heads with the findings quoted at the beginning of this *Legal Report*. Actually, those may be the kindest words in Judge Fullam's Order. Reviewing each of SCRUB's separate allegations, he also held:

> "Their complaint asserts the following: Count I - "Usurption of Legislative Powers'; Count II - 'Deprivation of Access to the Courts'; Count III - 'Depravation of Right to Petition the Legislature'; Count IV - 'Violation of Pennsylvania Sunshine Law'; Count V - 'Contract Zoning.' These assertions simply do not make sense."

It is always great to see a dissembler like SCRUB get its due. But organizations like SCRUB and Scenic America do not simply fade away. SCRUB got creamed in this case. But typically one battle does not end the war. SCRUB recently issued this press release:

> "SCRUB is Making a Difference! Scenic America has just released an inspiring visual essay about the growing crises in America's urban areas. The photographs made us realize how lucky we are here in Philadelphia. We have strong laws protecting the public space, dedicated pro bono attorneys willing to represent community groups, neighborhood citizens passionate about protecting our city's visual assets and judges whose decisions have upheld laws protecting the visual environment.
>
> … See what is happening in other parts of the country and celebrate the fact that your support has helped to prevent or remove more than 450,000 square feet of outdoor advertising in Philadelphia.
>
> … SCRUB's work depends on the generosity of our supporters Donate Online."

On July 18, SCRUB et al filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.

Prepared by Eric Rubin (Rubin, Winston, Diercks, and Harris & Cooke) for the OAAA on July 24, 2007.