NOTICE OF SPECIAL MEETING

PLEASE TAKE NOTICE THAT THE MUNICIPAL SERVICES COMMITTEE HAS SCHEDULED A SPECIAL MEETING TO BE HELD ON MONDAY, DECEMBER 16, 2013 AT 6:00 P.M. IN THE COUNCIL CHAMBERS AT CITY HALL, 1702 PLAINFIELD ROAD, DARIEN, ILLINOIS, AGENDA IS AS FOLLOWS:

1. **CALL TO ORDER & ROLL CALL**
2. **ESTABLISHMENT OF QUORUM**
3. **NEW BUSINESS**
    a. **Ordinance - Video Gaming Signage** - Consideration of an amendment to Section 3-3-25 of the City Code to amend signage related to video gaming.
4. **ADJOURNMENT**

THIS NOTICE IS GIVEN PURSUANT TO CHAPTER 5, SECTION 120/2.02 OF THE ILLINOIS COMPILED STATUTES (5 ILCS 120/2.01).

JOANNE E. RAGONA
CITY CLERK
DECEMBER 12, 2013

AGENDA MEMO
MUNICIPAL SERVICES COMMITTEE
MEETING DATE: December 16, 2013

Issue Statement

Video gaming signage: Consideration of an amendment to Section 3-3-25 of the City Code to amend signage related to video gaming.

Planning Overview/Discussion

In March of 2013, the City Council adopted an ordinance permitting video gaming pursuant to the Illinois Video Gaming Act. At a recent City Council goal setting session, there was discussion on whether or not to regulate signage advertising video gaming operations. The City Council directed staff to propose an ordinance amending said signage, including banners, signs in windows, wall signs and free-standing permanent signs.

Staff recently contacted adjacent communities as well as several communities that allow video gaming concerning whether they have enacted regulations specific to video gaming signage. See attached sheet labeled as Attachment A. The table indicates that none of the surveyed communities has any special regulations regarding video gaming only.

The Committee is requested to review the proposed items regarding Gaming Signage:

- Temporary Signs
- Permanent Signs
- Window Signs

TEMPORARY SIGNS

The Sign Code defines a temporary sign as:
A sign intended to be displayed for thirty (30) days or less

4-3-9: TEMPORARY SIGNS:

> The following signs shall be permitted anywhere on private property in the city subject to a sign permit and a permit fee as otherwise set forth in this code. Said signs shall in all respects comply with the applicable regulations contained in this sign code. Such signs shall not be mounted at a height which causes the top of the sign to exceed eight feet (8') above the average surrounding grade. The application for a temporary sign permit shall include a diagram depicting the number, location, size and such other information as requested by the director identifying any proposed signage. No more than one portable sign may be included as part of temporary promotional signage. Portable signs may not exceed four feet by eight feet (4' x 8') in size and shall not employ flashing lights. Such

signs may be internally illuminated. Temporary signs are prohibited in the public right of way.

A. Not more than two (2) construction signs, or signs announcing future construction, with a combined sign surface area not to exceed thirty two (32) square feet, identifying the architects, engineers, contractors and other individuals or firms involved with the construction and announcing the character of the building enterprise or the purpose for which the building is intended. The signs shall be confined to the site of the construction or development and shall be removed within fourteen (14) days after the issuance of the final occupancy permit for the construction or development.

B. Portable signs, banners, streamers, balloons, or other promotional materials or events, specifically approved by the director, and then only for the location(s) designated by the director. Each freestanding business or shopping center is permitted two (2) promotions per calendar year for a period not to exceed thirty (30) days for each promotion.

Action Items
The Committee is requested to review the following regarding Temporary Signs as it relates to Gaming:

Temporary Signs

1. The signs must be in compliance with the Sign Code, Section 4-3-9, Temporary Signs. **This will require no amendment and No Action.**

2. Signage containing video gaming language or graphics shall not exceed 50% of the permitted sign area for temporary signs.

PERMANENT SIGNS

The Section of the Sign Code regulating permitted permanent signs within the Business Districts:

4-3-10: PERMITTED SIGNS IN ZONING DISTRICT:

A. Signs In The Residential Districts:
1. All signs, flags and pennants are prohibited in residential districts except for those enumerated in sections 4-3-8 and 4-3-9 of this chapter.

2. Within residential planned unit developments for which the approved site plan allows nonresidential land uses, the signs allowed within such nonresidential uses shall comply with other provisions of this sign code relating to the type of use allowed (e.g., business zone, office zone, industrial zone).

3. Permanent residential development signs at major entrances designed to identify a residential subdivision or planned unit development and containing no commercial advertising, constructed of material which is the same or of a more permanent nature than the material used in the development with a maximum of thirty two (32) square feet per side.

4. Exempt signs.

5. Temporary signs.

B. Signs In The Business Districts:

1. All signs permitted in residential districts.

2. Wall signs not to exceed two (2) square feet of wall signage for each linear foot of business building frontage, up to a maximum of five hundred (500) square feet. The wall signs shall be placed upon the same side of the building that is considered the business building frontage. A commercial building with frontage on two (2) or more streets shall be permitted an additional one square foot of wall signage for the side of the business building facing the second street for each linear foot of building facing the second street.

3. Not more than one ground sign per street frontage is permitted. Manual changeable copy signs not exceeding forty percent (40%) of the sign area may be included on a ground sign, provided that all individual letters shall be uniform in height, style, and color, and provided the message is enclosed in a locking case. The area of a permitted ground sign shall be limited to sixty (60) square feet per side. The highest point on such ground sign shall not exceed twelve feet (12') above grade.

4. Not more than one gasoline point of sale price sign per street abutting a gasoline filling station, with a maximum sign size of no more than four feet (4') in any direction. No gasoline price sign shall be closer than four feet (4') from the front or corner side property line and shall be no closer than thirty feet (30') from any interior or rear property line.

Action Items
The Committee is requested to review the following regarding Permanent Signs as it relates to Gaming:

1. The signs must be in compliance with the Sign Code, Section 4-3-10(B), Permitted Signs, Signs in the Business Districts. **This will require no amendment and No Action.**

2. Signage containing video gaming language or graphics shall not exceed 50% of the permitted sign area for permanent window and ground signs.

WINDOW SIGNS

The following section relates to Window Signs.

4-3-7: GENERAL SIGN REGULATIONS:

(A) General Provisions: The following provisions shall apply in all zoning districts.

8. Permanent window signs shall conform to the requirements for wall signs under the provisions of the zoning district in which they are located.

4-3-8: EXEMPT SIGNS:

Unless otherwise provided, the signs set forth in this section are permitted in all zoning districts, shall not require a sign permit, and shall not be counted when calculating the number of signs with square footage on premises. However, such signs shall conform to other general regulations for signs enumerated in the remainder of this sign code. Signs exceeding the provisions of this section shall be required to obtain permits and shall conform to all of the requirements for permanent signs in the districts in which they are located.

(L) Window signs of paper or other similar material, placed on the inside of the window of the premises shall be permitted in business zones, provided that such signs are to be used to notify the public of special sales or current prices, and cover no more than fifty percent (50%) of the window area.

Action Items
The Committee is requested to review the following regarding Window Signs as it relates to Gaming:

1. The signs must be in compliance with the Sign Code, Section 4-3-7 and 4-3-8, Permitted Signs, Signs in the Business Districts. **This will require no amendment and No Action.**

2. Window signs referencing gaming shall not exceed 20 square feet. The wall signs shall be placed upon the same side of the building that is considered the business building frontage. A commercial building with frontage on two (2) or more streets shall be permitted window signage for the side of the business building facing the second street.

Additional Information

Staff requested input from the City Attorney regarding some of the legal issues which may be involved in the regulation of video gaming signage. Attorney Murphey's memo and relevant case law is attached and labeled as Attachment B.

Committee Recommendation

The Committee is requested to review the following and provide a recommendation to the City Council approving an amendment to Section 3-3-25 of the City Code to amend signage related to the video gaming Ordinance.

Temporary Signs

1. The signs must be in compliance with the Sign Code, Section 4-3-9, Temporary Signs. **This will require no amendment and No Action.**

OR

2. Signage containing video gaming language or graphics shall not exceed 50% of the permitted sign area for temporary signs.

Permanent Signs

1. The signs must be in compliance with the Sign Code, Section 4-3-10(B), Permitted Signs, Signs in the Business Districts. **This will require no amendment and No Action.**

OR

2. Signage containing video gaming language or graphics shall not exceed 50% of the permitted sign area for permanent window and ground signs.

Window Signs

1. The signs must be in compliance with the Sign Code, Section 4-3-7 and 4-3-8, Permitted Signs, Signs in the Business Districts. **This will require no amendment and No Action.**

OR

2. Window signs referencing gaming shall not exceed 20 square feet.

Alternate Consideration

As directed by Committee.

Decision Mode

The Municipal Services Committee will consider this matter at its meeting on December 16, 2013.

Attachment A

Video Gaming Sign Survey

Municipality	Allows Video Gaming	Temporary Signs	Permanent Sign	Stella's Location	Dotty's Location
Downers Grove	No	NA	NA	NA	NA
Carol Stream	Yes	No regulations	No regulations	NA	NA
Fox Lake	Yes	No regulations	No regulations	NA	NA
Hoffman Estates	Yes	No regulations	No regulations	Yes, no special treatment regarding signage	Yes, no special treatment regarding signage
Homer Glen	Yes	No regulations	No regulations	NA	Yes, no special treatment regarding signage
Lemont	Yes	No regulations	No regulations	NA	Yes, no special treatment regarding signage
Oak Forest	No Response				
Streamwood	Yes	No Regulations	No Regulations		Yes, no special treatment regarding signage
Waukegan	Yes	No regulations	No regulations	NA	Yes, no special treatment regarding signage
Westmont	No Responce				
Wheeling	Yes	No regulations	No regulations	Yes, no special treatment regarding signage	NA
Willowbrook	No Responce				
Woodridge	No	NA	NA	NA	NA

Rosenthal, Murphey, Coblentz & Donahue

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Memorandum

Via E-Mail

To: Dan Gombac

Fr: John B. Murphey

Date: December 11, 2013

Re: Content-Based Restrictions on Video Gaming Signage

I thought it would be helpful for you to have a simple explanation of the ability of the City to restrict or limit the "message" that can appear on signage advertising video gaming.

Of course, "free speech" is protected by the First Amendment. The courts have recognized a distinction between non-commercial speech and commercial speech.

Non-commercial speech, such as political speech, religious expression and the like are entitled to the highest protection under the First Amendment. The government can rarely, if at all, control or regulate the content of political, religious or other non-commercial forms of speech.

On the other hand, the courts allow government a little more flexibility in creating content-based regulations of commercial speech. Messages appearing on signs are a form of commercial speech. A recent federal decision summarizes the standard. In order to "sustain its content-based regulation of commercial speech," the City "must show at least that the [sign ordinance] directly advances a substantial governmental interest, and that the measure is drawn to achieve that interest." *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 370 (4th Cir. 2012). I am attaching a copy of this decision to illustrate the complex constitutional issues which may arise when a local government enacts sign regulations.

In our case, the first question is "what is the substantial governmental interest" we are trying to achieve by regulating the content of video gaming

signage? This is a question for Council consideration, but it seems to me that the governmental interest in enacting a content-based regulation of video gaming commercial speech is that the City wants to avoid "the tail wagging the dog," meaning that video gaming is designed to be ancillary to the principal business of the restaurant or bar, and, therefore, video gaming should not be the dominant activity taking place in the premises. A content-based regulation, which is drawn to achieve this interest, may be constitutionally permissible.

The question then becomes: What is a reasonable regulation to serve this purpose? In my opinion, it would be very difficult for the City to draw up specific language which must appear on video gaming advertising signage, and dictate that language to the business establishments. Similarly, it would be very difficult for the City to draft regulations limiting language that could be put on video gaming advertising.

Should the Council determine to restrict video gaming beyond the restrictions set forth in the City's sign regulations, a more reasonable approach might be limiting the number of signs devoted to video gaming or limiting the total square footage of signage devoted to video gaming, as opposed to dictating or restricting specific content of signage. To some extent, this would still be a content-based regulation, but it would be much easier to administer and more closely connected to the City's goal of making sure that legalized video gaming does not become the predominant activity taking place at the licensed establishments.

I have done additional research on a nation-wide basis. A case arising out of South Carolina held that it was unconstitutional for the state to entirely prohibit the advertising of video gaming. I am attaching a copy of this case, *Video Gaming Consultants, Inc. v. South Carolina Department of Revenue*, 535 S.E.2d 642 (2000). Video gaming has been legal in the state of South Carolina for many years. A state statute provided that "No person who maintains a place or premises for the operation of machines licensed under [the law] may advertise in any manner for the playing of the machines." The Supreme Court of South Carolina held that even though "minimizing gambling would certainly qualify as a substantial government interest," there was no evidence that a complete ban on advertising "would promote its goal of decreasing gambling activity."

It is my understanding that the Council has moved away from any sort of complete ban of video gaming. Nevertheless, I wanted to bring the existence of this case law authority to the Council's attention.

As discussed, I will participate in a telephone conference call on Monday, December 16, 2013, at 6:00 p.m. to review this matter.

JBM/sml

H

Supreme Court of South Carolina.
VIDEO GAMING CONSULTANTS, INC., Appellant,
v.
SOUTH CAROLINA DEPARTMENT OF REVENUE, Respondent.

No. 25177.
Heard June 20, 2000.
Decided July 31, 2000.

Operator of video gaming business appealed from administrative law judge's affirmance of citations issued by the Department of Revenue (DOR) for violation of statute prohibiting advertisement in any manner for playing of machines. The Circuit Court, Horry County, J. Stanton Cross, Special J., affirmed. Operator appealed. The Supreme Court, Moore, J., held that statute that prohibited video gaming operators from advertising the playing of video gaming machines violated the First Amendment.

Reversed.

West Headnotes

[1] Administrative Law and Procedure 15A 429

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules, Regulations, and Other Policymaking
15Ak428 Administrative Construction of Statutes
15Ak429 k. In general. Most Cited Cases
(Formerly 15Ak330)

Administrative law judges (ALJs) are an agency of the executive branch of government and must follow the law as written until its constitutionally is judicially determined.

[2] Administrative Law and Procedure 15A 316

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak316 k. Constitutional questions. Most Cited Cases

Administrative law judges (ALJs) have no authority to pass upon the constitutionality of a statute or regulation.

[3] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure

15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases

Exhaustion of administrative remedies is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

[4] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases

Purposes of requirement of exhaustion of administrative remedies would not be served when the only issue is the validity of a statute.

[5] Constitutional Law 92 983

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k983 k. Exhaustion of other remedies. Most Cited Cases
(Formerly 92k46(1))

As a general rule, if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling.

[6] Declaratory Judgment 118A 41

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(C) Other Remedies
118Ak41 k. Existence and effect in general. Most Cited Cases

If the only issue presented in challenge to agency action is a constitutional challenge to a statute or regulation, a party should seek a declaratory judgment from circuit court rather than going before an administrative law judge (ALJ).

[7] Administrative Law and Procedure 15A 229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases

Mere presence of a constitutional issue

does not excuse the exhaustion of administrative remedies requirement where there are other issues in controversy.

[8] Administrative Law and Procedure 15A ⚿316

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak316 k. Constitutional questions. Most Cited Cases

Constitutional issues may be raised, but not ruled upon, in administrative proceedings.

[9] Constitutional Law 92 ⚿1518

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1518 k. Strict or exacting scrutiny; compelling interest test. Most Cited Cases
(Formerly 92k90.2)

Constitutional Law 92 ⚿1624

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(D) False Statements in General
92k1624 k. Deception; misrepresentation. Most Cited Cases
(Formerly 92k90.2)

When a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ⚿1518

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1518 k. Strict or exacting scrutiny; compelling interest test. Most Cited Cases
(Formerly 92k90.2)

When a state entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process,

there is far less reason to depart from the rigorous review that the First Amendment generally demands. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law 92 ⚿1651

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)2 Advertising
92k1651 k. Gambling and gaming. Most Cited Cases
(Formerly 92k90.3)

Advertising the playing of video gaming machines was entitled to First Amendment protection, as it was commercial speech concerning a legal activity and was not misleading. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 ⚿1651

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)2 Advertising
92k1651 k. Gambling and gaming. Most Cited Cases
(Formerly 92k90.3)

Gaming 188 ⚿63(1)

188 Gaming
188III Criminal Responsibility
188III(A) Offenses
188k63 Constitutional and Statutory Provisions
188k63(1) k. Constitutionality. Most Cited Cases

Statute that prohibited video gaming operators from advertising the playing of video gaming machines violated the First Amendment, though minimizing gambling was a substantial government interest, where there was no expert testimony on the connection between advertising the playing of video games and increased gambling and alternate forms of regulation and educational campaigns regarding effects of gambling might prove effective. U.S.C.A. Const.Amend. 1; Code 1976, § 12–21–2804(B) (Repealed).

[13] Constitutional Law 92 ⚿1541

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)2 Commercial Speech in General
92k1541 k. Reasonableness; relationship to governmental interest. Most Cited Cases
(Formerly 92k90.2)

A governmental body seeking to sustain a restriction on commercial speech must

demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. U.S.C.A. Const.Amend. 1.

****644 *36** H. Buck Cutts, of Surfside, for appellant.

General Counsel Harry T. Cooper, Jr., and Chief Counsel for Regulatory Litigation Nicholas P. Sipe, both of Columbia, for respondent.

***37** MOORE, Justice:

Appellant Video Gaming Consultants, Inc. (Video Gaming), appeals the circuit court's decision holding S.C.Code Ann. § 12–21–2804(b) (Supp.1999) [FN1] constitutional. We reverse.

FN1. This section was repealed by 1999 Act No. 125, Part I, § 8, effective July 1, 2000.

FACTS

Video Gaming operates a video gaming business, Jackpot Video Games, in Garden City. On July 27, 1995, and September 25, 1995, respondent South Carolina Department of Revenue (DOR) issued citations to Video Gaming for violating § 12–21–2804(b).

This code section states: "No person who maintains a place or premises for the operation of machines licensed under Section 12–21–2720(A)(3) may advertise in any manner for the playing of the machines." [FN2] Video Gaming had displayed a large sign reading: "STOP HERE TRY OUR POKER VIDEO GAMES" and two signs stating "JACKPOT VIDEO GAMES." [FN3]

FN2. 27 S.C.Code Ann.Reg. 117–190.2 states:

> The Video Game Machines Act, found in Article 20, Chapter 21 of Title 12, states that no person who maintains a place or premises for the operation of video game machines as defined in Code Section 12–21–2772(5) may advertise in any manner for the playing of the machines. Therefore, any attempt to call attention to, or make known, to the general public that video game machines as defined in Code Section 12–21–2772(5) are available for play is advertising and is strictly prohibited by the statute.

FN3. The September violation was only for the two "Jackpot Video Games" signs.

Video Gaming appealed to the Administrative Law Judge (ALJ) challenging the statute on the ground that it violates the First Amendment. The ALJ upheld the citations. Video Gaming appealed to the circuit court. The circuit court affirmed the ALJ.

ISSUES

1) Does the ALJ have the authority to rule on the constitutionality of a statute?

***38** 2) Is the ban on advertising constitutional?

DISCUSSION

1) ALJ's authority

[1][2] Initially, we address an issue which has appeared in several recent cases. The ALJ specifically stated he had the authority to declare a statute unconstitutional because an ALJ has the same authority as a circuit court judge.[FN4] However, we have ruled an ALJ should not rule on the constitutionality of statutes. *See* Al–Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (ALJs must leave question of statute's constitutionality to the courts). ALJs are an agency of the executive branch of government and must follow the law as written until its constitutionally is judicially determined; ALJs have no authority to pass upon the constitutionality of a statute or regulation. *See, e.g.,* Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm., 335 S.C. 230, 516 S.E.2d 655 (1999); South Carolina Tax Comm'n v. South Carolina Tax Bd. of Review, 278 S.C. 556, 299 S.E.2d 489 (1983). In the present case, the only issue raised is the constitutionality of a statute.

FN4. The ALJ cited § 1–23–630 (Supp.1999), which states: "Each of the law judges of the division has the same power at chambers or in open hearing as do circuit court judges, and to issue those remedial writs as are necessary to give effect to its jurisdiction."

[3][4] Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. Plainly these purposes would ****645** not be served when the only issue is the validity of a statute. *See, e.g.,* Insurance Commissioner of Md. v. Equitable Life Assurance Soc., 339 Md. 596, 664 A.2d 862 (1995).

[5][6] Several cases from other jurisdictions have addressed this issue and have dispensed with the exhaustion requirement in certain situations. *See, e.g.,* Finnerty v. Cowen, 508 F.2d 979 (2d Cir.1974); ***39**Martinez v. Richardson, 472 F.2d 1121 (10th Cir.1973); Marsh v. County Sch. Bd., 305 F.2d 94 (4th Cir.1962). In Finnerty, the court held for it to require exhaustion of administrative remedies would be both futile and unnecessary when the party sought judicial resolution of only a constitutional question that could not be adjudicated by the federal agency. As here, Video Gaming

sought a determination that could not be made by an agency or ALJ. *See also* *Sch. Dist. of City of Saginaw v. United States Dept. of HEW*, 431 F.Supp. 147 (E.D.Mich.1977); *Plano v. Baker*, 504 F.2d 595 (2d Cir.1974). As a general rule, if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling. *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). Thus, we hold if the only issue is a constitutional challenge to a statute or regulation, a party should seek a declaratory judgment from circuit court rather than going before an ALJ.

[7][8] We note the mere presence of a constitutional issue does not excuse the exhaustion requirement where there are other issues in controversy. The constitutional issues may be raised, but not ruled upon, in the administrative proceedings. *Sch. Dist. of City of Saginaw*, 431 F.Supp. 147, 154 (citing *Yakus v. United States*, 321 U.S. 414, 437, 64 S.Ct. 660, 88 L.Ed. 834 (1944)). However, practically speaking, *requiring* a party to raise an issue which cannot be ruled upon by an ALJ makes little sense. *See Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446 (Tenn.1995) (APA requires more flexible approach and party may raise constitutional challenge upon judicial review). Thus, we hold the issue need only be raised to and ruled upon by the circuit court for preservation for further review.

2) Constitutionality of ban

The circuit court held the ALJ had properly applied the test set forth in *Central Hudson.*[FN5] In *Central Hudson,* the United States Supreme Court held:

> FN5. *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (setting forth the test for determining the constitutionality of regulations and restrictions on speech).

***40** 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, 100 S.Ct. at 2351. The circuit court also stated that this statute had been upheld under the *Central Hudson* analysis in *Reyelt et al. v. South Carolina Tax Comm'n,* Civil Action No. 6:93–1491–3 (D.S.C. July 5, 1994). However, this decision is not binding on this Court.

See *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999) (citing *Phillips v. Periodical Publishers' Serv. Bureau, Inc.*, 300 S.C. 444, 388 S.E.2d 787 (1989)). Furthermore, the *Reyelt* decision, the ALJ, and the circuit court all relied heavily upon the case of *Posadas*,[FN6] in which the Supreme Court deferred to the decision of the Puerto Rican legislature to ban advertising of casinos. In *Posadas*, Puerto Rico was permitted to ban casino gambling advertising aimed at its residents, while permitting advertising for other wagering games like cock fights. The Supreme Court has since disavowed its reasoning in *Posadas*. *See* ****646***44 Liquormart, Inc., v. Rhode Island*, 517 U.S. 484, 509, 116 S.Ct. 1495, 1511, 134 L.Ed.2d 711 (1996) ("we are now persuaded that *Posadas* erroneously performed the First Amendment analysis").

FN6. *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986).

In *44 Liquormart*, licensed retailers of alcoholic beverages who had violated Rhode Island's statutory ban on liquor price advertising challenged the ban's constitutionality. The first statute prohibited a licensee from advertising in any manner whatsoever the price of any malt beverage, cordials, wine, or distilled liquor offered for sale in that state. The second statute applied to the Rhode Island news media and contained a categorical prohibition against the publication or broadcast of any advertisements, even those referring to sales in other ***41** states, that made reference to the price of any alcoholic beverage. Additionally, the retailers in *44 Liquormart* challenged regulations which provided that no placard or sign that is visible from the exterior of a package store may make any reference to the price of any alcoholic beverage. Rhode Island argued the ban promoted temperance. The Supreme Court held the challenged Rhode Island statutes and regulation abridged speech in violation of the First Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment.

[9][10] In *44 Liquormart*, the Supreme Court concluded that "special care" should attend the review of such blanket bans, and it pointedly remarked that "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." 517 U.S. at 507, 116 S.Ct. at 1507 (quoting *Central Hudson*, 100 S.Ct. at 2351). When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to com-

mercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands. *Id.*

Sound reasons justify reviewing the latter type of commercial speech regulation more carefully. Most obviously, complete speech bans, unlike content-neutral restrictions on time, place, or manner of expression, are particularly dangerous because they all but foreclose alternative means of disseminating certain information. *Id.* The Court also held "[s]peech prohibitions of this type rarely survive constitutional review." 517 U.S. at 504, 116 S.Ct. at 1508.

[11][12][13] Here, as the circuit court held, the first prong of *Central Hudson* is clearly met. The advertising is entitled to first amendment protection as it is commercial speech concerning ***42** a legal activity and it is not misleading.[FN7] The second prong is whether the asserted governmental interest is substantial. If both inquiries yield positive answers, then, under *Central Hudson,* we must determine whether the regulation directly advances the governmental interest asserted, and lastly whether it is more extensive than is necessary to serve that interest. Stated another way: "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Greater New Orleans Broadcasting Ass'n v. United States,* 527 U.S. 173, 188, 119 S.Ct. 1923, 1932, 144 L.Ed.2d 161 (1999) (citing ****647** *Edenfield v. Fane,* 507 U.S. 761, 770, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)). The circuit court found the ban met the third and fourth prongs of *Central Hudson.* We disagree.

FN7. The DOR concedes the signs in question concern lawful activity. The ALJ found the signs were misleading based upon the word "Jackpot." The DOR states in its brief that it does not waive the issue whether the signs are misleading. However, the DOR does not make any argument on the issue. Thus, the DOR has abandoned this issue. *See First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal); *see also Muir v. C.R. Bard, Inc.,* 336 S.C. 266, 519 S.E.2d 583 (Ct.App.1999) (noting that conclusory arguments may be treated as abandoned); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

Minimizing gambling would certainly qualify as a substantial governmental interest. However, the DOR has not shown the ban would promote its goal of decreasing gambling activity. Under the third prong, the ban must advance the State's objective "to a material degree." *44 Liquormart,* 517 U.S. at 505, 116 S.Ct. at 1509. Here, the DOR argues and the circuit court found that the ban would prevent gambling and gambling addictions and all of the social ills implicated from addictive gambling (i.e. increased criminal activity and harm to families). However, the DOR has presented no evidence that the advertising ban would significantly reduce gambling. *44 Liquormart,* 517 U.S. at 506, 116 S.Ct. at 1510.

The DOR presented three experts. Two were experts on gambling and the third was an expert on advertising. Dr. Valerie Loranz testified that children are starting to gamble earlier because of watching their parents play the games, ***43** advertising of lottery tickets as family entertainment, and their experiences with computers and other video games such as Pac Man—not because of the advertising of "playing" of video poker machines. The DOR contends the other experts testified as to the connection between gambling and societal costs. Again, there was no expert testimony on the connection between advertising "playing" of video games and increased gambling.[FN8] The circuit court also held that, "Video Gaming would not be contesting the ban unless it believed that advertising would increase gambling and machine use." Certainly, we cannot conclude that advertising increases gambling simply because a party is contesting the constitutionality of the ban.

> FN8. Mr. Joseph Cook, one of the DOR's experts, testified that in his opinion publishing a business's name would not be "advertising." Mr. Cook made a distinction between "advertising" which is paid for by a business and "promotion" which he testified would be placing a sign with the business's name on the building.

After *44 Liquormart,* the fourth-prong or "reasonable fit" inquiry under *Central Hudson* has become a tougher standard for the State to satisfy. Little deference can be accorded to the State's legislative determination that a commercial speech restriction is no more onerous than necessary to serve the government's interests. *44 Liquormart,* 517 U.S. 484, 509, 116 S.Ct. 1495, 1511, 134 L.Ed.2d 711.

In *Greater New Orleans Broadcasting Ass'n, supra,* other media remained available, such as newspapers, magazines and billboards, and broadcast advertising of casinos, without reference to gambling, was permitted. The cases have repeatedly stated that government restrictions upon commercial speech may be no more broad or no more expansive than "necessary" to serve its

substantial interests. *See, e.g., Central Hudson,* 447 U.S. at 566, 100 S.Ct. at 2351. The Supreme Court has not insisted that there be no conceivable alternative, but only that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interests." *Board of Trustees of the State University of N.Y. v. Fox,* 492 U.S. 469, 109 S.Ct. 3028, 3034, 106 L.Ed.2d 388 (1989).

The ALJ held the statute was not too restrictive because persons other than Video Gaming operators could advertise ***44** the playing of the machines. [FN9] THE CIRCUIT COURT agreed and, quoting *reyelt,* statEd that the Tourism Department or the Chamber of Commerce could advertise. In its brief, the DOR takes this analysis even further and contends video game operators can advertise "Games" and "Food" [FN10] and even "24 Hours" as long as the ****648** advertisements do not refer or call attention to the playing of games. [FN11] We fail to see the practical distinction between these supposedly legal examples of advertising and the ones for which Video Gaming was fined. All would in effect be advertising the games and, since the gaming machines were not being sold outright, the promotion would be, of course, for the "play" of the games. The implied assertion is that somehow a ban on advertising the "playing" of the games accomplishes the State's objective of not promoting gambling; but merely advertising "games" also promotes gambling.[FN12] We reiterate that the business Video Gaming was running was named "Jackpot Video Games." Thus, two of the signs were advertising the business's name and there was some discussion in the record about whether placing a sign with a business's name on it even qualifies as "advertising." [FN13] ***45** Further, the DOR also cannot satisfy the requirement that its restriction on speech is reasonable or no more extensive then necessary to meet the fourth prong because alternate forms of regulation and educational campaigns regarding the effects of gambling might prove effective. *44 Liquormart,* 517 U.S. at 507, 116 S.Ct. at 1510 (alternate regulations, educational campaigns, limiting per capita purchases, or increased taxation are all alternatives which could be more effective in tempering the use of alcohol).

FN9. He also stated that the person who maintains the premises could also advertise its business but not the playing of the machines. Arguably, Video Gaming had done just that—advertised its business which was named "Jackpot Video Games."

FN10. 27 S.C.Code Ann.Reg. 117–190.1 provides that a business cannot offer "food" as an inducement to influence a person to play video games. Further, S.C.Code Ann. 12–21–2804(E) states: "It is unlawful to operate machines licensed under Section 12–21–2720(A)(3) between

the hours of midnight Saturday night and six o'clock a.m. Monday morning." Thus, this type of conduct would be illegal.

FN11. It appears that in 1995, the DOR agreed with Video Gaming that "Video Games" was not advertising violating the statute. Thus, the effect of the word "Jackpot" would have to be somehow be interpreted as referring to the playing of the games. Obviously, the DOR tied its hands when it agreed to the above and now it is stuck with the unappealing argument it makes.

FN12. We note the DOR did not fine Video Gaming for a violation of offering a special inducement, such as a jackpot.

FN13. The DOR stated at oral arguments the placing of a video gaming business's name and phone number in the white pages of the phone book would be a violation.

Obviously, the DOR realizes that a complete or total ban on advertising would be unconstitutional and violate the fourth prong of the *Central Hudson* test. Thus, the DOR is trying to illustrate the reasonableness of the prohibition. In doing so, the DOR has shown that the ban does not accomplish their goal and thus, also does not meet the third prong of the *Central Hudson* test. In conclusion, we hold the statute does not meet the last two prongs in the *Central Hudson* test and thus the statute is unconstitutional.

REVERSED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice JAMES W. JOHNSON, Jr., concur.

S.C.,2000.
Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue
342 S.C. 34, 535 S.E.2d 642

END OF DOCUMENT

CITY OF DARIEN

DU PAGE COUNTY, ILLINOIS

ORDINANCE NO._____

AN ORDINANCE AMENDING TITLE 3, CHAPTER 3, "LIQUOR CONTROL REGULATIONS," OF THE DARIEN CITY CODE BY ADDING NEW SECTION 3-3-25, "VIDEO GAMING SIGNAGE," THERETO OF THE DARIEN CITY CODE

ADOPTED BY THE

MAYOR AND CITY COUNCIL

OF THE

CITY OF DARIEN

THIS _____ DAY OF _____, 2013

Published in pamphlet form by authority of the Mayor and City Council of the City of Darien, DuPage County, Illinois, this __ day of _____, 2013.

ORDINANCE NO._____

AN ORDINANCE AMENDING TITLE 3, CHAPTER 3, "LIQUOR CONTROL REGULATIONS," OF THE DARIEN CITY CODE BY ADDING NEW SECTION 3-3-25, "VIDEO GAMING SIGNAGE," THERETO

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DARIEN, DU PAGE COUNTY, ILLINOIS, IN THE EXERCISE OF ITS HOME RULE POWERS, as follows:

SECTION 1: Section 3-3-25 of the Darien City Code is amended to provide as follows:

3-3-25: VIDEO GAMING ALLOWED; FEE.

(A) Video gaming is allowed in accordance with the Illinois Video Gaming Act.

(B) An annual fee of $25.00 is imposed for the operation of each video gaming terminal in the City of Darien.

(C) **1. Temporary Signs**

Signage containing video gaming language or graphics shall not exceed 50% of the permitted sign area for temporary signs.

2. Permanent Signs

Signage containing video gaming language or graphics shall not exceed 50% of the permitted sign area for permanent window and ground signs.

3. Window Signs

No window sign containing video gaming language or graphics shall exceed 20 square feet.

SECTION 2: This ordinance and each of its terms shall be the effective legislative act of a home rule municipality without regard to whether such ordinance should (a) contain terms contrary to the provisions of current or subsequent non-preemptive state law, or (b) legislate in a manner or regarding a matter not delegated to municipalities by state law. It is the intent of the corporate authorities of the City of Darien that to the extent that the terms of this ordinance

should be inconsistent with any non-preemptive state law, that this ordinance shall supersede state law in that regard within its jurisdiction.

SECTION 3: This Ordinance shall be in full force and effect from and after its passage and approval, and shall subsequently be published in pamphlet form as provided by law.

APPROVED BY THE CITY COUNCIL OF THE CITY OF DARIEN, DU PAGE COUNTY, ILLINOIS, this 16th day of December, 2013.

AYES: _____

NAYS: _____

ABSENT: _____

APPROVED BY THE MAYOR OF THE CITY OF DARIEN, DU PAGE COUNTY, ILLINOIS, this 16th day of December, 2013.

_____
KATHLEEN MOESLE WEAVER, MAYOR

ATTEST:

_____
JOANNE RAGONA, CITY CLERK

APPROVED AS TO FORM:

_____
CITY ATTORNEY