
Coates' Canons Blog: Can We Prohibit Offensive Signs?

By David Owens

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Malcolm Tucker runs a small nightclub. He recently put up a billboard advertising his business on the main road leading into town. The billboard is garish to say the least. It is bright orange and uses suggestive language and photos to advertise the entertainment offered at his club — drinking, dancing, and video sweepstakes games. A number of citizens raised objections to the sign at the public comment period at the last meeting of the town council. Many contended this sign was tasteless, offensive, tawdry, and just plain ugly. Others felt it sent an inappropriate message to children. Still others noted that the sign harmed the community's image and would impair future economic development efforts. All urged the board to amend the sign ordinance to prohibit this type of offensive commercial advertisement. Can the town do that?

The town can certainly regulate signs. But there are limits on the authority of the town to regulate the content of signs. The U.S. Supreme Court has held that advertisements have some protection as free speech under the First Amendment. In order to determine whether the town can limit offensive commercial signs, the town attorney is going to have to dig into a considerable body of constitutional law.

An initial principle that must be considered is that for the most part sign regulations need to be “content neutral.” If the regulation is not content neutral, a compelling governmental interest is needed to justify the sign restriction, a standard most typical sign restrictions cannot meet. In *Discovery Network, Inc. v. City of Cincinnati*, 507 U.S. 410 (1993), the Supreme Court invalidated a regulation that distinguished among the types of papers inside of regulated news racks. In *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), the Court invalidated as impermissible content-based discrimination a regulation prohibiting electric bill inserts promoting nuclear power while allowing other inserts. On the other hand, reasonable “time, place, and manner” restrictions (such as where the sign can be located, size limits, and the like) are permissible if applied without regard to the actual wording or message on the sign.

The courts do allow some distinctions while still considering the regulation content neutral for First Amendment purposes. It is permissible, for example, to distinguish between commercial and noncommercial signs and between on-premise and off-premise outdoor advertisements. But here the town is interested in restricting the content of Tucker's commercial sign, so those distinctions do not apply.

In addition to consideration of content neutrality, the town must address the general standard for regulation of commercial speech as set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1987) (invalidating a total ban of promotional advertising by electric utilities). *Central Hudson* established the following four-part test for assessing restrictions on commercial speech:

1. To be protected, the speech must concern lawful activity and not be misleading.
2. The asserted governmental interest in the restriction must be substantial.
3. The regulation must directly advance the governmental interest.
4. The regulation must be no more extensive than necessary.

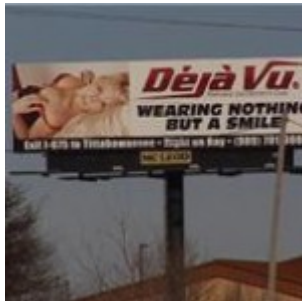
On the first test, all of the activity advertised on Tucker's new sign are legal, so that could not be the basis for prohibiting it. If he used obscene language or photos, that could be prohibited. But the fact that an advertisement is offensive to many does not remove its First Amendment protection.

On the second test, the town does have a substantial government interest that would support some degree of regulation. The government interest most often cited to support sign regulations is protection of community aesthetic values and promoting traffic safety. In the leading case on billboard regulations, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the Supreme Court held that there are substantial state interests in traffic safety and aesthetics and that sign regulations are a legitimate means of serving those objectives. Also, the courts have held that aesthetics alone may serve

as a sufficient justification for sign regulation. See, for example, *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991).

The third and fourth tests, however, pose some problems the town will have to address if it want to limit signs like Mr. Tucker's. The town must address whether the limits would directly advance the government's legitimate interests and be no more extensive than necessary.

An example of the need for this careful analysis is provided by *Sandhills Ass'n of Realtors v. Village of Pinehurst*, a recent federal district court case (No. 1:98CV00303, 1999 WL 1129624, M.D.N.C. Nov. 8, 1999). The village adopted regulations on temporary signs that had differing size and content rules depending on the type of sign. The rules limited the size of real estate signs, limited the colors that could be used, limited the duration the sign could be displayed, and limited the content that could be included on the sign. The court held this to be a content based restriction that failed both as a reasonable time, place, and manner restriction and as commercial speech regulation under *Central Hudson*. The court noted that while aesthetic concerns were a substantial governmental interest, they were not a compelling interest and the regulation was not narrowly tailored. The fact that different rules were applied to different types of temporary signs was also a significant issue. The court pointed out that aesthetic concerns could potentially justify uniform regulations, but singling out particular commercial messages for more restrictive regulation is a content-based regulation that casts doubt on the alleged governmental interest supporting the regulation.



Michigan recently adopted legislation limiting signs for adult businesses to display words and numbers only, no photos allowed.

One approach local governments have taken is to argue that the content can be considered in order to prevent adverse secondary impacts, much as is the case with regulation restricting the location of adult entertainment. For example, in *Excalibur Group, Inc. v. City of Minneapolis*, 116 F.3d 1216 (8th Cir. 1997), the court upheld limitations on the signs that could be displayed by an adult establishment. The ordinance prohibited signs displaying pictures of products or entertainment offered in the establishment. In *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982), the court held the city could prohibit display of provocative, lurid, sexually explicit posters by an adult theater. The courts allowed these sign restrictions as a narrowly tailored means of reducing adverse secondary impacts of the adult businesses.

But while Tucker's sign advertises adult products, it does not deal with sexually explicit forms of protected speech and the secondary impacts argument is rarely successful outside of the adult entertainment area. The facts that Tucker's sign deals with alcohol and gambling thus provide only modest support for regulation. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down restrictions on advertising retail prices of alcoholic beverages), the Court held that the authority to regulate alcohol does not reduce the protections afforded by the First Amendment. Limitations on advertisements of legal gaming were similarly invalidated by the Court in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999) (invalidating restrictions on broadcast advertisements for lawful casino gambling). Some limitation short of a total prohibition of advertisements of legal gambling may be permissible. See, for example, *WV Assoc. of Club Owners and Fraternal Services, Inc. v. Musgrave*, 553 F.3d 292 (4th Cir. 2009), upholding some advertising restrictions for legalized video gaming machines. But such a restriction must be carefully tailored and the rationale for the restriction well documented.



This need for careful tailoring is illustrated by the judicial review of limits on tobacco advertisements. Application of the *Central Hudson* requirements that restrictions on commercial speech be no more extensive than necessary led the Supreme Court to invalidate Massachusetts restrictions on tobacco advertisements in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The Court invalidated a prohibition of billboards advertising smokeless tobacco and cigars within 1,000 feet of schools and playgrounds. The Court found that while preventing underage tobacco use was a substantial government interest and restrictions on targeted advertisements were substantially related to that interest, the regulation was not sufficiently tailored. The government must carefully calculate the costs and benefits associated with the burden on free speech, and the Court found that the state had not done a sufficient calculation of those factors in this case.

When the speech is indiscriminately available to minors, as is the case with most signs, some restrictions are permissible. Restrictions on outdoor advertisements carefully targeted at protection of minors have been upheld. The Fourth Circuit has been particularly receptive to these considerations. In *Anheuser-Busch, Inc. v. Schmoke I*, 63 F.3d 1305 (4th Cir. 1995) and *Anheuser-Busch, Inc. v. Schmoke II*, 101 F.3d 325 (4th Cir. 1996), the court upheld a Baltimore ordinance prohibiting alcohol advertising near schools as a reasonable time, place, and manner restriction that satisfied the four-part test of *Central Hudson*. This might provide some basis for the town to limit placement of a sign like Tucker's near a school or playground, but is unlikely to allow a broader limit.

So, where does this leave the town? The town can limit where commercial advertising signs are located. The town can limit the size and height of the sign. It can limit features such as changeable copy or flashing lights. It can prohibit obscenity. It may even impose limits on advertisement of adult products to minors if the limits are narrowly tailored and carefully supported by an analysis of the way the restriction will advance a substantial governmental interest. But the town cannot prohibit the content of the sign on the grounds that it is objectionable or tasteless. Any limit on the content of the commercial advertisement is going to need thorough study and detailed legal support.

Links

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