Village of Empire Deputy Clerk

From: Terry Bacon <trbacon48@gmail.com>
Sent: Monday, August 5, 2024 7:37 PM
To: Derith smith; Acton Alacia
Subject: flags, banners, signs erected or required by government and a previously removed limitation on regulated signs
Attachments: Suggested changes to PC draft re Flags.pdf; Untitled attachment 00005.htm

Please forward to the Village Council and Planning Commission.

I do not request that this be read at a meeting of either the Village Council or the Planning Commission. A statement that it is available at the village office and is included as a handout to a VC meeting (or subsequent PC meeting on signs, if one occurs) is sufficient. If someone wants to try to summarize, I have no objection.

Introduction

The Planning Commission did much to improve the Village Sign Ordinance (in addition to merely re-integrating it to the Village Zoning Ordinance). For sure, the PC's original proposal included many ambiguities, redundancies, inconsistencies and inaccurate attempts to articulate what was actually intended, BUT those were (mostly) particulars that would not cause significant harm, as long as the Village did not undertake a new approach of vigorous and strict enforcement of the Ordinance. That is, if enforcement focused on conduct that causes real harm, problems remaining with the proposed ordinance could be corrected in due course.

I have not seen the wording the Planning Commission revised for submittal to the Council (because the Council's e-packet is not yet posted; as is also true for the PC's minutes from its special meeting). Nevertheless, I believe my comments address the changes made (or not made) by the PC. I apologize if my understanding is incorrect.

Flags

Unfortunately, in considering the PC's proposal, the Council focused on one of the inconsistencies—involving "flags"--and asked the PC to address that. The PC had attempted to clarify that "flags" are not to be treated as "signs" subject to the Ordinance (by expressly providing that the meaning of "Sign" did not include flags). Several Council members accurately noted that such a revised definition appeared to be inconsistent with a defined term "Flag Sign" as well as "Temporary Sign" (which recognized that a flag could be a temporary sign). The inconsistency caused no ACTUAL problem (because, if a flag is not a sign, it wouldn't matter if it were temporary or not; a flag would not be regulated because it is not a sign).

When asked to address/correct the flag issue, however, the PC abandoned the good work it had done in excluding flags from the definition of "sign." Why? Because the PC concluded that some flags SHOULD be regulated. But rather than do the work to properly address that particular kind of flag, the PC placed all flags back within the definition of "sign."

It is understandable that the PC wants to regulate certain kinds of flags: e.g., tall, thin flags attached to flexible poles, with the displays fluttering in the wind and associated with promoting car dealerships or temporary sales at other commercial businesses. I've referred to the effort to regulate those as a legitimate attempt to reduce a "honky-tonk" appearance that can result from the (over) use of such flags. But the PC's "throw the baby out with the bath water" approach should be rejected as wholly unnecessary.

Adopting the PC's approach results in no one in residential districts being able to display ANY of the usual sized flags that are commonly sold and displayed (whether it be the National flag, a university flag, a Detroit Lions flag or any other content). The GR, VR, and MR districts (and residential uses in a PUD) allow only signs that do not need a permit. Common flags have a display area that exceeds that allowed for a limited number of signs that do not need a permit (the allowed size being 6 sq ft, while common flags are either 15 sq ft (3 ft x 5 ft) or a slightly smaller 8.2 sq ft (28" x 40"), with there also being very large flags displayed on high poles on large property parcels). NONE of these flags could be displayed in any residential district. Is that really what the Council wants to tell its residents?

The solution is not hard and, despite the PC failing to make an effort to meet its legitimate goal without imposing unreasonable regulation, the Council can and should adopt a reasonable solution. Attached is a pdf containing sample provisions that can be adopted to enact the policy intended by the PC's originally proposed definition of "Sign," but retaining regulation of the particular type of flag (a "Feather Flag") associated with the honky-tonk appearance. If adopted, such a "Feather Flag" would remain a sign within the scope of the Ordinance. Displaying such a sign would require a permit (thus, not allowed in residential districts). Such a sign would be treated in subsection 9's table of sign types/restrictions along with restrictions on Banners—with a size restriction and a limitation as to how long such can be displayed (from 2 weeks before an event to 3 days after the event). I also suggest that wording, similar to that used for a freestanding sign (i.e., only allowed in the Gateway Corridor or Front St District and only 1 per 100 foot lot in those districts), because I assume that the Council would want those limits on Feather Flags (and Banners).

To reiterate, without some exception for flags, flags fall within the express definition of a sign (the pole or staff, attached to ground or a building meeting the requirement of a "structure"). Yet, no one could reasonably think that residents should be barred from displaying flags (including a national, state or municipal flag or the many other flags that currently are commonly displayed in the Village). As revised, the PC's proposal would prohibit all of them in residential districts.

Invalid definition of "Banner"

In the current sign ordinance and the proposal by the PC, the definition of "Banner" (or Banner Sign as the PC revision may term it) is constitutionally deficient in that it excludes regulation of some banners based on their content ("excepting national, state, or municipal flags"). Inexplicably, the village attorney, who reviewed the existing ordinance back in 2019 and the PC's 2024 proposal, never commented on this.. Because of the invalid definition, it is possible that any purported regulation of banners would fail. (The only provision expressly supplying a regulation of Banners is in the table in subsection 9—setting out a size limitation and the period of display for permitted banners. Anyone intending to display a banner that did not meet the intended restrictions may be able to successfully prevail against those restrictions, because the restrictions are necessarily content-based (because of the definition).)

The remedy is to eliminate the concluding clause ("excepting national, state, or municipal flags") in the definition of "Banner." (Note that, in the PC's original proposal, the issue of this invalid definition of Banner was only a theoretical problem, because ALL flags were not treated as signs. As a result, excepting national, state or municipal flags from regulation as banners did not have any content-based effect. But, once the PC put all flags back into the definition of "sign," the content-based definition of banner, once again, had an unconstitutional effect.)

Signs erected, approved, or required by government agencies

As mentioned above, there are many other aspects of the proposed ordinance that are problematic, but the benefit of adopting the proposed ordinance outweighs delaying adoption until/unless every little aspect is corrected. One, however, is significant enough to be corrected, and it has a simple correction.

Street address numbers literally fall within the ordinance's definition of "Sign" (either as a wall sign or freestanding). I do not think that the PC (or this Council) intends that a required street address number should constitute one of the four signs allowed in any district, without a permit (i.e., the intention is that there can be four small signs, not just three such signs, in addition to address numbers).

There are several ways to handle these signs, which are required by County Ordinance and Michigan's Building Code. One way would be to expressly declare these are not "Signs" (making that definition even more complicated). An alternative (and I suggest it is a better approach) would be to modify the proposed subsection 5(b) (which is one of the listed types signs that may be displayed without a permit in any district) as follows:

> "Signs erected, approved (other than by a sign permit issued under this ordinance) or required by government agencies."

Deleting the existing modifier ("when necessary to give proper direction or to safeguard the public") is appropriate because no one should really want the Village Zoning Administrator to be judging whether a sign erected, approved or required by a government agency is necessary. An advantage of this approach would be that it is more comprehensive, not being limited to street address numbers. For example, this category of signs not needing a permit also would cover a required display of building permits (that otherwise meet the definition of a sign).

The origin of this category of signs not needing a permit began in 2011, in Ord. #130, and included "street name signs, route markers and other traffic control signs erected or approved by state, county or village agencies when necessary to give proper direction or to otherwise safeguard the public." In 2015, Ord. #142 added "wayfinding" signs but otherwise kept the same language. The 2019 amendment to Ord. #142 deleted listing the particular types of signs, keeping the wording about "necessary to give proper directions or to safeguard the public."

This could be simplified to "erected or required" (eliminating "approved"), unless someone can identify what signs are "approved" by a government agency that deserve being a type that can be displayed without a village permit. I cannot think of any, but someone may be able to do so. My intent is not to delete a category that actually makes sense, so I have, tentatively, kept in signs approved by a government agency.

A separate issue with the definition of Sign

In 2019, at what was, figuratively, the last moment, the Village Attorney recommended deleting a part of the previous definition of "Sign"—a concept that had been included as a scope of what was being regulated in every version of the sign ordinance since at least June, 2001 (and, perhaps, even earlier, but the Village does not currently have earlier versions). The ONLY basis stated by attorney Tim Figura was that the language might "add" a burden on enforcement. But attorney Figura did NOT explain the vast expansion that his proposed change would make to the scope of what the Village regulates. His suggestion arose in October 2019, months after the attorney (and County planners) had reviewed the ordinance without suggesting that the language be deleted. In September 2019, the VC requested that Figura comment on concerns about two particular categories of signs (e.g. political signs) allowed without a permit but were regulated, and he provided his comments on those (and the VC later acted on them). The now missing language?

> "*on behalf of or for the benefit of any product, place[,] activity, individual, firm, corporation, institution, profession, association, business or organization.*"
> (The wording had minor changes over the years, but the thrust was the same:
>
> 2004-2019: the above language was in either the ZO provisions for signs or an independent ordinance, until October 2019, although, in 2004. the wording was "on behalf of and for the benefit of ... ."
>
> 2001: "and directs attention to an object, product, place, activity, person, institution, organization, or business" (Ordinance #74)

Note that attorney Figura did NOT base his suggestion on a concern that this language was an improper content-based regulation, because it is not. The wording is based on purpose, not content. Figura's early October 2019 communication did address some other content-based aspects of the then proposed amendment, but his suggestion on the definition of sign was placed under a heading of "Other Concerns." One such concern dealt with "grandfathering" and the other one was the definition. His entire comment with respect to removing this part of the definition of "sign" was:

> *"When enforcing the ordinance, the Village will need to determine whether the definition of 'sign' is met. This language would add an unnecessary burden to the Village's enforcement of the ordinance.*"

Minutes of the PC meeting on October 7, 2019 state that the PC discussed the proposed changes, but there is no indication that there was any discussion of the effect of Figura's suggestion, which dramatically expanded what signs are regulated. Similarly, the minutes of the Council meeting that adopted the amended Ord. #142 indicates no discussion of the expanded definition.

Thus, for example, "art," for the first time, became a regulated sign. Placing a poster of a Monet painting in a window became a regulated sign. A display declaring "Peace on Earth; Goodwill to Men;" "Preserve the Second Amendment;" "Protect Life;" or a window display of holiday lights spelling out "Happy Holidays," "Happy New Year," or anything similar became, for the first time, signs regulated by the Village. A display, in a garden, of a drawing of a butterfly became a regulated sign. A window poster depicting the Empire Beach, Empire Bluff or the Sleeping Bear Dune became a sign. All without any explanation from attorney Figura as to why such should be regulated by the Village. (In July 2019 minutes, then Planning Commissioner Clements is recorded as having asked "about the difference between art and a sign as it relates to commercial properties," but the minutes do not reveal what

answer was provided. The PC, however, sent to the VC, in August 2019, its amended Ord. #142 that included the full definition of Sign as it had existed since 2004—and, in concept, since 2001. There is no reporting of any explanation of the impact of Figura's later recommendation on this earlier discussion of "art.")

Reversal of this vast expansion of municipal over-regulation should not be contentious. If, however, reinserting this language is considered to be contentious, then do not delay adoption of the revised ordinance in order to fully explore why reinsertion of the modifier is or is not appropriate—assuming that the Village is not about to embark on vigorous strict enforcement of the sign regulations where a display is causing no significant harm. But, if there is general acceptance that art and non-promotional displays are not intended to be regulated, and, considering that, for almost 20 years, there was no indication that the language had, in fact, imposed a burden on enforcement, the language can be and should be easily reinserted.

Terry Bacon
Wilce Street, Empire

Suggested Changes re Flags

A. Define "Banner," (or "Banner Sign") essentially as found in the current ordinance, but eliminate the unconstitutional exception for national, state or county flags and add (based on the existing table of signs requiring a permit) that a banner is associated with a temporary event. That appears to be the ONLY instance for issuing a permit for a Banner.

> **Banner:** A sign printed or displayed upon cloth or other flexible material *and associated with a temporary event.*

B. Define "Flag" (not "Flag Sign")

> **Flag:** Cloth or bunting that is *either* attached to a staff or pole *or of a nature that is usually attached to a staff or pole.*

C. Define a "Feather Flag"

> **Feather Flag:** A flag characterized by its tall, slender design that resembles a feather. A Feather Flag is designed to move with the wind, usually attracting attention from passerby with its motion and graphics. Typically, a Feather Flag is from 5 to 15 ft. tall, attached to a flexible pole (from 6 to 20 ft tall) and is considerably narrower than its height. The following is an illustration of a Feather Flag.

Suggested Changes re Flags

D. Redefine Temporary Sign

> **Temporary Sign**: A sign, *including a Banner or Feather Flag*, intended for a limited period of display and without a permanent foundation.

E. Define "Sign" as originally recently proposed by the Planning Commission, but, after the word "flag," add "(except a Feather Flag, which is a sign allowed only with a permit, as provided in subsection 9)." The full definition would be:

> **Sign** A structure, including its base, foundation and erection supports upon which is displayed any words, letters, figures, emblems, symbols, designs, or trademarks by which any message or image is afforded public visibility from out of doors. The following are not signs: Flags (except a Feather Flag, which is a sign allowed only with a permit, as provided in subsection 9), architectural features; tombstones; and other memorial markers.

F. Finally, in the table in subsection 9, the first column for the current row for Banner Sign will read: "Banner/Feather Flag;" the Max Sign Surface area will be 24 sq ft for a Banner, 16 sq ft for a Feather Flag. The additional requirements column will provide that these are only allowed in the Gateway Corrido, as temporary signs, which may be erected 2 weeks before an event and must be removed within 3 days following the event. The final column could also include a limitation similar to that imposed for freestanding signs: not exceeding 1 such sign per 100 ft lot in the Gateway Corridor or Front Street District and a maximum height is 8 ft. Thus:

Banner/Feather Flag	24 sq ft for a Banner 16 sq ft for a Feather Flag	Only allowed in the Gateway Corridor or Front St district and as a temporary sign, erected two (2) weeks before an event and removed within three (3) days following the event. The number shall not exceed one (1) Banner/Feather Flag per 100 ft lot.