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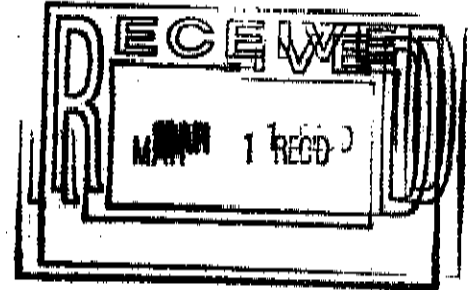
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Robert D. Butters  
(312) 876-6933  
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February 29, 2000



Mr. Douglas Yeaman  
Prudential Preferred Properties  
1165 N. Clark Street, Suite 608  
Chicago, Illinois 60610

Re: Legal Opinion On Constitutionality of Municipal Ordinances  
Governing Yard Signs

Dear Doug:

Attached is an original signed version of the October 12, 1999 letter I sent to you on the above-referenced subject. If you have any questions concerning the contents of the attached letter, please feel free to contact me at your convenience.

Sincerely,

  
Robert D. Butters

RDB/lp

cc/enclosure: Robert T. Cichocki, Esq.

537284v1

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October 12, 1999

**VIA FACSIMILE ( 312) 335-1492  
AND FIRST CLASS U.S. MAIL  
PRIVILEGED ATTORNEY-CLIENT  
COMMUNICATION AND  
ATTORNEY WORK PRODUCT**

Mr. Douglas Yeaman  
Prudential Preferred Properties  
1201 N. Clark Street, Suite 301  
Chicago, Illinois 60610

**Re: Constitutionality of Municipal Ordinances  
Restricting the Use of Quantum Yard Signs**

Dear Doug:

This responds to your request for an analysis of the constitutionality under the First Amendment of the United States Constitution of municipal sign ordinances that could be interpreted to prevent Prudential Preferred listing agents from utilizing Prudential Preferred's "Quantum" marketing program. It is our opinion that most municipal sign ordinances that would preclude the use of the Quantum Program would not survive scrutiny under current standards applied by the United States Supreme Court and the Seventh Circuit Court of Appeals for the regulation of commercial speech.

## **DESCRIPTION OF QUANTUM PROGRAM**

Prudential Preferred's Quantum Program is a marketing technique that utilizes as many as forty (40) directional signs placed in the front yards of residential properties in the neighborhood of the property listed for sale (the "subject property"). The directional signs are no larger than a standard six (6) square foot residential real estate "for sale" sign. The signs display a directional arrow and the name, address, and logo of the Prudential Preferred office that has listed the subject property.

The signs are placed on private residential property in the neighborhood of the subject property with the express consent of the property owners on whose property the signs are placed. The signs are displayed for approximately five (5) hours on weekend days while an "Open House" is conducted at the subject property. Prudential Preferred personnel place the signs in the yards before the Open House at the subject property and then remove them immediately after the conclusion of the Open House.

## ANALYSIS

### I. COMMERCIAL VERSUS NON-COMMERCIAL SPEECH

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . ." The First Amendment has been made applicable to state and local governments through the "due process clause" of the Fourth Amendment. Grosjean v. American Press Co., 297 U.S. 233 (1936). The First Amendment's prohibition on government restrictions upon speech, however, is not absolute. Jones v. City of Opelika 316 U.S. 584 (1942). For example, government may legitimately regulate or prohibit false and misleading advertising, Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748 (1976), casino gambling advertisements, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S. ct. 2968 (1986), and obscenity, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

In its efforts to define the legitimate scope of governmental regulation of speech or expression, the Supreme Court has drawn a clear distinction between a government's ability to regulate non-commercial speech, such as the expression of ideas, beliefs or political viewpoints, and "commercial speech", the purpose of which is to promote a business transaction. A government may prohibit "non-commercial" speech only if it can demonstrate a compelling state interest that is directly advanced by the regulation at issue. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). The Supreme Court has traditionally allowed governments wider latitude to regulate or even prohibit "commercial speech" when the same regulation would not be permitted to limit "non-commercial or "political " speech. Ohralik v. Ohio State Bar Association, 436, U.S. 447 (1978).

In this case, it seems clear that the Quantum program signs would be considered by a court to be "commercial speech". They clearly relate to a potential commercial transaction (the sale of the subject property) and, while directional in nature, they also display the Prudential Preferred logo. As such, any municipal regulations or prohibition of the Quantum program yard signs would be judged under the test announced by the Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) for determining the constitutionality of "commercial speech." In Central Hudson, the Supreme Court held that regulation of commercial speech is permissible under the First Amendment if (1) the speech concerns lawful activity and is not misleading; (2) the asserted governmental interest is "substantial"; (3) the regulation

directly advances the governmental interest asserted and (4) the regulation is not more extensive than necessary to serve the governmental interest.

## II. APPLICATION OF THE CENTRAL HUDSON TEST TO THE QUANTUM PROGRAM

The Quantum signs clearly concern lawful activity -- the sale of residential real estate --and are not misleading. Therefore, the first prong of the Central Hudson is plainly satisfied.

The second prong of the Central Hudson test requires that the government interest advanced by the regulation at issue be "substantial". Ordinances that may be asserted to block Prudential's use of the Quantum program may claim to advance different governmental interests. A typical ordinance, however, is the Northbrook sign ordinance that prohibits "off-premises identification signs" in residential neighborhoods.

An "off-premises identification sign" is defined as

"A sign giving only the name, trademark, or other readily recognized symbol or address, or any combination thereof, of a building, business, development or establishment, which sign is located off the lot on which such building, business, development or establishment is located."

Northbrook Municipal Code, Section 9-106E.1.(e). This is the category of sign that most closely describes the Quantum signs. An "off premises identification sign" is prohibited in residential neighborhoods in Northbrook. Northbrook Sign Ordinance, Section 9-106 G.3.

As applied to residential neighborhoods, the Northbrook sign ordinance states that its "purpose" is to protect the "physical appearance" of all areas of the Village, and to reduce "distractions, obstructions and hazards to pedestrians and auto traffic caused by the indiscriminate placement and use of signs." The Northbrook ordinance, therefore, identifies two governmental interests purportedly being advanced by the ordinance: (1) neighborhood aesthetics; and (2) pedestrian and vehicular safety that is allegedly compromised by distractions caused by "indiscriminate" display of signs.

It is highly likely that neighborhood aesthetics and vehicular and pedestrian safety will be found by most courts to be "substantial" governmental interests. Therefore, the second prong of the Central Hudson would likely be satisfied, at least with respect to the Northbrook ordinance, which is representative of the types of ordinances Prudential Preferred Properties is likely to confront in other Chicago area municipalities.

The third and fourth prongs of the Central Hudson test are (1) whether the sign ordinance's ban on "off-premises" signs in residential neighborhoods "directly" advances the Village's interests in neighborhood aesthetics and vehicular and pedestrian safety; and (2) whether the ordinance does so in a manner that is not "more extensive than necessary" to serve the Village's substantial interests. The Supreme Court has more recently clarified the third and fourth prongs of the Central Hudson to mean that a court must examine whether there is a "reasonable fit" between the regulation adopted by the municipality and the "substantial governmental interests" the regulation purports to advance. If an ordinance bans a form of commercial speech, but the ban only marginally advances a "substantial governmental interest," the "fit" will not be deemed "reasonable" and the ordinance will be found to be unconstitutional.

**III. AN ORDINANCE THAT BANS THE QUANTUM SIGN BUT ALLOWS  
THE DISPLAY OF FOR SALE SIGNS AND POLITICAL SIGNS  
WILL NOT PASS THE "REASONABLE FIT"  
TEST OF CENTRAL HUDSON**

The Supreme Court has held that a governmental regulation need not be the "least restrictive alternative" to achieve the government's stated purposes at the expense of commercial speech, Board of Trustees, S.U.N.Y. v. Fox, 492 U.S. 469 (1989). On the other hand, there must be a significant relationship between the results of the regulation chosen by the government and the ostensible purpose that the government is attempting to achieve. If the relationship between the regulation of commercial speech and the government's stated purpose is too tenuous, there will not be a "reasonable fit" and the third and fourth prongs of the Central Hudson test will not be satisfied.

The most recent Supreme Court case on the "reasonable fit" requirements of the Central Hudson test is City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993). In Discovery Network, the City of Cincinnati revoked the right of publishers of free distribution promotional magazines to distribute their magazines through news racks located on public sidewalks. The City determined that the magazines were "commercial handbills", the distribution of which on public property violates the City's ordinances.

At the time the City prohibited their distribution from news racks or public sidewalks, the free magazines were distributed from sixty-two (62) news racks located on public sidewalks. At the same time, there were approximately 2,000 news racks on the City's sidewalks from which traditional newspapers were sold. The City's enforcement action against the free distribution magazines did not have any effect on the use of news racks on public property to distribute traditional newspapers.

The publishers of free magazines distributed from news racks, one of which was a real estate "Homes" magazine, challenged the City's action as a violation of the First Amendment. The Supreme Court evaluated the City's action under the Central Hudson test. The Supreme Court affirmed the court of appeals' holding that the City's action

violated the First Amendment because there was not a "reasonable fit" between the City's prohibition of free magazines from news racks on public property and the City's justification based on aesthetics and traffic safety.

The Supreme Court specifically rejected the City's argument that its action satisfies the Central Hudson "reasonable fit" test because any reduction in the number of news racks will reduce the likelihood of littering on public sidewalks and improve motorist visibility at intersections where the news racks might be located. The City argued that the free magazines were "commercial speech", which the City may constitutionally prohibit so long as a direct relationship exists between the City's regulation and its stated public interest justification.

The Supreme Court held that the City's argument improperly devalued the constitutional protection to which commercial speech is entitled. The Court determined that the City cannot rely on a justification to prohibit commercial speech when non-commercial speech, which is not prohibited, equally detracts from the City's proffered justification.

In Discovery Network, the City allowed traditional newspapers to be distributed from news racks. These news racks, which the City did not prohibit, were as harmful, if not more so, to the City's aesthetics and traffic safety as the so-called "commercial" news racks that the City did prohibit. Because the City could not demonstrate any relationship whatsoever between "commercial" news racks contribution to blight and traffic accidents that was in excess of the same contribution by "non-commercial" news racks, the City did not demonstrate a "reasonable fit" between its regulation and the governmental interest it claimed it was advancing.

The Court of Appeals for the Seventh Circuit in Pearson v. Edger, 153 F. 3d 397 (7th Cir. 1998), relied upon the Supreme Court's Discovery Network, decision to reverse the Seventh Circuit's prior holding in the Pearson case that upheld an Illinois statute that prohibited real estate licensees from soliciting homeowners who indicated in writing a desire not to be solicited. The Seventh Circuit in Pearson II held that there was not a "reasonable fit" between the state's asserted interest in promoting residential privacy and the state's prohibition of only real estate solicitations as opposed to the many other forms of solicitations that are permitted to intrude upon a homeowner's residential privacy.

Applying the Discovery Network and Pearson holdings to municipal efforts to prohibit Prudential's Quantum program, the municipal prohibitions would not appear to constitute a "reasonable fit" with the anticipated justifications of aesthetics and traffic safety. For the purpose of illustration, we will examine the Northbrook sign ordinance under the Discovery Network/Pearson holdings.

Mr. Douglas Yeaman

February 29, 2000

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The Northbrook sign ordinance arguably prohibits the Quantum signs as impermissible "off site identification" signs. The Northbrook ordinance states that its objective is to promote community aesthetics and traffic safety.

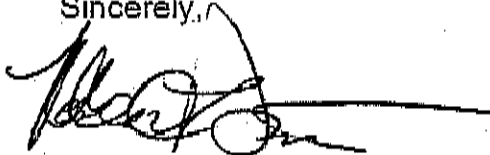
On the other hand, the Northbrook sign ordinance specifically permits "for sale" signs, "political" signs, and "garage sale" signs on residential property. "For sale" signs may be displayed during an entire listing period. "Political" signs may be displayed during an entire election campaign.

There does not appear to be any logical basis to conclude that the Quantum signs used for a brief period on days that "open houses" are conducted are any more harmful to community aesthetics or traffic safety than the other types of signs that Northbrook does allow on residential property for long periods of time. Unless the Village can show that the Quantum signs are more detrimental to aesthetics or traffic safety than the signs the Village does permit on residential property, then the Village cannot demonstrate the "reasonable fit" that the Supreme Court requires before the Village can prohibit commercial speech.

#### CONCLUSION

Each municipal ordinance that is cited to prohibit the Quantum program must be evaluated separately. Most ordinances will most likely be justified on the grounds of aesthetics and traffic safety. In all probability, the ordinances will also allow some types of signs on residential properties. The ultimate outcome of a First Amendment challenge to a prohibition of the Quantum program will turn on whether a city can show that the Quantum signs harm aesthetics or traffic safety in a different and more substantial way than the other signs that are allowed. It is unlikely that a city can sustain this burden.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Butters", with a long horizontal line extending to the right.

Robert D. Butters

RDB/kds/sh

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