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CARLSON'S CHRYSLER v. CITY OF CONCORD - The New Hampshire Supreme Court's Foray into the World of Sign Regulation

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I. INTRODUCTION

For decades, the Free Speech clause of the First Amendment to the United States Constitution has been the subject of scores of judicial opinions. Through time, the forms of communication found protected by the First Amendment have varied, almost certainly beyond that which the founding fathers envisioned when they adopted the Amendment. One mode of communication that has seen increasing attention over the last two decades is the display of signs. Be it commercial billboards displayed along a highway or political campaign signs displayed on someone's front lawn, courts have been called upon to evaluate the constitutionality of municipal regulations seeking to control this form of communication.

Although entitled to constitutional protection, signs, regardless of the message conveyed, are not immune from regulation. Indeed, towns and cities have a judicially recognized interest in regulating signs for the purpose of aesthetics and traffic safety and, therefore, may proscribe the placement of signs in furtherance of those interests. Nevertheless, given the constitutional significance of a person's right to express his or her ideas through the use of signs, a municipality's ordinance must be carefully drafted so as not to cross the sometime amorphous boundaries set by courts interpreting the First Amendment. Less than a year ago, the New Hampshire Supreme Court decided Carlson's Chrysler v. City of Concord,(fn1) in which it addressed the constitutionality of a sign ordinance regulating certain kinds of electronic signs.(fn2)

In evaluating the constitutionality of local regulations, the court first must decide whether the signs being regulated fall under the category of commercial speech or non-commercial speech. To the extent a local ordinance seeks to regulate purely commercial speech, the municipality has greater liberty at controlling the display of these signs, since commercial speech is universally afforded less protection under the Constitution. If an ordinance treads into the world of non-commercial speech, however, the ordinance will receive close scrutiny to ensure the local government is not discriminating among the conflicting ideas expressed by its citizens. Ordinances that cross the line into content-specific regulation will receive the strictest scrutiny, while truly content-neutral regulations -- a concept that is not as clear as it may sound -- will be subject to the more flexible standard known as time, place and manner.

In its decision in Carlson's Chrysler, the majority of the New Hampshire Supreme Court analyzed the Concord ordinance as regulating purely commercial speech even though, as Justice Duggan noted in a concurring opinion, it was debatable that the ordinance actually regulated both types of speech. As explained later in this article, treating the ordinance as pure commercial speech was significant because the ordinance contained exceptions for certain messages. To the extent the ordinance included non-commercial speech within its purview, the Court would have needed to address the content-neutrality of the ordinance. Moreover, the Chrysler decision raises questions regarding the proper burden placed upon a municipality to introduce evidence to support the constitutionality of its regulation.

The purpose of this article is to explain the general background of judicial review of sign regulations, both commercial and noncommercial, and how the Chrysler case fits within that matrix.

II. DISCUSSION

A. The Concept of Free Speech, and the Constitutional Protection Afforded Signs

The First Amendment to the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."(fn3) The First Amendment is made applicable to the states through the Fourteenth Amendment to the Constitution.(fn4) New Hampshire's own constitution contains a similar protection, stating "Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved."(fn5) The New Hampshire Supreme Court has stated that the standards for considering restrictions on the

freedom of speech are the same the State and Federal Constitutions.(fn6) As a result, parties and courts in New Hampshire look to cases analyzing the First Amendment when addressing the constitutionality of local speech restrictions.

Over the years, the United States Supreme Court has analyzed the reach of the First Amendment's free speech protection to a wide array of expressive forms.(fn7) It has been widely held that "communication by signs and posters is virtually pure speech" protected by the Constitution.(fn8) Despite the protected status of signs, however, municipalities have authority to regulate them under some circumstances.(fn9) The United States Supreme Court has recognized that First Amendment values must sometimes "yield to other societal interests," and that "each method of communicating an idea is a law unto itself, and that law must reflect the differing natures, values, abuses and dangers of each method."(fn10) In weighing the burden on free speech against the societal impact of signs, the Court has stated:

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs -- just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.(fn11)

In New Hampshire, municipalities are given fairly broad discretion to adopt ordinances for the purpose of protecting the citizenry's health, safety and general welfare.(fn12) Typically, the purpose underlying sign regulations is to protect traffic safety and preserve aesthetic quality.(fn13) A municipality may indeed exercise its zoning power solely to advance aesthetic values, on the premise that preserving or enhancing the visual environment will promote the general welfare.(fn14) "Municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats of expression, including some types of signage."(fn15)

That a regulation addresses the goals of aesthetics and traffic safety, however, does not guarantee that the regulation is constitutional. Rather, the court must first determine the level of scrutiny to which the regulation must be subjected. This requires a threshold determination of whether the particular regulation affects commercial speech, non-commercial speech, or both.

B. Categories of Protected Speech, and the Standards Used to Analyze Regulations Controlling That Speech

The two categories of speech subject to governmental regulation are commercial speech and non-commercial speech. Commercial speech, which has been loosely defined as speech that does no more than propose a commercial transaction,(fn16) is entitled to some constitutional protection(fn17) since "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish."(fn18) The United States Supreme Court has "emphasized that commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression."(fn19)

In Central Hudson Gas & Electric Corporation v. Public Service Commission of New York,(fn20) the United States Supreme Court adopted the following test for evaluating regulations of commercial speech:

(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.(fn21)

The party seeking to uphold a restriction burdening commercial speech has the burden of justifying the regulation.(fn22) Assuming the commercial speech at issue concerns lawful activity and is not misleading, a sign regulation is typically found to implement the substantial government interests of traffic safety and aesthetics. It is the third and fourth prongs of the commercial speech test that are generally at issue in cases analyzing the commercial speech doctrine.(fn23)

In explaining the government's burden with respect to the third and fourth prongs of the Central Hudson Gas test, the United States Supreme Court has stated:

The third step of Central Hudson concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest. It requires that the speech restriction directly and materially advanc[e] the asserted governmental interest. 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. We do not, however, require that empirical data come ... accompanied by a surfeit of background information... [W]e have permitted litigants to

justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense.

The last step of the Central Hudson analysis complements the third step, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. We have made it clear that the least restrictive means is not the standard; instead, the case law requires a reasonable fit between the legislature's ends and the means chosen to accomplish those ends, ... a means narrowly tailored to achieve the desired objective.(fn24)

The New Hampshire Supreme Court has stated that "even in the area of regulation of commercial speech, government restrictions on first amendment rights must be narrowly drawn."(fn25) Thus, while a municipality is afforded more leeway in regulating commercial speech, which would include the display of commercial signs, it must be careful when drafting its ordinance so it does not appear to favor commercial speech over non-commercial speech. A sign ordinance will be presumed unconstitutional if it permits commercial messages where it does not permit noncommercial ones or otherwise prefers commercial speech over noncommercial speech.(fn26)

To the extent a regulation is interpreted as infringing upon noncommercial speech -- such as political or religious speech -- the speech is given greater protection than commercial speech, thereby subjecting the law to closer scrutiny.(fn27) Of paramount concern is whether the law regulates non-commercial speech on the basis of content, for the Federal and State constitutions prevent the government from restricting speech on the basis of ideas expressed.(fn28) Unlike commercial speech, therefore, the threshold inquiry when analyzing a regulation affecting non-commercial speech is whether the ordinance is a content-specific or content-neutral regulation(fn29), as "[t]he appropriate level of scrutiny is tied to whether the [regulation] distinguishes between prohibited and permitted speech on the basis of content."(fn30)

"With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one."(fn31) To justify a content-based restriction on speech, the government must show that its regulation is necessary to serve a compelling interest and is narrowly drawn to achieve that end.(fn32) This examination is known as the rule of strict scrutiny.(fn33)

With respect to sign ordinances, a regulation burdening speech will be considered content-based if the regulation treats signs differently depending on the message it carries.(fn34) Thus, in Outdoor Systems, Inc. v. City of Lenexa, for example, the United States District Court for the District of Kansas held that a regulation requiring that temporary political campaign signs be removed within seven days after an election was a content-based restriction because the regulation did not restrict other temporary signs, such as general political, real estate and onsite advertising signs, in a similar manner.(fn35) Determining whether a regulation is a content-based or content-neutral restriction is not always as straightforward as it would seem however.

Unlike content-based restrictions, a speech restriction will generally be considered content-neutral if it is "justified without reference to the content of the regulated speech."(fn36) If a municipality's sign regulation is truly content-neutral, then the law will be analyzed under the well-known time, place and manner test. This test recognizes that reasonable content-neutral restrictions can be placed upon speech in furtherance of societal interests. In addition to being content-neutral, the sign regulation must: 1) be narrowly tailored to serve a significant governmental interest; and 2) leave open ample alternative channels for communication of the information.(fn37) This test is noted as "substantially similar" to the test used for analyzing pure commercial speech restrictions.(fn38) The United States Supreme Court has explained that "the essence of time, place or manner regulation lies in the recognition that various forms of speech, regardless of their content, may frustrate legitimate governmental goals."(fn39)

When examining whether a regulation is narrowly tailored, it is critical that the law not "burden substantially more speech than is necessary to further the government's legitimate interest."(fn40) In describing whether a regulation is narrowly tailored to serve a significant governmental interest, the courts require

a fit between the legislature's ends and the means chosen to accomplish those ends, 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.(fn41)

Importantly, a sign regulation need not be the least restrictive or least intrusive means of accomplishing a legislative goal.(fn42) "So long as the means chosen are not substantially broader than necessary to achieve the government's interest. . .the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."(fn43) Thus, the constitutionality of a sign ordinance does not hinge upon whether the court agrees with the local decision-makers'

determination of how best to satisfy the municipalities' needs, and whether those needs are worthy of protection.

The municipality's ordinance must also "leave open ample alternative channels for communication of the information."(fn44) As a practical matter, the danger presented by this factor is evident where the municipality regulates signs in such a way as to effectively ban signs from private property.(fn45) As a result, to survive constitutional challenge, the regulation must not be arbitrary and must not serve to effectively "impair the free flow of protected speech."(fn46) Generally, courts will uphold, as valid time, place and manner restrictions, those regulations that reasonably limit the size, height, number or location of signs displayed.(fn47)

C. CARLSON'S CHRYSLER v. CITY OF CONCORD

1. The Facts and Procedural History

In November 2007, the New Hampshire Supreme Court decided Chrysler v. City of Concord,(fn48) where the Court addressed whether a city ordinance prohibiting certain types of electronic signs was constitutional under the First Amendment of the United States Constitution.(fn49) Until Chrysler, the Court had not squarely addressed whether a sign ordinance satisfied the free speech guarantees of the Federal or State constitutions.(fn50)

In Chrysler, a local automobile dealership applied to the City of Concord for permission to erect an electronic changeable copy sign on its property.(fn51) This sign would electronically display messages advertising Carlson's vehicle inventory.(fn52) The City's code administrator denied the application because the sign violated the City of Concord's sign ordinance, which prohibited:

(a) Signs which move or create an illusion of movement except those parts which solely indicate date, time, or temperature and (b) Signs which appear animated or projected, or which are intermittently illuminated or of a traveling, tracing, or sequential light type, or signs which contain or are illuminated by animated or flashing light, except such portions of a sign as consist solely of indicators of time, date, and temperature.(fn53)

The dealership appealed the code administrator's decision to the Concord Zoning Board of Adjustment (ZBA), which upheld the decision of the code administrator.(fn54)

The dealership subsequently appealed the ZBA's decision to the superior court, which held that the City's ordinance violated the First Amendment as an unlawful infringement upon commercial speech.(fn55) Applying the commercial speech test set forth in Central Hudson Gas, the superior court found that while the City of Concord's concerns for public safety and aesthetics are "substantial governmental goals," the City failed to meet its burden of proving that the ordinances advance its asserted interests and reach no further than necessary because the City presented no evidence that regulating the content of electronic display signs will promote aesthetics or public safety.(fn56)

In analyzing the lack of evidence bearing on aesthetics and public safety, the superior court explained

the ZBA expressed many concerns that numerous signs in a small area might lead to visual clutter or otherwise be unsightly. However, the City's ban on electronic display signs does not take into account the character of the area in which a sign is proposed to be placed or the size of the sign or its lettering. For example, the Court can take judicial notice that the sign proposed in this case will be situated among many other commercial entities with large, lit advertising signs of their own. It is difficult to imagine that electronic display signs in this area will have an aesthetically negative effect.(fn57)

[T]he City contends that the changing displays of the proposed sign might be distracting to motorists and lead to increased traffic accidents. While this may have a common sense appeal, no evidence was presented to support such a concern.(fn58)

2. The Majority Opinion -- What Evidence Must a Municipality Produce to Establish the Constitutionality of a Sign Ordinance Under the Commerical Speech Test?

The New Hampshire Supreme Court reversed the superior court's decision striking down the Concord ordinance, holding that the City's sign ordinance was a constitutional regulation of commercial speech.(fn59) The Court, relying upon the oft-cited United States Supreme Court case Metromedia v. San Diego(fn60), explained that a municipality is not required to provide "detailed proof" that the regulation advances its purported interests of safety and aesthetics, and that it may be presumed, as a matter of law, that an ordinance regulating electronic signs advances the twin governmental concerns of aesthetics and traffic safety.(fn61)

In Metromedia, the United States Supreme Court addressed a San Diego ordinance that blanketly prohibited all off-site billboards, but permitted on-site billboards that advertised goods or services available on those premises.(fn62) This regulation had the effect of imposing a substantial burden on many outdoor advertising displays within the City of San Diego in the interest of traffic safety and aesthetics.(fn63) A plurality of the Court held that under the commercial speech analysis, the City's interest in traffic safety and its aesthetic interest justified a prohibition of off-site commercial billboards even though similar on-site signs were permitted.(fn64) Ultimately the Court rejected

the ordinance, however, as unconstitutional because the regulation, by its language, regulated both commercial and non-commercial speech and favored some commercial speech over non-commercial speech.(fn65)

In evaluating the third and fourth prongs of the Central Hudson Gas test, the Court upheld the California Supreme Court's determination that, as a matter of law, an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety, and that similarly, prohibiting billboards satisfies the aesthetic concerns of the community.(fn66) In addressing the apparent incongruity of permitting on-site billboards and not off-site billboards, the Court explained:

In the first place, whether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising. Second, the city may believe that off-site advertising, with its periodically changing content, presents a more acute problem than does on-site advertising. Third, San Diego has obviously chosen to value one kind of commercial speech -- on-site advertising -- more than another kind of commercial speech -- off-site advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that, in a limited instance -- on-site commercial advertising -- its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise -- as well as the interested public -- has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. It does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, off-site commercial billboards may be prohibited while on-site commercial billboards are permitted.(fn67)

The Metromedia decision has been found persuasive by not only the New Hampshire Supreme Court, but also the United States Court of Appeals for the First Circuit.(fn68) Nevertheless, the strength of Metromedia is debatable since it is a plurality decision, and thus is not treated as binding precedent on lower courts.(fn69) Indeed, two justices concurring in the judgment of Metromedia took issue with the plurality's position that the City of San Diego did not have to present evidence to show how the ordinance satisfies its interest in traffic safety and aesthetics.(fn70) This is not to say that Metromedia is not persuasive, and does not support the New Hampshire Supreme Court's decision in Carlson's Chrysler. Unlike Metromedia, however, the City of Concord's ordinance did not ban outright all animated electronic signs, but rather allowed certain signs if they displayed a particular message. While the regulation in Metromedia did permit certain on-premises signs to be displayed, the Court recognized that the interest of traffic safety and aesthetics could not be used as a tool to trump what for many would be the only viable means of advertising their goods and services. The reasons for the distinction in Chrysler are not so apparent, and it is arguable that the Court should not have been so willing to accept the local legislative judgment in such circumstances.

As the superior court recognized in Carlson's Chrysler, the City's ordinance prohibited some kinds of electronic signs and not others, thus prompting the logical question whether the ordinance was too broad to satisfy the City's societal interests, since other signs, electronic or otherwise, were already displayed and could pose similar dangers. Indeed, that the City ordinance allowed an exemption for animated displays showing time, date and temperature certainly called into question whether the ordinance was too broad to satisfy the commercial speech test. While the court should not be in the business of second-guessing decisions by local legislators on what it best for their community, it would certainly be reasonable to inquire, for example, how it is that an electronic and animated sign displaying the date, time and temperature is less distracting to motorists, or less offensive to aesthetics, than other forms of animated electronic signs?

Other lower courts, both federal and state, have required municipalities to produce evidence justifying their regulations under the commercial speech doctrine.(fn71) One case factually analogous to Chrysler agreed that evidence should be presented to support an ordinance regulating similar commercial speech. In Flying J Travel Plaza v. Commonwealth(fn72), the Kentucky Supreme Court examined a local ordinance that stated "advertising devices shall be subject to the following standards":

(4) Lighting of advertising devices: Advertising devices may be illuminated subject to the following restrictions:

(a) Advertising devices which contain, include or are illuminated by any flashing intermittent, or moving light or lights are prohibited except those giving public service information such as time, date, temperature, weather, or similar information.(fn73)

In Flying J, a landowner was denied a permit to use a lighted sign on his property because its message was not limited to time, date, temperature, weather or other public information.(fn74)

Focusing on the Central Hudson Gas test, the Court stated

that the local government "is required to demonstrate the existence of a reasonable connection between the interests of the government and traffic safety and aesthetics and the restraint on commercial speech."(fn75) The government, said the Court, "bears the burden of justifying its restrictions [and] must affirmatively establish the reasonable necessity for the regulations."(fn76) The Court held that the government failed to establish a reasonable connection between the means provided by the regulation and the legislative goals of highway safety and aesthetics.(fn77)

The Court explained the dilemma as follows:

The electronic billboards in question which comply with the technical requirements of the regulation may display "temperature---99 degrees" but may not display "regular unleaded $1.07." When the regulation prohibits commercial speech but allows time, date, temperature or weather information to be displayed, the regulations become substantially broader than necessary to protect the governmental interest of highway safety.

. . .

In this case, the [government] has failed to offer any proof in the trial court, either by expert testimony or otherwise, that the restrictions imposed on the kind of speech allowed to be displayed on the electronic billboard have anything to do with highway safety or aesthetics. Certainly highway safety and aesthetics can be legitimate state interests. In a technical sense, regulations regarding time limits and the number of electronic cycles displayed, as distinguished from content, could have some bearing on highway safety. However, in this case, the content based restrictions have no bearing on either interest.(fn78)

The Court explained that the regulations clearly permit electronic billboards, but improperly limit the content of the message on such boards.(fn79)

The Court also noted that the government failed to satisfy its burden of proving that less restrictive measures were not available to achieve the legitimate government interests.(fn80) The Court took a position similar to the superior court in Carlson's Chrysler, stating that the government should have demonstrated why "simple limits on the number of displays and maximum time limits for those displays will not better serve the governmental interest and highway safety than a content based restriction that results in a prohibition of certain kinds of commercial speech."(fn81) Like the government's restrictions in Flying J, the City of Concord's ordinance sought to regulate speech based on the content of the message conveyed, under the interests of traffic safety and aesthetics.

In his concurring opinion in Chrysler, Justice Duggan noted that the majority did not consider the fact that the City's regulation treated some messages more favorably than others, and acknowledged that the constitutionality of the Concord ordinance was a somewhat "closer question."(fn82) Nevertheless, he ultimately found that the exception advanced a substantial governmental interest.(fn83) Specifically, he noted that the exception "directly and materially advances the City's interests and reaches no further than necessary to accomplish its stated goals."(fn84) "Because a message displaying time, date and temperature is short and rudimentary, the City could have reasonably found that such a message is less distracting and thus poses less of a traffic hazard than other messages."(fn85)

Interestingly, this reason was not one given by City officials as evidence to explain the reasons why the ordinance favored some messages over others, but rather a reason advanced solely by the Court. The question of whether an animated electronic sign displaying the time, temperature or date is equally distracting to motorists, or equally repugnant to the aesthetic landscape, seems to be a question where reasonable people can differ. While the government should not be required to introduce significant evidence to support its ordinance in this circumstance, it is arguable that the regulation cannot be justified based solely on history, consensus, and simple common sense. That said, it seems prudent, therefore, to require the municipality to offer some evidence to support its decision to prohibit certain speech under the circumstances.

As for the fourth prong of the commercial speech test -- whether the ordinance reaches no further than necessary to accomplish its stated goals -- the superior court had found that "the City has available other, more narrowly tailored means to meet its desired objectives. To protect its interests, the City could regulate the number, proximity or placement of electronic display signs or it could ban all types of electronic signs, including those displaying time, date and temperature."(fn86) The Supreme Court disagreed, stating that "[t]he most effective way to eliminate the problems raised by electronic signs containing commercial advertising is to eliminate them."(fn87) Contrary to the Court's statement, however, Concord did not eliminate all electronic animated signs at the time, but rather allowed certain kinds of signs depending upon the message conveyed. Because the Court disregarded the ordinance's content-specific nature in its analysis, it did not address whether the ordinance reached further than necessary to satisfy the interests of traffic safety and aesthetics. Moreover, blanket prohibitions of certain forms of signs do not always pass constitutional muster.

The United States Supreme Court has stated that "Our prior decisions have voiced particular concern with laws that

foreclose an entire medium of expression. Thus, we have held invalid ordinances that completely banned the distribution of pamphlets within the municipality; handbills on the public streets; the door-to-door distribution of literature; and live entertainment."(fn88) "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent -- by eliminating a common means of speaking, such measures can suppress too much speech."(fn89) In Linmark Associates, Inc. v. Willingboro, for example, the city of Willingboro attempted to regulate signs by banning "For Sale" signs, arguing that the restriction was a proper time, place and manner regulation.(fn90) The Court, in rejecting this argument, stated that:

[S]erious questions exist as to whether the ordinance leave[s] open alternative channels for communication. Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations of the like. The options to which sellers realistically are relegated -- primarily newspaper advertising and listing with real estate agents -- involve more cost and less autonomy than "For Sale" signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold. The alternatives, then, are far from satisfactory.(fn91)

Of course, the City of Concord's amended ordinance did blanketly prohibit all animated electronic signs regardless of the message displayed and this was upheld by the United States Court of Appeals for the First Circuit.(fn92) In Naser Jewelers, Incorporated v. City of Concord, the Court noted that City of Concord's ban did not foreclose people from using other means of communication, such as static and manually changeable signs.(fn93) It was also noted that people can also place advertisements in newspapers and magazines and on television and the Internet, distribute flyers, circulate direct mailings, and engage in cross-promotions with other retailers as a means of conveying messages.(fn94) Importantly, a ban on a specific form of electronic sign does not violate the fourth prong of the Central Hudson Gas test because is would be rare when such a method of communication would be vital to an individual or business. Indeed, one of the only conceivable scenarios where a blanket ban could run afoul of the constitution would be if a company was in the business of designing animated electronic signs and was prohibited from displaying such signs to market its business.

3. The Concurrence -- Was it Proper for the Majority to Analyze the City of Concord's Ordinance Under the Commercial Speech Test?

In his concurring opinion in Carlson's Chrysler, Justice Duggan raised a more fundamental question of whether the ordinance was one that regulates both commercial and non-commercial speech. The question is critical because the answer could have changed the decision in the case. As Justice Duggan explained, ordinances that do not differentiate between commercial and non-commercial speech, such as Concord's, typically would not be subject to a strict commercial speech analysis.(fn95) Rather, courts frequently review those regulations under the time, place and manner test.(fn96) The Concord ordinance makes no distinction between commercial and non-commercial messages and, therefore, the party challenging the ordinance could have argued that the Court apply the time, place and manner analysis applicable to non-commercial speech. While the time, place, and manner test is said to be substantially similar to the commercial speech test,(fn97) a threshold question must be addressed regarding whether the ordinance is truly content-neutral, a critical requirement in time, place, and manner analysis. Because neither party argued that the time, place and manner test applied in Chrysler, Justice Duggan chose to limit his discussion to the commercial speech test. Had he and the other members of the Court addressed the City of Concord's regulation as limiting non-commercial speech, the decision may well have been different.

As stated earlier, a sign regulation burdening speech will be considered content-based if the regulation treats signs differently depending upon the message they carry.(fn98) Concord's ordinance provided expressed exceptions for certain content (those messages identifying time, temperature, and date), thereby calling into question the regulation's content neutrality. There are times, however, when courts have upheld regulations as content-neutral, despite the fact that the law prohibits some messages but not others. The United States Supreme Court addressed this arguable contradiction in terms in Ward v. Rock Against Racism(fn99) stating:

[t]he principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.(fn100)

Stated another way, the question of content-neutrality turns on whether the government, through regulation, is either attempting to give an advantage to one side of a debatable

question by allowing that side, and not others, to express views to the public, or is seeking to select certain messages that it considers "permissible subjects for public debate and thus control the search for political truth."(fn101)

Following the Ward decision, some courts have found that sign regulations proscribing certain physical characteristics of signs, but yet allowing an exception for certain messages conveyed, are con-tent-neutral.(fn102) In LaTour v. City of Fayetteville, the United States Court of Appeals for the Eighth Circuit found a sign regulation that prohibits flashing, blinking or animated signs, but, as applied, allows an exemption for signs displaying the time, date or temperature, to be content-neutral.(fn103) Citing Ward, the Court reasoned that the regulation was content-neutral because "[a] regulation that distinguishes between speech activities likely to produce the consequences that it seeks to prevent and speech activities unlikely to have those consequences cannot be struck down for failure to maintain content neutrality."(fn104)

In LaTour, the Court found that the exemption allowing for the display of time and/or temperature did not pose the dangers sought to be addressed by the ordinance and thus the law as a whole could properly be categorized as content-neutral.(fn105) Under LaTour, and indeed the First Circuit's jurisprudence, the fundamental inquiry for contentneutrality requires an examination of the municipality's purpose in crafting the ordinance to determine whether certain speech allowed under the regulation is in contradiction to the non-discriminatory purposes of the ordinance.(fn106) This concept of content-neutrality is subject to some debate, however.

In LaTour, a dissenting justice challenged the majority's contentneutral finding, stating that the City's ordinance cannot be applied in a content neutral way because the message being displayed determines whether or not the sign is illegal.(fn107) As support for his position, the justice relied upon City of Cincinnati v. Discovery Network, Incorporated(fn108), a case in which the United States Supreme Court deemed content specific, an ordinance against handbill distribution that prohibited freestanding newsracks on public property that contained commercial handbills, but permitted similar newsracks that contained newspapers.(fn109)

In Discovery Network, the Court rejected the argument that the City ordinance was content-neutral and stated that the basis for the regulation was the difference between different kinds of speech.(fn110) Importantly, the Court stated that it "expressly rejected the argument that discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas."(fn111) The Court concluded that the City ordinance was content specific because to determine whether a newsrack was prohibited by the regulation required consideration of the publication resting in the newsrack.(fn112) This ban, the Court said, was content specific "by any commonsense understanding of the term."(fn113) Relying upon the Discovery Network case, the dissenting justice in LaTour argued that the Fayetteville ordinance was also content specific because "the city's decision to enforce its ban against some blinking signs and not others is determined solely by the message the sign displays."(fn114) Given the United States Supreme Court's varying interpretation of content-neutrality, it is open to question exactly what form of regulation passes muster.

Indeed, when faced with perhaps one of the optimum cases for resolving the content-neutral/content-based dichotomy, a majority of the Court elected to pass on the opportunity. In City of Ladue v. Gilleo, the United States Supreme Court struck down a city ordinance that banned almost all yard signs on private property, with certain limited exceptions, including real estate signs, house identification signs, and signs for churches, schools, and commercial signs in commercial districts.(fn115) In that case, the petitioner was cited by the City of Ladue for violating the ordinance because she placed a political yard sign on her property.(fn116) While the Court recognized that significant governmental interests of aesthetics and traffic safety sought to be advanced by such an ordinance, it ruled that the regulation violated free speech. The Court's decision was not based upon the ordinance's content-specific nature, however, but rather on the law's failure to leave open ample alternative channels of communication of idea.(fn117) The majority's unwillingness to address the issue of content-neutrality is particularly puzzling given that Gilleo was decided years after Ward v. Rock Against Racism, which may have been construed as supporting the law's content-neutral status.

In a concurring opinion, Justice O'Connor criticized the majority for failing to address the threshold question of content-neutrality, and instead assuming the sign ordinance was content-neutral, especially given the content distinctions evident from the face of the regulation.(fn118) She explained that the Court should have first addressed whether the ordinance was content-specific in order to determine the proper level of scrutiny to apply.(fn119) Justice O'Connor noted that the Court's traditional content-specific/content-neutral approach has been subject to legitimate criticism, and that there are times when laws are "occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable."(fn120) Regardless, she stated that she would have preferred to see the Court apply the normal analytical structure, which may have caused the Court to re-examine the existing free speech doctrine.(fn121)

Because the City of Concord's ordinance arguably regulated both commercial and non-commercial speech, the Court should have started its analysis by asking whether the ordinance was indeed content neutral and then apply the proper scrutiny. Based upon its language, the regulation was arguably content-specific under the traditional meaning of the term because it drew distinctions based on the content and the message on the sign determined whether the sign's owner would be penalized. The fact that the messages conveyed (time, date and temperature) are plain or rudimentary does not change the nature of the ordinance as content specific. In fact, even under the test set forth in Ward, it is debatable whether the exceptions in the ordinance were unlikely to produce the consequences that the City sought to prevent. Absent some evidence to the contrary, it is plausible that animated electronic signs, regardless of content, would frustrate the purposes of traffic safety and aesthetics and thus be legitimate targets for the ordinance.

To allow some content to be displayed in that circumstance renders the regulation content-specific. Accordingly, the ordinance, to the extent it regulated non-commercial speech, would have to be examined under the more stringent strict scrutiny test,(fn122) and declared unconstitutional, even though the ordinance "may" arguably pass muster to the extent it regulates commercial speech. Because the Court did not follow this analytical model, however, the public will need to wait for a future case to come before the Court to see how it treats such regulations.

III. CONCLUSION

From a municipality's perspective, the majority's decision in Carlson's Chrysler is encouraging since it gives substantial deference to a town or city's decisions on how to regulate commercial speech. Whether the local concern is traffic safety or aesthetics, the Court appears to reinforce the principle that zoning is a hallmark of local legislative function, which the Court will not second-guess. So long as there is some logical and reasonable purpose behind the legislation, an ordinance regulating commercial signs -- even if it draws content distinctions -- will be deemed constitutional even if there is a lack of evidence offered to support the differing treatment. In the words of the Court, a regulation of commercial signs will be upheld as constitutional so long as the expressed purposes for the ordinance are not "manifestly unreasonable."(fn123)

Chrysler was decided under the commercial speech doctrine, however, and a regulation limiting non-commercial as well as commercial speech could, and should, receive different treatment. Municipalities should therefore have evidence available to support their regulations in the event the law is interpreted as affecting non-commercial speech.

Footnotes:

1. Carlson's Chrysler v. City of Concord, 156 N.H. 399 (2007).

2. Id. at 401. The City of Concord amended its sign ordinance prior to the Supreme Court's decision, and the amended ordinance was subsequently challenged and found constitutional by the United States Court of Appeals for the First Circuit. Naser Jewelers, Inc. v. City of Concord, 513 F.3d 27 (1st Cir. 2008).

3. U.S. CONST. amend. I.

4. Whitton v. City of Gladstone, 54 F.3d 1400, 1402 (8th Cir. 1995).

5. N.H. Const., Part I Art. 22. Interestingly, speech was not expressly included in this clause until 1968.

6. See Opinion of the Justices, 128 N.H. 46, 50 (1986).

7. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (plurality opinion).

8. Curry v. Prince George's County, 33 F.Supp.2d 447, 451 (D. Md. 1999). See Whitton, 54 F.3d at 1402 ("Signs are a form expression protected by the Free Speech Clause") (quotations, brackets and ellipsis omitted).

9. City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994).

10. Id. (citation and quotations omitted).

11. City of Ladue, 512 U.S. at 48.

12. Taylor v. Town of Plaistow, 152 N.H. 142, 145 (2005).

13. See e.g. Foti v. City of Menlo Park, 146 F.3d 629, 637 n.8 (9th Cir. 1997) (recognizing that in a plethora of reported cases government justified its ban on expression through interests of aesthetics and traffic safety).

14. Carlson's Chrysler, 156 N.H. at 404.

15. Advantage Media, LLC v. City of Eden Prairie, 456 F.3d 793, 803 (8th Cir. 2006) (quotations omitted).

16. USA v. United Foods, Inc., 533 U.S. 405, 409 (2001).

17. See Opinion of the Justices, 121 N.H. 542, 546 (1981).

18. USA v. United Foods, Inc., 533 U.S. at 409.

19. Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 477 (1989).

20. Central Hudson Gas & Elec. v. Public Srv. Comm'n.,

447 U.S. 557 (1980).

21. Central Hudson Gas & Elec., 447 U.S. at 563-66.

22. Thompson v. Western States Medical Ctr., 535 U.S. 357, 373 (2002).

23. See e.g. Carlson's Chrysler, 156 N.H.at 403-05.

24. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555-56 (2001) (citations and quotations omitted).

25. Opinion of the Justices, 121 N.H. at 546.

26. Metromedia, 453 U.S. 490, 513 (1981); see also Burkhart Advertising, Inc. v. City of Auburn, 786 F. Supp. 721, 731-32 (N.D. Ind. 1991) (ordinance banning all off-premises signs held unconstitutional because determination of whether a sign was permitted depended upon what it said and, consequently, treated commercial speech more favorably than non-commercial speech).

27. Metromedia, 453 U.S. at 513.

28. See Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988).

29. Advantage Media, LLC, 456 F.3d at 803 (stating that restrictions on commercial speech need not always be content neutral because the government "may distinguish between the relative value of different categories of commercial speech.").

30. Foti, 146 F.3d at 635.

31. Id. (quoting City of Ladue, 512 U.S. at 59 (O'Connor, J. concurring)).

32. Whitton, 54 F.3d at 1408.

33. See Curry, 33 F.Supp.2d at 452. Content-based restrictions on political speech are subject to the most demanding scrutiny. See Whitton, 54 F.3d at 1408.

34. See Outdoor Systems, Inc. v. City of Lenexa, 67 F.Supp.2d 1231, 1240 (D. Kan. 1999).

35. See id. (noting that general political, real estate and onsite advertising signs are not subject to any durational restrictions).

36. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

37. Id.

38. Lorillard Tobacco Co, 533 U.S. at 554.

39. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980).

40. Cleveland Area Board of Realtors v. City of Euclid, 88 F.3d 382, 388 (6th Cir. 1996).

41. Id. (quotations omitted).

42. Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989).

43. Id.

44. Clark, 468 U.S. at 293.

45. See City of Ladue, 512 U.S. 43 (1994); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977).

46. State v. Miller, 416 A.2d 821,828 (N.J. 1980).

47. See, e.g., Bender v. City of St. Ann, 816 F.Supp. 1372, 1378 (E.D. Miss. 1993); Baldwin v. Redwood City, 540 F.2d 1360, 1368-69 (9th Cir. 1976); Williams v. Denver, 622 P.2d 542, 546-47 (Colo. 1981); see also 83 Am.Jur.2d Zoning and Planning 259 (2003) ("municipal ordinances which regulate the height, size and construction of outdoor signs are generally upheld . . . ."); but see Arlington Cty. Republican Com. v. Arlington Cty., 983 F.2d 587 (4th Cir. 1993) (two sign limit for temporary signs held unconstitutional).

48. Carlson's Chrysler v. City of Concord, 156 N.H. 399 (2007).

49. Carlson's Chrysler, 156 N.H. at 402-05.

50. The Court did address the issue in a more indirect fashion in Asselin v. Conway, 137 N.H. 368 (1993), where the Court held that a local regulation prohibiting the interior illumination of outdoor signs was a reasonable regulation consistent with the due process protections of the Constitution.

51. Carlson's Chrysler, 156 N.H. at 400.

52. Id.

53. Id.

54. Id. at 400-01.

55. Id. at 401.

56. Id. at 403.

57. Id.

58. Id.

59. Id. at 403.

60. Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

61. Carlson's Chrysler, 156 N.H. at 404.

62. Metromedia, 453 U.S. at 495-96.

63. Id.

64. Id. at 512.

65. Id. at 521.

66. Id. at 508-10.

67. Id. at 509-10.

68. Naser Jewelers, Inc., 513 F.3d at 35.

69. Horton v. California, 496 U.S. 128, 131 (1990).

70. Metromedia, 453 U.S. at 528-34 (Brennan, J. and Blackmun, J. concurring)

71. See e.g. Casey v. City of Newport, 308 F.3d 106, 111 (1st Cir. 2002); Flying J Travel Plaza v. Commonwealth, 928 S.W.2d 344, 348 (Ky. 1996) ("Although reasonable time, place and manner restrictions may be used, the state government has the responsibility of justifying such restrictions).

72. Flying J Travel Plaza v. Commonwealth, 928 S.W.2d 344 (Ky. 1996).

73. Id. at 346.

74. Id.

75. Id. at 348 (citing cases).

76. Id.

77. Id.

78. Id.

79. Id. at 849.

80. Id.

81. Id.

82. Carlson's Chrysler, 156 N.H. at 406-07 (Duggan, J. concurring)

83. Id. at 407

84. Id.

85. Id.

86. Id. at 405.

87. Id.

88. City of Ladue, 512 U.S. at 55.

89. Linmark Associates, Inc., 431 U.S. at 93.

90. Id. at 92-93.

91. Id. at 93 (citations and quotations omitted).

92. Naser Jewelers, Inc., 513 F.3d at 37.

93. Id. at 36.

94. Id.

95. Carlson's Chrysler, 156 N.H. at 405 (Duggan, J. concurring).

96. Id. at 405-06 (citing cases).

97. Fox, 492 U.S. at 477 ("[W]e said that the application of the Central Hudson test was "substantially similar" to the application of the test for validity of time, place, and manner restrictions upon protected speech.").

98. See Foti, 146 F.3d at 636; see also Outdoor Systems, Inc., 67 F.Supp.2d at 1240.

99. Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989).

100. Id.

101. City of Ladue, 512 U.S at 51.

102. LaTour v. City of Fayetteville, 442 F.3d 1094, 1097 (8th Cir. 2006).

103. Id. at 1096-97.

104. Id. at 1097. The United States Court of Appeals for the First Circuit follows a similar test for content-neutrality. See Naser Jewelers, Inc., 513 F.3d at 32.

105. LaTour, 442 F.3d at 1097.

106. Id.

107. LaTour, 442 F.3d at 1100 (Hansen, J., dissenting).

108. Id. at 1101; City of Cincinnati v. Discovery Network,

Inc., 507 U.S. 410 (1993).

109. City of Cincinnati, 507 U.S. at 429.

110. Id.

111. Id.

112. Id.

113. Id.

114. LaTour, 442 F.3d at 1101 (Hansen, J., dissenting).

115. City of Ladue, 512 U.S. at 47.

116. Id. at 45.

117. Id. at 56.

118. Id. at 59-60 (O'Connor, J. concurring).

119. Id. at 60 (O'Connor, J. concurring).

120. Id. (O'Connor, J. concurring).

121. Id. (O'Connor, J. concurring).

122. Burson v. Freeman, 504 U.S. 191, 198 (1992) (content-based regulations subject to exacting standard).

123. Carlson's Chrysler, 156 N.H. at 405 (citing Metromedia, 453 U.S. at 509).