

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE CITY OF ROSEVILLE,

Plaintiff-Appellee,

v

EDWARD STROSS,

Defendant-Appellant.

UNPUBLISHED
February 21, 2008

No. 271764
Macomb Circuit Court
LC No. 2005-000694-AR

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order affirming his district court jury trial conviction for violating § 264-9(J) of the city of Roseville's ("the city's") sign ordinance. He was sentenced to two years' probation, with 30 days to be served in jail, and was ordered to modify his mural located at the intersection of Gratiot and Utica Road to comply with a variance that the city granted him. We reverse.

Defendant first argues that § 264-9(I) of the city's sign ordinance is unconstitutional on its face because it is both vague and overbroad. This argument is not properly before this Court. Before trial, plaintiff dismissed an additional charge based on § 264-9(I) and proceeded under § 264-9(J) only. Therefore, defendant was not convicted of violating § 264-9(I). Although defendant contends that he would not have been required to apply for a variance if § 264-9(I) was constitutional, the record shows that he applied for a variance not because of § 264-9(I), but rather, because he sought to paint a mural larger than the 150-square-foot maximum allowed under the sign ordinance. Accordingly, we decline to address this issue.

Defendant next argues that the variance is unconstitutional as applied to his particular circumstances. We agree in part. We review de novo constitutional issues. *In re Contempt of Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003).

Initially, plaintiff argues that defendant waived his right to challenge the variance as unconstitutional by failing to timely appeal an earlier decision of the city's Zoning Board of Appeals ("ZBA"). Former MCL 125.585(11) provided:¹

The decision of the board of appeals is final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:

- (a) *Complies with the constitution and laws of this state.*
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.
- (d) Represents the reasonable exercise of discretion granted by law to the board of appeals. [Emphasis added.]

Moreover, the time limit within which to appeal the decision of a ZBA as of right is 21 days. MCR 7.101(B)(1); *Krohn v Saginaw*, 175 Mich App 193, 196; 437 NW2d 260 (1988).

Plaintiff asserts that, after receiving the benefit of the variance for over seven years and failing to appeal the ZBA's decision pursuant to MCL 125.585(11), defendant cannot now argue that the conditions of the variance are unconstitutional. Defendant's failure to appeal the decision of the ZBA, however, did not waive his constitutional challenge asserted as a defense against the city's enforcement of the variance. See *City of Iron Mountain v Krist Oil Co*, 439 Mich 988; 482 NW2d 458 (1992); *London v Detroit*, 354 Mich 571, 574; 93 NW2d 262 (1958).

Plaintiff also argues that defendant is estopped from challenging the constitutionality of the conditions of the variance because he retained the benefit of the variance for over seven years. Plaintiff relies on the following language from this Court's decision in *City of Troy v Aslanian*, 170 Mich App 523, 530; 428 NW2d 703 (1988):

A party who has accepted and retained the advantages of a variance granted on condition is estopped to attack the propriety of the condition and will be deemed to have waived any error with respect to the imposition of the condition. [Citation omitted.]

Defendant, however, apparently did not accept the purported conditions of the variance because he disputed whether the variance prohibited the display of female breasts and maintained that he

¹ Although the Legislature has repealed MCL 125.585, effective July 1, 2006, the repealed provision applies in the present case, which was pending on the date of repeal. MCL 125.3702(2).

was permitted to title the mural despite the condition pertaining to lettering. Therefore, he is not estopped from challenging the constitutionality of the ordinance.

Defendant argues that the conditions of the variance, as applied, violate his First Amendment right to the freedom of speech.² “The First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that the government ‘shall make no law . . . abridging the freedom of speech.’ US Const, Am I.” *City of Rochester Hills v Schultz*, 459 Mich 486, 489; 592 NW2d 69 (1999). The degree of protection that the First Amendment affords depends on whether the speech at issue constitutes commercial or noncommercial speech. *Bolger v Youngs Drug Products Corp*, 463 US 60, 64-65; 103 S Ct 2875; 77 L Ed 2d 469 (1983). “First Amendment jurisprudence recognizes a distinction between commercial speech and political or expressive speech.” *Rochester Hills*, *supra* at 490. As the United States Supreme Court stated in *Bd of Trustees of the State Univ of New York v Fox*, 492 US 469, 477; 109 S Ct 3028; 106 L Ed 2d 388 (1989), quoting *Ohralik v Ohio State Bar Ass’n*, 436 US 447, 456; 98 S Ct 1912; 56 L Ed 2d 444 (1978),

[o]ur jurisprudence 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.” [Brackets in original.]

Because the protection afforded to commercial speech is less than that afforded to noncommercial speech, where a particular regulation impermissibly regulates commercial speech, it would necessarily also constitute an impermissible regulation of noncommercial speech. In the present case, we conclude that the variance at issue constitutes an impermissible regulation of commercial speech. Therefore, we decline to decide whether the mural constitutes commercial or noncommercial speech.

In *Rochester Hills*, *supra* at 490-491, the Michigan Supreme Court recognized the four-part test announced in *Central Hudson Gas & Electric Corp v Pub Service Comm of New York*, 447 US 557, 566; 100 S Ct 2343; 65 L Ed 2d 341 (1980), for determining the constitutionality of commercial speech regulations. Under the *Central Hudson* test, courts must ask:

(1) Does the speech concern a lawful activity and is it not misleading, so that it falls within the protections of the First Amendment, and (2) is the government’s restriction justified by a substantial governmental interest? If those two questions are answered “yes,” then we must go on to ask: (3) Does the regulation directly advance the asserted governmental interest, and (4) is the regulation more

² Although the city could have permissibly denied the variance for a number of reasons, it could not properly deny the variance, or conditioned it, on a basis that infringed defendant’s constitutional protections, in particular, his right to the freedom of speech. See *Perry v Sindermann*, 408 US 593, 597; 92 S Ct 2694; 33 L Ed 2d 570 (1972).

extensive than necessary to serve the governmental interest. [*Rochester Hills, supra* at 490-491 (internal citation omitted).]³

There appears to be no dispute that the mural is protected under the First Amendment.⁴ Regarding the second factor, the city's restrictions are justified by a substantial governmental interest. The minutes of the July 15, 1997, ZBA meeting, at which the variance was approved, noted that the ZBA considered the health, safety, and welfare of the surrounding area and that granting the variance, with the restrictions, would not be injurious to the neighborhood or otherwise detrimental to the public welfare. Moreover, § 264-2 of the sign ordinance provides that,

[t]he purpose of this chapter [is] to protect the health, safety and welfare of the citizens of the City of Roseville, including but not limited to defining and regulating signs in order to promote aesthetics, to avoid danger from sign collapse and to regulate sign materials, avoid traffic hazards from sign locations and size, avoid visual blight and provide for the reasonable and orderly use of signs.

This Court has recognized that promoting the public health, safety, and welfare of the public are legitimate governmental interests and that protecting aesthetic value is included in the notion of general welfare. *Norman Corp v City of East Tawas*, 263 Mich App 194, 200-201; 687 NW2d 861 (2004). Here, the primary interests involved are traffic safety and the aesthetic value of the neighborhood. These are substantial governmental interests.

Next, we must consider whether the regulation directly advances the asserted governmental interests. Plaintiff argues, and the circuit court determined, that the mural is located at a well-traveled intersection, and that the restrictions are clearly related to avoiding traffic hazards. The mural is 1,100 square feet and covers most of the 50-foot side of the building housing defendant's art studio. Considering the overwhelming size of the mural, the inclusion of genitalia in the mural could very well distract motorists and cause aesthetic concerns.⁵ The inclusion of lettering could also distract motorists, depending on the size and quantity of the lettering. For example, a mural consisting principally of words could cause a traffic safety hazard if drivers shifted their focus to reading the mural. Thus, it appears that the restrictions directly advance the asserted governmental interests.

³ This test applies to commercial speech even if the regulation of the speech is content based. See *Lorillard Tobacco Co v Reilly*, 533 US 525, 553-555; 121 S Ct 2404; 150 L Ed 2d 532 (2001); *King Enterprises, Inc v Thomas Twp*, 215 F Supp 2d 891, 912 (ED Mich, 2002).

⁴ The United States Supreme Court has held that paintings, pictures, drawings, and engravings are protected as speech under the First Amendment. *Kaplan v California*, 413 US 115, 119-120; 93 S Ct 2680; 37 L Ed 2d 492 (1973).

⁵ We note that the mural did not contain genitalia under the plain meaning of that term. *Random House Webster's College Dictionary* (2001) defines "genitalia" as "the organs of reproduction, esp. the external organs." Because breasts are not reproductive organs, they are not properly considered genitalia.

Finally, we must consider whether the restrictions are more extensive than necessary to serve the governmental interests. As our Supreme Court recognized in *Rochester Hills*, *supra* at 497, this prong of the test requires courts to examine the “fit” between a particular restriction and the governmental interest sought to be advanced.

What our decisions require is 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,” that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed. [*Bd of Trustees of the State Univ of New York*, *supra* at 480 (citations and quotations omitted).]

“Thus, the ordinance does not have to be the ‘least restrictive means’ to remedy the asserted governmental interest. The fact that there may be less restrictive means to accomplish the government’s goals will not invalidate an ordinance as long as the ordinance still provides the required ‘reasonable fit.’” *Rochester Hills*, *supra* at 497.

Here, there is a “reasonable fit” between the restriction concerning genitalia and the governmental interest of avoiding traffic hazards and promoting aesthetic value. The more difficult question concerns the restriction on lettering. While prohibiting lettering to a certain extent may be a reasonable means of achieving the goals of traffic safety and aesthetics, prohibiting lettering completely appears to be an excessive restriction compared to the interests sought to be advanced. Indeed, it does not appear that the word “Love” on the mural would distract motorists or detract from the aesthetic value of the neighborhood. Thus, we conclude that the complete ban of *all* lettering is too restrictive to promote the goals of traffic safety and aesthetics and is not narrowly tailored to achieve these objectives. Accordingly, the restriction prohibiting lettering is an unconstitutional regulation of speech, infringing on defendant’s First Amendment protections.

Because the jury was permitted to convict defendant based on the unconstitutional provision prohibiting lettering, his conviction must be reversed. “[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.” *Griffin v United States*, 502 US 46, 53; 112 S Ct 466; 116 L Ed 2d 371 (1991). Thus, because the jury could have convicted defendant based on either the unconstitutional lettering provision or the provision prohibiting genitalia, we reverse his conviction.

In light of our decision, we need not address defendant’s remaining issues.

Reversed.

/s/ William B. Murphy
/s/ Michael R. Smolenski