

**CITY OF CORAL GABLES**  
**OFFICE OF THE CITY ATTORNEY**

**-MEMORANDUM-**

**TO: CITY COMMISSION**

**DATE: November 24, 2008**

**FROM:**

  
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City Attorney

  
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Assistant City Attorney

**SUBJECT: Handbills Ordinance**

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Attached hereto is a copy of the proposed draft Ordinance on Handbills and Flyers for your review and approval. The purpose of the Ordinance is to enforce regulations concerning litter with commercial handbills which is increasing at an alarming rate causing a health, fire and safety hazard as well as becoming unsightly. To follow is an analysis of the law regulating handbills and flyers.

**INTRODUCTION**

Leaflets, handbills, flyers, and pamphlets are inexpensive ways to spread religious, political and commercial messages and are protected by the Free Speech Clause of the First Amendment. The constitutionality of bans upon this type of speech is reviewed by considering whether the ordinance is content-based or content-neutral.

Content based restrictions are subject to strict scrutiny and the regulation must serve a compelling government interest and employ the least restrictive means to achieve that interest. Content-neutral regulations are subject to a lesser, intermediate level of scrutiny. This means that any regulation must be substantially related to an important government purpose. Content-neutral ordinances are subject to time, place, and manner restrictions.

**THE CONSTITUTIONALITY TEST**

The test to determine the constitutionality of restrictions of this type of speech is set out in the case of *Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

This case involved a regulation of the Public Service Commission of New York completely banning Central Hudson from advertising to promote the use of electricity. The Court held that this restraint on commercial speech was in violation of the company's rights because it was more extensive than reasonably necessary. The Court stated that although the Constitution affords a lesser protection to commercial speech than other speech, the First Amendment nevertheless protects commercial speech from unwarranted governmental regulations.

In its consideration, the Court set out a four-part test to determine the constitutionality of restrictions on commercial speech. This test provides that the Court must find that:

- (1) the speech is not misleading and concerns lawful activity;
- (2) the asserted government interest is substantial;
- (3) the regulation advances the governmental interest; and
- (4) the regulation is narrowly drawn to advance the governmental interest.

Thus, government must demonstrate that a harm exists and that the restrictions the government advances will in fact alleviate the harm to a material degree.

#### **APPLICATION OF THE CENTRAL HUDSON TEST**

In *Sciarrino v. City of Key West*, 83 F.3d 364 (11<sup>th</sup> Cir. 1996), a City ordinance banned "off-premises canvassing" by barkers distributing handbills to pedestrians advertising a business. The ban of the canvassing was limited to specific areas of the City. The City's aim was to reduce litter, sidewalk congestion, and invasion of pedestrians' privacy. The ordinance was challenged by a Key West business owner on First Amendment grounds.

The district court reviewed the ban on off-premises canvassing under the *Central Hudson* four-part test as follows:

- (1) Is the speech misleading and/or does it concern unlawful activity? The Court answered this question in the negative thereby concluding that the speech was protected by the First Amendment.
- (2) Is the interest advanced by the City legitimate in theory and does the problem exist? The Court held that the City asserted valid goals and the record supported assurance that the problems were ones sought to be redressed, i.e. the prevention of harassment of pedestrians, reduction of pedestrian traffic, and reducing litter.
- (3) Does the evidence support the idea that the regulation will work, i.e. there must be concrete indications that the regulation will have the intended effect? The Court held the evidence was very clear that the ban in this instance advanced

the City's asserted interests in reducing pedestrian congestion and pedestrian harassment. Although the City did not clearly show a reduction in the litter problem, the Court ruled that the City need only show that the ban worked on some of the evils the City wished to correct.

- (4) Has the City demonstrated that its interest cannot be protected adequately by more limited regulations of commercial speech? The Court held the evidence showed there was an absence of less-burdensome alternatives to the restriction of commercial speech. The City was not required to employ the least restrictive means available.

Thus, the Court ruled that the City of Key West presented sufficient evidence that a problem existed, the ordinance advanced the City's goals, and it did not reach farther than necessary to achieve its goals.

### **CONCLUSION**

Municipalities have a legitimate interest in prohibiting certain forms of expression for aesthetic reasons. However, in order to limit or ban commercial speech of businesses promoting or advertising in handbills, flyers, pamphlets, or leaflets, a government must demonstrate that a harm exists and the restrictions it promotes will alleviate the harms to a material degree. When the City demonstrates the harm, it may regulate time, place, and manner involving the commercial speech.

The proposed draft ordinance provides for a ban of the distribution of commercial advertising materials in the City's commercial district in order to reduce litter, reduce sidewalk congestion and harassment of pedestrians. Just as in the City of Key West, the ordinance limits the ban to business advertising through canvassing in specific commercial areas within the City.

Attachment.

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Martha Salazar-Blanco, Zoning Official