

EXAMINER'S ANALYSIS OF QUESTION NO. 2

The First Amendment of the United States Constitution applies to the states through the Fourteenth Amendment. It states the government "shall make no law...abridging the freedom of speech." US Const, Am I. The Michigan Constitution provides "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." Const 1963, art 1, § 5.

The type of speech involved in this case is commercial speech, because it involves the sales of goods or things. Commercial speech is protected by the US and Michigan Constitutions from "unwarranted governmental regulation." *Central Hudson Gas & Electric Corp v Public Serv Comm of New York*, 447 US 557, 561 (1980); *City of Rochester Hills v Schultz*, 459 Mich 486, 489 (1999).

Signs as expression of speech under the Free Speech Clause pose particular problems because they have a nonexpressive aspect. The signs take up space, obstruct views, distract drivers, displace alternate use of the property or land and pose problems that are the subject of legitimate regulation. See *City of Ladue v Gilleo*, 512 US 43, 48 (1994); *Schultz*, 459 Mich at 492.

The First Amendment and art I, § 5 both recognize that commercial speech has more limited protections than does expressive speech. *Board of Trustees of the State Univ of New York v Fox*, 492 US 469, 477 (1989) quoting *Ohralik v Ohio State Bar Assn*, 436 US 447, 456 (1978). This limited or reduced protection is based on the fact that commercial speech is different in nature than political or expressive speech.

There is a four-part test to determine if a regulation is constitutional. That inquiry looks at both the speech or expression and the governmental interest achieved by the regulation. *Schultz*, 459 Mich at 490-491; *Central Hudson*, 447 US at 566:

1. Does the speech concern a lawful activity (not misleading) within the protection of the First Amendment?
2. Is the government's restriction justified by a substantial government interest?

If these two questions are answered in the affirmative, then the next two questions are asked:

3. Does the regulation directly advance the asserted government interest?

4. Is the regulation more extensive than necessary to serve the government interest?

Applying the *Schultz* factors to the facts of Pamela's case shows under factor one, the signs are not unlawful nor misleading. They simply give hours of operation, the phone number and indicate the location. The signs, therefore, are within the protections of the First Amendment.

Under factor two, the government has a substantial interest in the character of residential neighborhoods. That character is maintained by only allowing minimal, nominal traffic and precluding signs to keep that neighborhood character. Because the first two questions are answered in the affirmative, the test goes on to the other two factors.

Under factor three, the regulation does advance a government interest insofar as the signs on the residential property can be seen as constituting an aesthetic harm. *Members of the City Council of Los Angeles v Taxpayers for Vincent*, 466 US 789, 808 (1984) quoting *Metromedia, Inc v San Diego*, 453 US 490, 510 (1981); *Schultz*, 459 Mich at 492.

A regulation will be allowed when the government is primarily concerned about the appearance of the sign, rather than the content or message of the sign. *Schultz*, 459 Mich at 492; *Metromedia*, 453 US at 510. The "substantive evil" or harm the ordinance is directed at is created by the medium of the expression, the visual blight of the sign itself. *Schultz*, 459 Mich at 492; *Vincent*, 466 US at 810.

In this case the city has not indicated it has any concerns over the content of the signs. The city has indicated it objects to the presence of the signs in the residential neighborhood and the fact there are two signs as well as the size of the signs. The ordinance seeks to preserve the integrity of the residential neighborhoods and prohibits signs that are commercial in nature and signs that conflict with the residential character of the neighborhood. The ordinance does not address the message contained on the sign. Pamela could still advertise her business, for instance, online, in the newspaper, flyers or by billboard where permitted. The ordinance does not regulate Pam's advertising in these mediums, only on her residential property by sign. The city regulation (ordinance) is content neutral. *Schultz*, 459 Mich at 494.

The city purpose in the ordinance may not be sustained if it is ineffective or provides only remote support for that purpose. 44 *Liquormart, Inc v Rhode Island*, 517 US 484, 505 (1996); *Schultz*, 459 Mich at 496. The city must demonstrate a nexus between its creating or keeping the character of the residential neighborhood and the sign ban.

Under factor four, the fit between the ban on commercial signs and the means to accomplish the goal of preserving the character of the neighborhood must be reasonable. It must be a means narrowly tailored to achieve the desired objective. *Fox*, 492 US at 480. The ordinance does not have to be the least restrictive means to achieve the government's interest, but it must be a reasonable fit. *Schultz*, 459 Mich at 497. The ban on signs that advertise a home business must be reasonable and a narrow way to preserve the residential character of the neighborhood. *Schultz*, 459 Mich at 497.

In Pamela's case, the city has a legitimate interest in preservation of the aesthetic value of the neighborhood as well as regulating the amount of traffic in the neighborhood. The city is not seeking to regulate the message or speech of the sign, but the look the sign presents to the neighborhood. That end is not an infringement on Pamela's speech in violation of the First Amendment or art I, § 5, but a legitimate regulation. Pamela will not prevail.