CITY OF MILWAUKEE

Form CA-43

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December 19, 2005

Alderman Michael S. D'Amato, Chair
Zoning, Neighborhoods and Development Committee
Room 205 – City Hall

Re: Determination of the Architectural Review Board for the Third Ward Historic District – 207 East Buffalo Street (Marshall Building); Cranston "Accents for Life" Window Signs

Dear Alderman D'Amato:

This letter will respond to your request dated December 1, 2005 for the opinion of this office concerning the authority of the Architectural Review Board for the Third Ward Historic District ("Board") to issue a Statement of Denial precluding the placement of interior-affixed window signs advertising product brand names within the storefront display area located at the above-referenced address.

The Board issued its Statement of Denial to this effect on September 21, 2005, which was appealed to the Common Council by Mr. Mark Van Ess, owner of the premises in question on October 18, 2005. The Statement of Denial was premised upon the Board's enabling ordinance, § 200-61, Milwaukee Code of Ordinances ("MCO") and the Design Guidelines for the Historic Third Ward District ("Design Guidelines"), dated January, 1990, apparently updated in 1997, and adopted by the Common Council per § 200-61-2-d, MCO. Although it did not refer to any particular provision of the Design Guidelines, our examination of those Guidelines indicates that the Board relied upon the first paragraph of the section entitled "Sign Message," appearing on page 68 thereof, which states as follows:

> Business signs should only include the formal name of the business, the nature of the business, and the address. **There should be no advertising of brand names**.

> Avoid an accumulation of outdated service club affiliations, credit card decals and other sign clutter.[1]

(Emphasis added).

We are of the opinion that preclusion of the building owner's placement of signs advertising brand names upon the storefront windows of his building would violate the United States Constitution's guarantee of freedom of commercial speech as contained in the First Amendment and made applicable to actions of state and local governments by the Fourteenth Amendment. Because the Design Guidelines in this respect cannot be enforced or implemented, we need not at this time address the issue of whether the Board has the jurisdiction to regulate the **interior** of buildings.

For nearly 30 years, beginning with its decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed. 2d 346 (1976) ("*Virginia Board of Pharmacy*"), the United States Supreme Court has recognized and repeatedly confirmed that "commercial speech" (including advertising) enjoys protection under the First Amendment to the United States Constitution. *See also* to the same effect, *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed. 2d 532 (2001) ("*Lorillard*"); *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 119 S.Ct. 1923, 144 L.Ed. 2d 161 (1999) ("*Greater New Orleans*"); *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed. 2d 543 (1993) ("*Edenfield*"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed. 2d 99 (1993) ("*City of Cincinnati*"); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed. 2d 388 (1989) ("*Fox*"); *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980) ("*Central Hudson*"); and *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977); ("*Bates*").

The protections afforded to "commercial speech" under the First Amendment are applicable to actions of state governments and their political subdivisions by virtue of the due process clause of the Fourteenth Amendment to the United States Constitution. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 at n. 1, 116 S.Ct. 1495, 134 L.Ed. 2d 711 (1996); *Bigelow v. Virginia*, 421 U.S. 809, 811, 95 S.Ct. 2222, 44 L.Ed. 600 (1975); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 761 at n. 3, 93 S.Ct. 2955, 37 L.Ed. 2d 948 (1973); *Murdock v. Pennsylvania*, 319 U.S. 105, 108, 63 S.Ct. 870, 87 L.Ed 1292 (1943). The Wisconsin Supreme Court, citing some of the above-referenced decisions, has affirmed that: "It

[1] The Board's original "Statement of Non-compliance" issued to Mr. Van Ess and dated July 20, 2005 confirms the basis for its denial of his application for a "certificate of appropriateness," stating that the basis thereof was "Brand names are prohibited."

is beyond question that the United States Supreme Court has accorded commercial speech the protection of the First Amendment." *State of Wisconsin v. Amoco Oil Company*, 97 Wis. 2d 226, 255, 293 N.W.2d 487, 502 (1980).

"Commercial speech" within the protection of the First Amendment comprises any speech that seeks to "propose a commercial transaction." *Fox, supra*, 492 U.S. at 473-474l; see also *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 340, 106 S.Ct. 2968, 92 L.Ed. 2d 266 (1986) ("*Posadas*"); *Virginia Board of Pharmacy, supra*, 425 U.S. at 762; *City of Milwaukee v. Blondis*, 157 Wis. 2d 730, 735, 460 N.W.2d 815, 817 (Ct. App. 1990). In *Central Hudson, supra*, the Supreme Court alternatively defined "commercial speech" as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. There is no doubt that a window sign advertisement identifying product brand names for sale within a retail establishment falls within these definitions of "commercial speech."

The United States Supreme Court has repeatedly explained the basis for according constitutional protection to such forms of speech premised upon society's "strong interest in the free flow of commercial information." *Virginia Board of Pharmacy, supra*, 425 U.S. at 764; *Securities and Exchange Commission v. Suter*, 732 F.2d 1294, 1299 (7th Cir. 1984). See, *e.g.*, *Edenfield, supra*, in which the Court stated as follows:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

(Citations omitted). 507 U.S. at 766-767. The *Edenfield* decision further outlined the nature of the justification required to sustain a restriction upon protected "commercial speech" as follows:

> It is well established that "[t]he parties seeking to uphold a restriction on commercial speech carries the burden of justifying it." . . . This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. . . . Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

507 U.S. at 770-771.

Both the Board's Statement of Denial issued to Mr. Van Ess and the provision of the Design Guidelines upon which that Statement is premised are squarely aimed at a particular form of "commercial speech," *i.e.*, advertisement of product brand names. As such, the restriction is "content based" or, stated otherwise, "a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed. 2d 661 (1989); *Gresham v. Peterson*, 225 F.3d 899, 905 (7th Cir. 2000). Content-based restrictions on speech generally draw stricter scrutiny precisely because they single out certain viewpoints or subject matter for differential treatment. *City of Cincinnati, supra*, 507 U.S. at 429-430; *Carey v. Brown*, 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed. 2d 263 (1980); *Schultz v. City of Cumberland*, 228 F.3d 831, 840 (7th Cir. 2000). And, although it is often stated that "the Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," *Central Hudson, supra*, 447 U.S. at 563; *Bland v. Fessler*, 88 F.3d 729, 739 (9th Cir. 1996), the Supreme Court has warned against underestimation of "the value of commercial speech" and of the measure of constitutional protection that it enjoys. *City of Cincinnati, supra*, 507 U.S. at 419.

The established test for evaluating the constitutionality of content based restrictions on "commercial speech" was originally enunciated by the United States Supreme Court in *Central Hudson, supra*, as follows:

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

447 U.S. at 564. The Court then announced a four-part test for analyzing "commercial speech" cases arising under the First Amendment as follows:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the

> asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The *Central Hudson* test has been repeatedly reaffirmed by both the United States Supreme Court and lower federal courts. See, *e.g., Lorillard, supra*, 533 U.S. at 553-555; *Greater New Orleans, supra*, 527 U.S. at 183-184; *Long Island Board of Realtors, Inc. v. Incorporated Village of Massapequa Park*, 277 F.3d 622, 626-627 (2nd Cir. 2002); *South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 935 F.2d 868, 888-894 (7th Cir. 1991); *Curtis v. Thompson*, 840 F.2d 1291, 1297-1298 (7th Cir. 1988); *Lavey v. City of Two Rivers*, 994 F.Supp. 1019, 1025 (E.D. Wis. 1998). In our opinion, the ban on advertising of product brand names at issue here fails the *Central Hudson* test. The first prong is not at issue; we assume the product brand names proposed to be advertised by Mr. Van Ess's business (and perhaps by other retailers within the geographic area of the Board's jurisdiction) concern the marketing of lawful products and are not misleading, in the sense that they accurately list brand names actually offered by these retailers.

Satisfaction of the second and third prongs of the *Central Hudson* test is, however, far more problematic, and we believe that those prongs have not been satisfied in this instance. The second prong requires that the Board demonstrate a "substantial interest" justifying a restriction or ban on product brand name advertising by retailers located within the District. The District's contention is that this "substantial interest" is the promotion of the aesthetics of the District and of the quality of the visual appearance of its street-level storefronts. We grant that achievement of these objectives constitutes a legitimate and important governmental interest, particularly as applied to a historic district. The difficulty with this contention, however, is that there is no indication that storefront window advertising, generally, or advertisement of product brand names, in particular, is in any way inconsistent with this goal. These forms of advertising are especially prevalent in the retail trades, and are recognized, well-established methods of promoting commercial traffic (even among "high-end" retailers) throughout the District. Thus, we perceive a disconnection between the District's asserted interests in promoting aesthetics and visual quality and its decision to "target" particular forms of storefront window advertising.

This disconnection becomes even more apparent in applying the third prong of the *Central Hudson* test. This prong, which is somewhat related to the second prong of *Central Hudson*, requires a determination of "whether the regulation directly advances the governmental interest asserted." Thus, it requires an evaluation of the fit between the objectives of the restriction or other regulation and the means chosen to accomplish those objectives. *Fox, supra*, 492 U.S. at

480; *Posadas, supra*, 478 U.S. at 341; *Pearson v. Edgar*, 153 F.3d 397, 402-403 (7th Cir. 1998). This third prong requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Fox, supra*, 492 U.S. at 480, quoting *In Re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed. 2d 64 (1982). Stated otherwise, "the third part of the *Central Hudson* test asks whether the speech restriction directly and materially advances the asserted governmental interests." *Greater New Orleans, supra*, 527 U.S. at 188.

We believe that the Board's Statement of Denial, premised upon a ban on product brand name advertising fails this test. Even assuming the fact of the Board's asserted interest in promotion of aesthetics and visual quality, and its related desire to avoid the proliferation of "sign clutter," we do not perceive any fit between those objectives and a ban on this particular form of "commercial speech." Here, the Board has chosen to ban particular content (advertising of brand names) because of its disapproval of the substance of that content. It has not chosen to ban other forms of advertising, including other forms of storefront window advertising, irrespective of the fact that those other forms of advertising have equal impact upon the aesthetics and visual qualify of the District's streetscape. There is no lawful basis for singling out the particular form of speech represented by product brand name advertising from other forms of "commercial speech" that are not only protected by the First Amendment, but that have also not fallen within any restriction or ban imposed by the Board. Accordingly, we believe that this particular ban runs afoul of the First Amendment and is thus unconstitutional.

We do not perceive a problem with the fourth prong of the *Central Hudson* analysis, which concerns "whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Greater New Orleans, supra*, 527 U.S. at 188. This prong thus inquires as to whether a particular governmental restriction on "commercial speech" is "over-inclusive." The restriction in this case, by contrast, is "under-inclusive" in that it targets a particular form of protected "commercial speech" based on content, while choosing to allow similar (and broader) categories of protected "commercial speech." In *Curtis v. Thompson, supra*, which upheld the constitutionality of an Illinois "anti-blockbusting" statute prohibiting solicitation of sales of residential real estate once the owner had given notice that he or she did not desire to sell his/her property, the Seventh Circuit noted the following:

> Mere underinclusiveness does not, however, amount to constitutional infirmity. As explained previously, a restriction on commercial speech may well be valid where it "directly advances the governmental interest asserted, and . . . is not more *extensive* than is necessary to serve that interest." *Central Hudson*, 100 S.Ct. at 2351. While the Illinois statute could have been *more* extensive, the state's decision to limit the scope of the statute does not translate into a constitutional problem.

(Footnote omitted, emphasis supplied by the Court). 840 F.2d at 1303.

We therefore conclude that the Statement of Denial issued by the Board to Mr. Van Ess and dated September 21, 2005, fails the second and third prongs of the *Central Hudson* test and is therefore unconstitutional as violative of the First Amendment's protections accorded to "commercial speech." We therefore believe that this Statement of Denial is invalid. If you have any further questions concerning this matter, please do not hesitate to contact this office.

Very truly yours,

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