UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DENNIS BALLEN, et al.,

Plaintiffs,

v.

THE CITY OF REDMOND, et al.,

Defendants.

No. C03-2580P

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross-motions for summary judgment on all claims. (Dkt. Nos. 26 & 27). Both parties agree that this case should be decided on summary judgment as there are no genuine issues of material fact in dispute. Plaintiffs also move to strike certain statements in the April 19 Ferris declaration. Having reviewed the pleadings and supporting documents, the Court GRANTS Plaintiffs' motion and DENIES Defendants' motion. The ordinance at issue is unconstitutional. Under Supreme Court precedent established in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), a restriction on commercial speech is valid only if the restriction directly and materially advances a substantial government interest and there is a reasonable fit between the restriction and the goals, meaning the restriction is no more excessive than

necessary. The City of Redmond 's sign ordinance fails both of those tests. The ordinance restricts certain commercial speech, based on its content, but carves out exceptions for other commercial as well as noncommercial speech. While the ordinance's aesthetics and traffic and pedestrian safety goals are substantial government interests, the ordinance's exceptions for certain speech, based on content, do not directly and materially advance those goals. The content-based distinction has no relationship to those goals. Likewise, there is not a reasonable fit between the content-based restriction and the ordinance's goals.

BACKGROUND

Plaintiffs Dennis Ballen ("Ballen") and Nice Tie, Inc. ("Plaintiffs") own and operate a baked goods store in Redmond, Washington known as Blazing Bagels. (Pls' Mot. for Simm. J., Ex. 1 (Ballen Decl., ¶¶ 3, 5)). At various times in 2002 and 2003, Ballen had an employee stand on the corner of Redmond Way and NE 70th wearing a sign that read "Fresh Bagels – Now Open" with an arrow pointing in the store's location. (Id., ¶¶ 15-16). While the employee was holding the sign in public, the store was open and selling fresh bagels. (Id. at ¶ 17). The City of Redmond ("the City") sent Plaintiffs a cease and desist order, stating that their use of portable signs violated a City ordinance prohibiting such signs. Plaintiffs filed suit, challenging the ordinance facially and as applied under the First Amendment of the United States Constitution as well as the Washington State Constitution. The facts below outline the origin of the ordinance, the ordinance itself, the enforcement against Blazing Bagels, the Preliminary Injunction order, and events that have occurred since the injunction.

A. Proposed Restrictions on Portable Signs

In 1979, the City of Redmond ("the City") prohibited all portable signs. (Id., Ex. 5 (Planning Comm'n Report. at 2) (hereinafter "Planning Comm'n Report")). Later that same year, in response to concern over the adverse economic impact to businesses, the City passed an ordinance permitting sandwich board signs under some circumstances. (Id.) However, the City was not able to enforce effectively the restrictions on the signs. (Id. at 1, 3). In June 1997, the Planning Commission, at the

City Council's request, submitted a proposed ordinance to ban commercial sandwich board signs. (Id., Ex. 4 (Lewandowski Dep., 69:11-25; 70:1-5) (hereinafter "Lewandowski Dep."); Planning Comm'n Report at 1).

The purpose of the amended ordinance was to eliminate as many signs as possible because the signs detract from the City's appearance, present hazards to drivers and pedestrians, and the City's then current regulations had proven difficult to enforce. (Lewandowski Dep., 75:7-13; Planning Comm'n Report at 1).

While the Planning Commission considered regulating sandwich board signs rather than banning them, it recommended a ban because it found that the City's experience with enforcing the regulations was not effective. (Planning Comm'n Report at 13). According to Roberta Lewandowski, the Director of Planning and Community Development, the City Council wanted a ban rather than stricter regulations or other alternatives because they did not like or want the signs. (Lewandowski Dep., 81:7-15).

However, the proposed ordinance would permit the display of certain noncommercial signs, real estate signs, and special event commercial signs, subject to certain time, place, and manner restrictions. (Planning Comm'n Report at 1). The City Council did not survey the number of commercial signs of the type that would be banned compared to the number of exempted signs regularly displayed in the City. (Lewandowski Dep., 86:12-24). Likewise, Ms. Lewandowski stated that there was no evidence that commercial signs were a more significant problem than real estate or other noncommercial signs. (Lewandowski Dep., 90:16-18).

In response to concerns about the impact of banning the signs on small businesses, the Planning Commission found that the ban would not adversely affect small businesses. (Planning Comm'n Report at 10). The Planning Commission reasoned that if "sandwich board signs [were] a significant benefit to small business, then it would be expected that Redmond would have a higher proportion of small businesses than Bellevue and Kirkland which ban sandwich board signs." (Id.)

The Planning Commission compared the number of small business in Redmond to those in Kirkland and Bellevue and found that Redmond did not have a higher proportion of small retail or service establishments. (Id.) Additionally, the Planning Commission noted that alternative methods of advertising would be more effective, such as permanent signs that were less susceptible to destruction and could be positioned more favorably and lighted at night. (Id.)

The Planning Commission found that permanent signs were not feasible for advertising real estate and that sandwich board signs were needed to guide potential buyers to open houses or hard to find homes. (Planning Comm'n Report at 16). However, the Commission did find that there were too many off-site real estate signs and that they were unattractive. The Commission concluded that this problem could be addressed by limiting 1) the times the signs could be displayed, 2) the total number of signs that signs could be displayed for a particular house, and 3) directional signs only for hard to find houses. (Planning Comm'n Report at 16). Nonetheless, real estate signs were not considered to be more aesthetically pleasing or to cause less traffic problems than other sandwich signs. (Lewandowski Dep., 82:6-23).

B. The Ordinance

The Redmond Community Development Guide ("RCDG"), § 20D.160.10-090, provides in relevant part as follows:

> Off-Premises Signs. Off-premises signs are not permitted within the City of Redmond unless exceptions are specifically made elsewhere in this section. Included within this prohibition are billboards, poster boards and other advertising for products or businesses not located on the site of the business or place of sale.
>
> Portable Signs. All portable signs except real estate signs and other portable signs specifically allowed by RCDG § 20D.160.10-060, Signs and Street Graphics, are prohibited. This prohibition includes, but is not limited to, portable reader boards, signs on trailers, sandwich boards, except as allowed by RCDG § 20D.160.10-060, Signs and Street Graphics: Temporary Uses, and sidewalk signs.

(Id., Ex. 8).

The portable signs that are allowed under RCDG § 20D.160.10-060 include banners on Redmond Way Railroad Overpass; construction signs; celebration displays; banners in the City Center Neighborhood announcing a new enterprise, celebrating business anniversaries or announcing major sales; major land use action notices; political signs; real estate signs; temporary window signs; signs on kiosks; and temporary uses and secondary uses of schools, churches, or community buildings. (Id.) As outlined in RCDG § 20D.160.10-060, there are time, place, and manner restrictions for many of these exceptions.

Criminal violations of these ordinances will result in a punishment of a fine of not more than $5,000 and/or imprisonment of not more than one year. Redmond Municipal Code ("RMC") § 1.14.060(a). Civil violations of the ordinances will result in a civil penalty not to exceed $1,000 per violation. RMC § 1.14.060(b).

The stated purpose for regulating the signs:

> ...is to increase the overall effectiveness of visual communications, provide a harmonious relationship of urban graphics and their settings, and to avoid the visual clutter that is potentially harmful to traffic and pedestrian safety, property values, business opportunities and the community's appearance.

RCDG § 20D.160.10-010.

The City's Code Compliance officer, Deborah Ferris, states in a declaration accompanying these motions, that the aggregate number of portable signs has decreased since the sign ordinance went into effect, and that in her professional judgment, experience, and observation the prohibited signs represent a significant portion, if not majority, of the total number of signs that would be displayed if there were no restriction. (Defs' Resp., Ex. A (Ferris April 19 Decl., ¶¶ 4-5)). Plaintiffs moved to strike these statements for lack of foundation.

C. Enforcement against Plaintiffs

On June 18, 2003, Defendant Department of Planning and Community Development (the "Department") sent a letter to Blazing Bagels that stated as follows:

> After further review of the Redmond Community Development Guide Redmond's City Attorney has determined that Section 20D.160.10-090, *Prohibited Signs,* applies to portable signs, which are being held or worn by individuals, as well [as] signs that have been placed in or on the ground.
> Due to this determination, the person you have placed on the corner of Redmond Way and NE 70th...is considered to be in violation of the above-cited code and this activity needs to cease and desist immediately.

(Pls' Mot. for Simm. J., Ex. 7).

D. Preliminary Injunction and Subsequent Events

On January 21, 2004, the Court entered an order preliminarily enjoining the City from enforcing the ban against Plaintiffs. (Dkt. No. 23). The Court concluded that Plaintiffs' as-applied challenge to the sign ordinance's restriction on commercial speech was likely to succeed on the merits.

Since January 22, 2004, an employee of Blazing Bagels has stood most mornings on the same corner as before wearing a portable sign showing the name "Blazing Bagels," the phone number for the store, and a directional arrow pointing to the sign's location. (Pls' Mot. for Simm. J., Ex. 3).

The City contends that since the injunction was issued and all portable signs have been allowed, there has been a significant increase in the number of commercial signs displayed that would be banned under the sign ordinance as enacted. (Defs' Resp., Ex. B (Farris May 11 Decl., ¶¶ 3-4) (hereinafter "Ferris Decl."). The City presents evidence of this increase in the form of photographs of the signs displayed over a 10-day period in April, 2004. The photographs show both prohibited commercial signs and exempt real estate signs. The photographs are accompanied by a matrix that purportedly details relevant information about these signs.[1] (Id., Attachment). However, the City has

[1] In their reply, Plaintiffs move to strike this evidence for lack of foundation. (Plfs' Reply at 3 n.1). This challenge is distinct from their other challenge to statements in the April 19 Ferris declaration. It is not clear what the basis for challenging this evidence is. Ms. Ferris states that she personally took the photographs. Therefore, the evidence is admissible. Beyond this challenge, Plaintiffs do not dispute the veracity of the information in the photographs or matrix. Instead, they disagree with Defendants as to whether some of the signs in the photos would have actually been banned under the challenged portion of the sign ordinance in the first place.

not presented any evidence indicating what portion of the City was covered by this survey, nor evidence comparing the total number of the prohibited signs with the otherwise permissible signs, specifically real-estate signs. Nonetheless, excluding the signs that Plaintiffs maintain would be barred under other ordinance provisions not challenged here, there appear to be more than a dozen signs that would be banned under the challenged ordinance. (Id.)

ANALYSIS

Under the First Amendment of the United States Constitution, States are not permitted to make laws that impermissibly abridge free speech. U.S. Const. Amend. I. The Washington State Constitution provides that "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Wash. Const., Art. I. § 5. The Washington Supreme Court applies a federal analysis when confronting Article I, Section 5 challenges to restrictions on commercial speech. Nat'l Fed'n of Retired Persons v. Ins. Comm'r, 120 Wash.2d 101, 119 (1992); see also, Ino Ino, Inc. v. City of Bellevue, 132 Wash.2d 103, 116 (1997). Therefore, the Court's First Amendment analysis incorporates Plaintiffs' Washington Constitution claim.

II. Central Hudson Test

The parties agree that Plaintiffs' signs constitute "commercial speech." Commercial speech is constitutionally protected, but it may be regulated because of the nature of the speech. See Virginia Bd. of Pharmacy v. Virginia Consumer Council, Inc., 425 U.S. 748, 762-63, 771-72, n.24 (1976). Nonetheless, there is a strong interest in the free flow of commercial information. Id. at 763. In Central Hudson, 447 U.S. at 566, the Supreme Court established a four-prong "intermediate scrutiny"[2]

[2] Plaintiffs argue that the ordinance should be subjected to strict scrutiny because it is a content-based restriction on speech. In their motion for preliminary injunction, Plaintiffs argued that strict scrutiny applied because the ordinance impacts commercial speech in a public forum (i.e. the sidewalk). The Court rejected that argument. (Preliminary Injunction Order at 6 n.5). While Plaintiffs now offer a different rationale, their argument is still unpersuasive. The Ninth Circuit observed that it was unclear whether the Supreme Court's holding in R.A.V. v. City of St. Paul, 505 U.S. 377, 388-89. (1992), that strict scrutiny applied to content-based restrictions extended to

test used to review the governmental restriction on commercial speech as follows: (1) whether the speech concerns a lawful activity and is not misleading; (2) whether the regulation seeks to implement a substantial government interest; (3) whether that interest is directly and materially advanced by the regulation; and (4) whether the regulation reaches no further than necessary to accomplish the given interest. The restriction need only be reasonable, the scope of which is in proportion to the interest served. Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (the restriction imposed need not be the least restrictive means for achieving the interest served, it need only be "narrowly tailored to achieve the desired objective.") (citations omitted). The parties agree that Plaintiffs' signs concern lawful activity and are not misleading. The parties also agree that traffic and pedestrian safety and community aesthetic goals are substantial. (Plfs' Mot. for Simm. J. at 14). The parties dispute whether the City's ordinance, RCDG § 20D.160 et seq., satisfies the third and fourth prongs of the Central Hudson test.

A. Directly Advance Substantial Governmental Interest

The third prong of the Central Hudson test requires a regulation to directly and materially advance a substantial governmental interest. "[T]he Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.'" Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)). The regulation "may not be sustained if it provides only ineffective or remote support for the government's purpose." Central Hudson, 447 U.S. at 564. Plaintiffs rely on Coors Brewing, Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999), and Valley Broad. Co. v.

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commercial speech. Valley Broad. Co. v. United States, 107 F.3d 1328, 1331 n.3 (9th Cir. 1997). The Ninth Circuit noted that, in spite of this uncertainty in R.A.V., the Supreme Court had continued to apply the intermediate scrutiny in Central Hudson to commercial speech cases. Id. Accordingly, the Ninth Circuit has continued to apply this standard to commercial speech. See Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 815 (9th Cir. 2003). Given this precedent, the Court finds no basis to apply anything other than the standard set out in Central Hudson to this commercial speech case.

United States, 107 F.3d 1328 (9th Cir. 1997), to support their argument that the sign ordinance does not directly and materially advance the City's interest because the exceptions for real-estate and other special commercial circumstance signs as well as noncommercial signs undermine and counter the ordinance's safety and aesthetic goals. In contrast, Defendants rely on Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 511-12 (1981), and its progeny to support their contention that the sign ordinance satisfies this prong of Central Hudson. Even if the sign ordinance is "underinclusive," the third prong is still satisfied because the ordinance bans a substantial percentage of the total number of portable signs that would be displayed in the City if there were not a ban, and thereby directly advances the safety and aesthetic goals.

In Coors Brewing, the Federal Alcohol Administration Act (the "FAAA") prohibited the disclosure of the alcohol content on beer labels and in beer advertising. 514 U.S. at 478. The asserted governmental interest was to suppress the threat of "strength wars" among brewers by preventing brewers from competing in the marketplace based on the potency of their beer. Id. at 479. The FAAA contained exceptions to the disclosure ban, allowing the disclosure of the alcohol content of beer in the vast majority of states and allowing the use of the descriptive term "malt liquor" on beers (i.e., malt beverages) with the highest alcohol content. Id. at 487-89, n.3. The FAAA also did not ban the disclosure of the alcohol content of wine and distilled spirits even though they contained higher alcohol content than beer. Id. at 488. Notably, the FAAA required the disclosure of the alcohol content of wines with more than 14 percent alcohol. Id. The Supreme Court held that the FAAA's disclosure ban could not directly and materially advance the interest asserted by the Government "because of the overall irrationality of the Government's regulatory scheme." Id. The "other provisions of the same Act directly undermine and counteract its effects." Id. at 489. The government's anecdotal evidence and educated guesses that the ban advanced the asserted goal of preventing strength wars was insufficient to overcome this irrationality. Id. at 490.

Similarly, in Greater New Orleans, federal law prohibited broadcast advertising for legal gambling. Over the years however, Congress had created numerous exceptions, such as for state-run lotteries and Native American-run casinos. 527 U.S. at 177-80. An association of advertisers sought to broadcast casino adds for privately run casinos in Louisiana, where gambling is legal. The Court held that the federal law failed Central Hudson's third prong because the ban's goal of not promoting gambling, while theoretically advanced by banning casino adds, was undermined by the simultaneous legislative encouragement of tribal casino gambling. Id. at 189. In short, the Court concluded that the regulatory regime was too "pierced by exceptions and inconsistencies" to justify the ban on private adds as advancing the government's interest. Id. at 190. See Valley Broad. Co. v. United States, 107 F.3d at 1335 (concluding that this same federal statute was unconstitutional for the same reasons cited by Greater New Orleans).

In Metromedia, the City of San Diego prohibited all off-site billboards, but allowed on-site billboards. Additionally, it created 12 categories of exceptions, in which certain off-site billboards were permitted.[3] 453 U.S. at 494-95 & n.3. The purpose of the ordinance was "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City." Id. at 493. A plurality of the Supreme Court upheld the ordinance's prohibition on all off-site commercial billboards. The Court held that the different treatment of on-site versus off-site billboards did not undermine the traffic safety and aesthetics goals that the ban was intended to further. Id. at 511-12. The Court found that the city had chosen to value one type of

[3] Defendants correctly assert that the Preliminary Injunction Order incorrectly stated the facts of Metromedia. The Order stated that the 12 exceptions were all for noncommercial speech. In fact, the exceptions included commercial as well as noncommercial speech. 453 U.S. at 495 n.3. However, this error does not have the significance that Defendants try to claim. (See Defs' Mot. for Summ. J. at 8-10). The 12 categories of exceptions were not challenged in Metromedia in the same way that the City's sign ordinance exceptions are. See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 425 n.20 (1993) (noting that Metromedia did not say whether or not the city could distinguish between different categories of off-site billboards that cause the same aesthetic and safety concerns).

commercial speech (on-site billboards) more than another type (off-site billboards) The ban reflected this interest. Id. at 512. The Court noted that its underinclusiveness did not prevent the ban on a subset of billboards (off-site ones) from advancing the goals. Id. at 511. Additionally, it would be reasonable to have banned off-site billboards if the city believed that their more frequently changing content created more acute traffic hazards than on-site billboards. Id. See Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 815-16 (9th Cir. 2003) (citing Metromedia and holding that similar billboard restriction advanced the restriction's goals, even if it targeted only off-site signs, which represented only a fraction of all signs); see also Jim Gall Auctioneers, Inc. v. City of Coral Gables, 210 F.3d 1331, 1333 (11th Cir. 2000) (holding that restriction on auction sale signs in residential neighborhoods directly advanced aesthetics and tranquility goals, even though garage sale signs were permitted).

The case law and undisputed facts favor Plaintiffs on this prong. The City's sign ordinance bans commercial portable signs, but carves out exceptions for noncommercial signs and certain categories of commercial signs. As such, it is a similar irrational regulatory scheme as those defeated in Coors Brewing, Greater New Orleans, and Valley Broad. Co.. The City does not contend that the real-estate and other exempted signs are more attractive than the prohibited commercial signs, nor that they present less traffic hazards. The exempted signs and the prohibited signs both present the same problems, namely traffic and pedestrian hazards and unattractiveness, which the ban is meant to address. This is unlike the on-site/off-site distinction in Metromedia where the Court observed that off-site billboards might plausibly present more of an acute traffic hazard than on-site billboards. As discussed below in more detail, the regulatory scheme here creates content-based exceptions for certain commercial speech that has no material relationship to the safety and aesthetic goals. Therefore, this content-based differential treatment cannot be said to materially and directly advance the City's interests.

Moreover, contrary to Defendants's assertion that the sign ordinance bans a significant percentage of the total number of signs that would be displayed if not for the ordinance, Defendants have not presented sufficient evidence to support that conclusion. If the ordinance bans only a "minute" or "paltry" percentage of that total, then City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417-18 (1993), suggests that the ordinance fails Central Hudson's requirements. Defendants point to the statements by Defendants' witness Ferris that the aggregate number of signs has decreased since the ban went into effect and that in her professional experience, judgment, and observation, the banned sign represent a significant percentage of the total aggregate portable signs. Plaintiffs challenge the admissibility of these statements. The Court concludes that Plaintiffs' challenge is valid because the declaration does not indicate the basis of Ms. Farris conclusion (i.e. did she conduct a study? were her observations made in a methodological way? or are her conclusions based on anecdotes told to her by others and haphazard observations?). Defendants also present evidence that since the injunction was issued, portable signs that would otherwise be banned have proliferated. While this evidence does show the display of some such portable signs, there is no basis to conclude that this is more than a minute percentage of the total signs displayed during this time. Defendants have not included anything regarding what percentage of the total portable signs displayed this represents. Consequently, Defendants have not met their burden on this prong.

B. Restriction Is No More Extensive Than Necessary

The fourth prong of the Central Hudson test requires that there be a reasonable fit between the restriction and the goal. Discovery Network, 507 U.S. at 416. In other words, the restriction must be no more extensive than necessary. Again, the government has the burden of proof on this prong. Id. Relying on Discovery Network, Plaintiffs argue that there is not the requisite reasonable fit here because the exceptions are content-based and this content-based distinction has no rational relationship to the safety and aesthetic goals. According to Plaintiffs, the City's ordinance is more

extensive than necessary because there are other less restrictive alternatives that could have been used to advance these goals, such as time, place or manner regulations for all signs.

In Discovery Network, the City of Cincinnati prohibited distribution of commercial handbills displayed in news racks on public property but allowed for noncommercial handbills displayed in news racks. 507 U.S. at 413 n.2. Cincinnati asserted that it had safety and aesthetics interests in decreasing the number of news racks in the city. Id. at 418. Although the Supreme Court accepted Cincinnati's position that limiting the number of news racks necessarily affected an increase in safety and attractiveness, the Court found a lack of "fit" between the city's goals and its method of achieving them because the prohibited new racks were no more harmful than the permissible news racks. Moreover, the ordinance would have only a minimal impact on the overall number of news racks (62 prohibited news racks; 1,500-2,000 permissible news racks). Id. at 417-18, 428. As a result, Cincinnati's categorical ban on commercial news racks and its allowance of noncommercial news racks created a distinction that had "no relationship *whatsoever* to the particular interests that the city has asserted." Id. at 424 (emphasis in original). Additionally, Cincinnati's adoption of a content-based ban rather than valid time, place or manner regulations indicated that the city had "not carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition." Id. at 417, 428-430. In sum, the Court found that the ordinance's underinclusiveness, particularly when based on a content-based distinction between commercial and noncommercial speech that had no rational relationship to the goals, made the fit between the restriction and the goals not sufficiently close.

Here, the exceptions to the City's portable sign ordinance are all content-based. The City does not contend that the prohibited signs present more safety threats or are less attractive. The different treatment under the ordinance is entirely based on a sign's content. There is no rational reason for such a distinction; there is no relationship between the content-based distinction and the safety and aesthetic goals. Rather than reasonable fit, here there is an irrational fit. As in Discovery Network,

the City's use of a content-based ban rather than subjecting all portable signs to valid time, place, or manner regulations indicates that the City has not carefully calculated the benefits versus the burden on speech. As such, the ordinance restricts more speech than is necessary.

Contrary to Defendants' assertion otherwise, Metromedia does not dictate a different result. The distinction that was challenged and upheld there was between on-site and off-site billboards. It was a content-neutral distinction. Defendant cites a footnote in Discovery Network stating that "[u]nlike [the Discovery Network] case, which involves discrimination between commercial and noncommercial speech, the 'offsite-on-site' distinction [in Metromedia] involved disparate treatment of two types of commercial speech." 507 U.S. at 425 n.20. However, "two types" of speech refers to speech displayed in two different locations, not speech with different types of content. In fact, Discovery Network went on in this same footnote to observe that Metromedia did not address a content-based distinction (i.e. commercial/ noncommercial) within the offsite category because that question was not presented to the Court. Id.

Defendants suggest that this conclusion is contrary to a different part of the Metromedia holding. In addition to the challenge to the offsite/on-site distinction, the plaintiff challenged the ordinance's treatment of noncommercial speech. Under the ordinance, only commercial speech was allowed on on-site billboards; noncommercial speech was not allowed. Additionally, the exceptions allowed for only certain content-specific noncommercial speech on both on-site and off-site billboards. The Court held that the entire ordinance was unconstitutional because it discriminated against noncommercial speech. The city could not grant greater protection to commercial speech than noncommercial speech and could not impose a content-based restriction on noncommercial speech. 453 U.S. at 513-14. The Court commented that "[a]lthough the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." Id. at 514. See Rappa v. New Castle County, 18 F.3d 1043, 1065 n.35 (3d

Cir. 1994) (noting in dicta that "under the reasoning of the Metromedia plurality, content differentiation among categories of commercial speech is generally permissible," but also noting that this view of Metromedia is in "significant tension" with Discovery Network). The Court concludes that its reading of Discovery Network, a more recent case, controls.

Defendants also rely heavily on Ackerley Communications of the Northwest, Inc. v. Krochalis, 108 F.3d 1095 (9th Cir. 1997), for the proposition that Discovery Network and Coors Brewing did not limit Metromedia's holding. However, Ackerley addressed legal arguments not made here. There, Seattle regulations limited construction and relocation of billboards, premised on safety and aesthetic goals. Id. at 1096-97. Plaintiff challenged the regulation on grounds that Seattle had not provided sufficient evidence that the regulation would sufficiently advance those goals. The court rejected that argument by reaffirming Metromedia's holding that a city need not provide a voluminous record to support its claim that billboard regulation advances safety and aesthetic goals as a general principle. Id. at 1099. There was no argument made as to any invalid content-based distinction within the regulation.

On a separate note, the existence of alternatives that intrude less on free speech rights is a factor to consider in determining whether there is a "reasonable fit." The Discovery Network Court found that news racks, whether commercial or noncommercial, were equally unattractive and concluded that discrimination against the small number of commercial news racks was untenable when other alternatives (e.g. simply limiting the total number of news racks) were available. 507 U.S. at 425-26. In Coors Brewing, the availability of alternative ways to prevent "strength wars" among brewers, such as directly limiting the alcohol content of beers or prohibiting marketing efforts emphasizing high alcohol strength, indicated that the FAAA's ban was "more extensive than necessary." Coors Brewing, 514 U.S. at 490-91.

Here, the City could impose time, place, and manner restrictions on all commercial signs in the way that it does on real estate signs. Likewise, if the City found that signs with live people holding them are more distracting and therefore more hazardous, it could ban such signs altogether.

II. Overbreadth

In the preliminary injunction order, the Court rejected Plaintiffs' overbreadth claim on the grounds that overbreadth challenges do not apply to restrictions on commercial speech. Plaintiffs do not argue their overbreadth claim in their motion for summary judgment. Defendants argue in their motion that summary judgment should be granted on this claim for the same reasons stated in the preliminary injunction order. Plaintiffs' response does not present any reason to deviate from the Court's analysis and conclusion in the preliminary injunction order. Therefore, that portion of the preliminary injunction order is incorporated here.

III. Severance

Defendants assert in the final pages of their motion for summary judgment that if the Court should find the challenged portion of the ordinance unconstitutional, that portion should be severed from the rest of the ordinance, leaving the remaining provisions intact. Specifically, the general ban on portable signs would be intact. Plaintiffs respond with three persuasive arguments. First, they maintain that they are not challenging the constitutionality of the exceptions per se. Rather, they challenge the restriction on their commercial speech as unconstitutional in light of the exceptions in the ordinance. Second, "the remedy sought by Defendants would subject activity that is currently authorized by the legislature [i.e. the exceptions] to civil and criminal sanctions." (Pls' Resp. at 22). Third, this remedy would affect the significantly effect the interests of real estate agents without having given these parties the opportunity to participate in this litigation. Therefore, the severance requested is denied.

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## CONCLUSION

The Court GRANTS Plaintiffs' motion and DENIES Defendants' motion. The ordinance at issue is unconstitutional under Central Hudson. While the ordinance's aesthetics and traffic and pedestrian safety goals are substantial government interests, the ordinance's exceptions for certain speech, based on content, do not directly and materially advance those goals. The content-based distinction has no relationship to those goals. Likewise, there is not a reasonable fit between the content-based restriction and the ordinance's goals.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: June 15, 2004

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge