MEMORANDUM

To: Harmony Community Development District Board of Supervisors
From: Young Qualls P.A.
Date: 08/11/2020
Re: Governmental Entity No Solicitation Policy Analysis

Questions Presented

1. May a community development district ("CDD") restrict private entities from soliciting business at the CDD's recreation facilities?
2. If so, provide language restricting solicitation.

Answers

1. Yes. A CDD may regulate advertising on CDD property if the CDD can show substantial government interests are involved and that the restrictions are narrowly tailored in order to implement said interests. Substantial government interests include aesthetics, disease transmission, littering, and overcrowding.
2. See Draft No Solicitation Policy attached hereto.

Discussion

An analysis of regulating advertisements on public property falls under the commercial-speech jurisprudence of the U.S. Supreme Court and the Florida Supreme Court. The First Amendment states that, "Congress shall make no law . . . abridging the freedom of speech . . . ."[1] Similarly, article I, section 4 of the Florida constitution provides that "[n]o law shall be passed to restrain or abridge the liberty of speech . . . ."[2] Florida courts have defined the scope of free speech, including commercial speech, under the Florida Constitution consistently with the

[1] U.S. CONST. amend. I.
[2] FLA. CONST. art. I, § 4.

freedom-of-speech jurisprudence of the U.S. Supreme Court.[3] If the constitutionality of a regulation on commercial speech is challenged, a court must determine whether the regulation is content-based or content-neutral.

Content-neutral ordinances are subject to time, place and manner restrictions. Such restrictions merely limit when and where speech can take place in order to reduce or prevent annoyance or inconvenience to the public. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* the court held that commercial speech may be subject to time, place, and manner restrictions so long as such restrictions are 1) imposed without reference to the content of the speech, 2) serve significant governmental interests, and 3) "leave open ample alternative channels for communication of the information."[4] Advertisements constitute not just speech, but commercial speech. The definition of commercial speech extends beyond the "core notion" of speech that only proposes a commercial transaction.[5] Speech is not classified as commercial solely because it is an advertisement,[6] it refers to a specific product,[7] or the declarant has an economic motivation for the speech.[8] There is strong support for the classification of speech as commercial only when all of these criteria are met.[9]

The Florida Supreme Court explained in *State v. Bradford* that the constitutionality of a restriction on commercial speech is determined based on the framework established by the U.S. Supreme Court in the seminal *Central Hudson* case.[10] Central Hudson splits the constitutional inquiry in to two tiers of analysis. First, the court examines the nature of the commercial speech itself. If the commercial speech pertains to illegal activity or is false or deceptive, then the speech is not entitled to constitutional protection and thus may be prohibited or otherwise regulated.[11] Second, the court examines the nature of the restriction. If the restriction is (1) supported by a substantial government interest and (2) is narrowly tailored to directly and materially advance that interest, the restriction is permissible even though the commercial speech is entitled to constitutional protection.

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[3] *Café Erotica v. Fla. Dep't of Transp.*, 830 So. 2d 181, 183 (Fla. 1st DCA 2002).
[4] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).
[5] *Bolger v. Youngs Drug Prods. Corp*., 463 U.S. 60, 66 (1983).
[6] *Id.* (citing New York Times v. Sullivan, 376 U.S. 254, 265–66 (1964)).
[7] *Youngs*, *supra* note 5, at 66.
[8] *Id.* at 67.
[9] *Id.*
[10] *State v. Bradford*, 787 So. 2d 811, 820 (Fla. 2001)
[11] *Id.* (citing Central Hudson Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980)).

Restaurant Menus Constitute Commercial Speech and May Be Regulated

In order to be classified as commercial, speech generally must be some kind of advertisement and refer to a specific product, and the speaker must have an economic motivation for the speech.[12] Solicitation by means of handing out or posting advertisements on public property meets all three of these criteria:

1. The entity is advertising its services. Such is the nature of any professional solicitation.
2. Second, the entities' advertisement offers specific products and services in exchange for money.
3. Third, the entity clearly has an economic motivation to solicit business from the public because the entity is compensated for its work.

Solicitation by private entities, regardless of when it occurs, constitutes commercial speech as understood by the U.S. Supreme Court and the Florida Supreme Court. However, public property which is not by tradition or designation a forum for public communication may be reserved by the government "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's views."[13] The CDD recreation facilities' intended purpose is for physical exercise and recreation and is neither by design or tradition a public forum. Thus, the CDD's reasonable regulations on the speech within recreation facilities are valid if content neutral and leaving alternative channels of communication.

In *Taxpayers for Vincent*, the Supreme Court ruled that municipalities have a legitimate interest in prohibiting "intrusive… formats of expression" for aesthetic reasons. The Court wrote, "[T]he visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property – constitutes a significant substantive evil within the City's power to prohibit."[14] The Court further noted,

> Appellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for purposes of their communication… it is clear that 'the First

[12] *See,* supra notes 9-11.
[13] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 46 (1983).
[14] *Members of City Council City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 790 (1984).

Amendment does not guarantee access to government property simply because it is owned or controlled by the government.'[15]

In *Jobe v. City of Catlettsburg,* the District Court held against a Kentucky windshield leafleter.[16] Plaintiff placed leaflets for the American Legion under the windshield wipers of cars parked on public property. Plaintiff was cited and fined for violating a city ordinance. The court analyzed the ordinance using the three-part test for written forms of expression. Both parties agreed that the ordinance was content-neutral, thus satisfying the first part of the test. The court then decided that the ordinance was narrowly tailored, left open other channels of communication and advanced the government's interest in "prohibiting litter and visual blight."[17] It is well-settled that aesthetics is a substantial government interest.[18]

Conclusion

Thus, in order to regulate private entities from advertising on CDD property the CDD must show there are substantial government interests involved and that the restrictions are narrowly tailored in order to implement said interests. Here, the District may do so if it accepts and adopts the attached proposed policy or a version thereof. The bottom line is that advertising is a form of commercial speech protected under the federal and state constitutions' but may be reasonably regulated to serve substantial government interests.

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[15] *Id*. (citing United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 114 (1981).
[16] *Jobe v. City of Catlettsburg*, 409 F.3d 261, 274 (6th Cir. 2005).
[17] *Id.* at 268.
[18] *See also Southlake Prop. Assocs., Ltd. v. City of Morrow, GA*, 112 F.3d 1114, 1116 (11th Cir. 1997) (recognizing Morrow's right to "clean, aesthetically pleasing and safe business thoroughfares"); *Harnish v. Manatee Cty., Fla.*,783 F.2d 1535, 1540 (11th Cir.1986) (upholding "prohibition of portable signs to eliminate aesthetic blight passed muster under the First Amendment").

ATTACHMENT A
PROPOSED SAMPLE POLICY

In order to minimize poor aesthetics or the opportunity for disease transmission, littering, and overcrowding that could interfere with providing quality services at the recreation facilities, the Harmony CDD prohibits the solicitation, distribution and posting of written materials on or at the recreation facilities by any officer, employee, or non-employee, except as may be permitted by this policy.

Officers, employees and non-employees may not solicit recreation facility users during or after hours of operation, except in connection with a Harmony CDD approved or sponsored event.

Officers, employees and non-employees may not distribute literature of any kind at or within a recreation facility during or after hours, or at any time, except in connection with a CDD-sponsored event.

Violation of this policy should be reported to the Harmony CDD District Manager at 407-566-1935 or Kristen.Suit@inframark.com.