

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ROBERT PETERSON and )  
LEIBUNDGUTH STORAGE )  
& VAN SERVICE, INC. )

Plaintiffs, )

v. )

Civil Action No. 14-cv-9851

VILLAGE OF DOWNERS GROVE, )  
ILLINOIS, an Illinois municipal )  
corporation )

Judge: Honorable Edmond E. Chang  
Magistrate Judge: Honorable Young B. Kim

Defendant. )

**DEFENDANT’S VERIFIED ANSWER AND COUNTERCLAIM  
TO VERIFIED FIRST AMENDED COMPLAINT**

NOW COMES Defendant, VILLAGE OF DOWNERS GROVE, ILLINOIS, an Illinois municipal corporation (“Village”) by and through its attorneys, DAY & ROBERT, P.C., and answers the Verified First Amended Complaint filed by Plaintiffs as follows:

**ANSWER**

1. Leibundguth Storage & Van Service, Inc. (“Leibundguth”), which has existed in Downers Grove, Illinois, since 1928, has had a sign painted on the back of its brick building advertising its business to train passengers for over 70 years, as shown in the photo below. This sign is crucial to Leibundguth’s business, as thousands of Metra rail commuter passengers see the sign every day. Customers who find Leibundguth because of this sign make up a significant portion of its business.

**ANSWER:** The Village lacks knowledge or information sufficient to form a belief as to the length of time Leibundguth Storage & Van Service, Inc. has existed in Downers Grove, how long Leibundguth has had the sign depicted in paragraph #1 of the Verified First Amended Complaint painted on the “back” of its brick building and if customers who find Leibundguth because of this sign make up a significant portion of its business, and the Village therefore demands strict proof thereof.

Further answering, the Village admits that numerous Metra rail commuters pass the sign on weekdays, but lacks knowledge or information sufficient to form a belief as to how many commuters see the sign every day, and the Village therefore demands strict proof thereof.

**Further answering, the Village denies the sign is crucial to Leibundguth's business.**

2. No one has ever complained about the sign to Plaintiffs, nor, upon information and belief, to Downers Grove (the "Village"). But now the Village is trying to force Plaintiffs to paint over the sign because it does not comply with the Village's sign ordinance, as amended in 2005, which, with some exceptions that do not apply to Plaintiffs, prohibits signs that do not face a roadway, signs painted directly on a wall of a building except in certain zoning districts, and signs over a certain aggregate size.

**ANSWER: The Village denies that no one has complained about the sign to Plaintiffs or to the Village.**

**Further answering, the Village admits that it seeks to eliminate the non-conforming signs of Plaintiffs.**

3. The Village's sign ordinance deprives Plaintiffs of their right to free speech under the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution. Plaintiffs ask this Court to declare the sign ordinance provisions at issue unconstitutional and preliminarily and permanently enjoin enforcement of those provisions of the sign ordinance.

**ANSWER: The Village denies the allegations within paragraph #3 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively asserts that the denial of variances by the Village Zoning Board of Appeals constitutes a final administrative decision (Section 12.090 Village Code) subject to judicial review in accordance with the Illinois Administrative Review Law (735 ILCS 5/3-101). Administrative Review is the sole and exclusive means of judicial review of the variance denials (735 ILCS 5/3-102). Because the decision of the Village Zoning Board of Appeals occurred on November 26, 2014, the 35 day statute of limitations for Plaintiffs to seek judicial review of the denial of the variances expired on January 5, 2015 (735 ILCS 5/3-103). Any and all state court claims seeking judicial review of the Zoning Board of Appeals denial of Plaintiffs' request for variations from the Village sign ordinance, other than a facial constitutional challenge to the sign ordinance, are therefore forever barred.**

**Further answering, the denial of the text amendment to amend the sign ordinance to permit wall signs on building facades that face the Burlington Northern Santa Fe (BNSF) right-of-way by the Village Council on September 2, 2014 and again on October 7, 2014 was a legislative decision, and any action seeking judicial review of that decision is now barred as the 90 day statute of limitation period to do so under Section 5/11-13-25 of the Municipal Code has expired (65 ILCS 5/11-13-25).**

## JURISDICTION AND VENUE

4. This action arises under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1983, 1988, and Article I, Section 4 of the Illinois Constitution. Plaintiffs seek injunctive and declaratory relief against the enforcement of the challenged portions of the Village's sign ordinance, which violate Plaintiffs' free speech rights on their face and as applied.

**ANSWER: The Village admits that the facial constitutional challenges to the Village sign ordinance arise under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1983, 1988, and Article I, Section 4 of the Illinois Constitution**

**Further answering, the Village denies that the challenged portions of the Village sign ordinance are facially unconstitutional infringements upon Plaintiffs' First Amendment right of free speech. By a separate pleading, the Village has filed a motion to dismiss Plaintiffs' as-applied constitutional challenges to the sign ordinance in accordance with Rule 12(b)(6)**

**Further answering, the Village affirmatively asserts that the denial of variances by the Village Zoning Board of Appeals constitutes a final administrative decision (Section 12.090 Village Code) subject to judicial review in accordance with the Illinois Administrative Review Law (735 ILCS 5/3-101). Administrative Review is the sole and exclusive means of judicial review of the variance denials (735 ILCS 5/3-102). Because the decision of the Village Zoning Board of Appeals occurred on November 26, 2014, the 35 day statute of limitations for Plaintiffs to seek judicial review of the denial of the variances expired on January 5, 2015 (735 ILCS 5/3-103). Any and all state court claims seeking judicial review of the Zoning Board of Appeals denial of Plaintiffs' request for variations from the Village sign ordinance, other than a facial constitutional challenge to the sign ordinance, are therefore forever barred.**

**Further answering, the denial of the text amendment to amend the sign ordinance to permit wall signs on building facades that face the BNSF right-of-way by the Village Council on September 2, 2014 and again on October 7, 2014 was a legislative decision, and any action seeking judicial review of that decision is now barred as the 90 day statute of limitation period to do so under Section 5/11-13-25 of the Municipal Code has expired (65 ILCS 5/11-13-25).**

**Further answering, the Village affirmatively asserts that Plaintiffs lack standing to assert a facial challenge to the sign ordinance under the "overbreadth doctrine".**

5. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343, and 2201. The state law claims are so closely related to the federal claims as to create supplemental jurisdiction under 28 U.S.C. § 1367(a).

**ANSWER: The Village admits this Court has jurisdiction over the facial constitutional challenge to the Village sign ordinance. All other inferences or suggestions of this assertion are denied.**

Furthering answering, the Village has filed a separate motion to dismiss Plaintiffs' as-applied constitutional challenges to the sign ordinance in accordance with Rule 12(b)(6).

Further answering, the Village affirmatively asserts that the denial of variances by the Village Zoning Board of Appeals constitutes a final administrative decision (Section 12.090 Village Code) subject to judicial review in accordance with the Illinois Administrative Review Law (735 ILCS 5/3-101). Administrative Review is the sole and exclusive means of judicial review of the variance denials (735 ILCS 5/3-102). Because the decision of the Village Zoning Board of Appeals occurred on November 26, 2014, the 35 day statute of limitations for Plaintiffs to seek judicial review of the denial of the variances expired on January 5, 2015 (735 ILCS 5/3-103). Any and all state court claims seeking judicial review of the Zoning Board of Appeals denial of Plaintiffs' request for variations from the Village sign ordinance, other than a facial constitutional challenge to the sign ordinance, are therefore forever barred.

Further answering, the denial of the text amendment to amend the sign ordinance to permit wall signs on building facades that face the BNSF right-of-way by the Village Council on September 2, 2014 and again on October 7, 2014 was a legislative decision, and any action seeking judicial review of that decision is now barred as the 90 day statute of limitation period to do so under Section 5/11-13-25 of the Municipal Code has expired (65 ILCS 5/11-13-25).

6. This Court is authorized to grant Plaintiffs' prayer for declaratory judgment under 28 U.S.C. §§ 2201 and 2202, Federal Rule of Civil Procedure 57 and 740 ILCS 23/5(b).

**ANSWER: The Village denies the allegations within paragraph #6 of the Verified First Amended Complaint.**

7. This Court is authorized to grant Plaintiffs' pray for injunctive relief under 42 U.S.C. § 1983, Federal Rule of Civil Procedure 65 and 740 ILCS 23/5(b).

**ANSWER: The Village denies the allegations within paragraph #7 of the Verified First Amended Complaint.**

8. This Court is authorized to award Plaintiffs' attorneys' fees and costs under 42 U.S.C. § 1988 and 740 ILCS 23/5(c).

**ANSWER: The Village denies the allegations within paragraph #8 of the Verified First Amended Complaint.**

9. Venue is proper in this district under 28 U.S.C. § 1391(b) because the events giving rise to Plaintiffs' claims occurred within the district and because Defendant is located in this district.

**ANSWER: The Village admits that venue is proper in this district under 28 U.S.C. § 1391(b), limited to the facial challenges to the Village sign ordinance. The Village denies all remaining allegations within paragraph #9 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively asserts that the denial of variances by the Village Zoning Board of Appeals constitutes a final administrative decision (Section 12.090 Village Code) subject to judicial review in accordance with the Illinois Administrative Review Law (735 ILCS 5/3-101). Administrative Review is the sole and exclusive means of judicial review of the variance denials (735 ILCS 5/3-102). Because the decision of the Village Zoning Board of Appeals occurred on November 26, 2014, the 35 day statute of limitations for Plaintiffs to seek judicial review of the denial of the variances expired on January 5, 2015 (735 ILCS 5/3-103). Any and all state court claims seeking judicial review of the Zoning Board of Appeals denial of Plaintiffs' request for variations from the Village sign ordinance, other than a facial constitutional challenge to the sign ordinance, are therefore forever barred.**

**Further answering, the denial of the text amendment to amend the sign ordinance to permit wall signs on building facades that face the BNSF right-of-way by the Village Council on September 2, 2014 and again on October 7, 2014 was a legislative decision, and any action seeking judicial review of that decision is now barred as the 90 day statute of limitation period to do so under Section 5/11-13-25 of the Municipal Code has expired (65 ILCS 5/11-13-25).**

#### **PARTIES**

10. Plaintiff Robert Peterson is a lifetime resident of Downers Grove, Illinois, Vietnam veteran, former firefighter, and the sole owner of Leibundguth. Mr. Peterson became part owner of Leibundguth in 1971 and sole owner in 1985.

**ANSWER: The Village lacks knowledge or information sufficient to form a belief as to the allegations within paragraph #10 of the Verified First Amended Complaint and therefore demands strict proof thereof.**

11. Leibundguth is an Illinois corporation located in Downers Grove, Illinois, that provides moving and storage services for its customers. The business began in 1928 and was incorporated in 1965.

**ANSWER: The Village admits that Leibundguth is an Illinois corporation incorporated in 1964 located in Downers Grove, Illinois, that provides moving and storage services for its customers. The Village lacks knowledge or information sufficient to form a belief as to the remaining allegations within paragraph #11 of the Verified First Amended Complaint and therefore demands strict proof thereof.**

12. The Village of Downers Grove is an Illinois municipal corporation located in DuPage County, Illinois.

**ANSWER: The Village admits the allegations within paragraph #12 of the Verified First Amended Complaint.**

#### STATEMENT OF FACTS

13. Leibundguth was founded in 1928 by Earl Leibundguth as a sand, gravel and building materials company. It obtained a license for moving household goods in 1930 and became a moving and storage company.

**ANSWER: The Village lacks knowledge or information sufficient to form a belief as to the allegations within paragraph #13 of the Verified First Amended Complaint and therefore demands strict proof thereof.**

14. For approximately 80 years, Leibundguth has been located at 1301 Warren Avenue in Downers Grove, which is adjacent to the Metra commuter train tracks ("Metra"). Earl Leibundguth purchased the property and built the brick warehouse in which the business still operates.

**ANSWER: The Village lacks knowledge or information sufficient to form a belief that for approximately 80 years, Leibundguth has been located at 1301 Warren Avenue in Downers Grove, which is adjacent to the train tracks and that Earl Leibundguth purchased the property and built the brick warehouse in which the business still operates, and therefore demands strict proof thereof.**

**Further answering, the Village denies that Metra owns any rail right-of-way in Downers Grove and affirmatively asserts that the rail right-of-way to the south of Plaintiffs' property is owned by Burlington Northern Santa Fe Railroad, and any use of this line by Metra is pursuant to a purchase agreement from Burlington Northern Santa Fe Railroad.**

15. In the mid-1950's, Earl Leibundguth's brother, Edward Leibundguth, became co-owner of the business. Plaintiff Robert Peterson bought all of Earl Leibundguth's shares and

became co-owner with Edward Leibundguth in approximately 1971. Mr. Peterson became sole owner in 1985 after Edward Leibundguth's death.

**ANSWER: The Village lacks knowledge or information sufficient to form a belief as to the allegations within paragraph #15 of the Verified First Amended Complaint and therefore demands strict proof thereof.**

#### **LEIBUNDGUTH'S SIGNS**

16. The back of Leibundguth's building facing the Metra has a sign painted directly on it, with a white background and the words "Leibundguth Storage and Van Service", its phone number, and the words "Wheaton World Wide Movers," with which Leibundguth contracts for a long-distance moving, as picture. The sign is approximately 40 feet long and 10 feet high, a total of 400 square feet, and has been on the building for over 70 years (with maintenance and minor alteration).

**ANSWER: The Village admits that the back of Leibundguth's building facing the Burlington Northern Santa Fe Railroad has a sign painted directly on it, with a white background and the words "Leibundguth Storage and Van Service", its phone number, and the words "Wheaton World Wide Movers", and that the photograph on page 1 of the Verified First Amended Complaint depicts the sign on the railroad right-of-way, and that the sign is approximately 400 square feet in size.**

**Further answering, the Village lacks knowledge or information sufficient to form a belief if Plaintiffs contracts for long distance moving with "Wheaton World Wide Movers", and how long the sign has been on the building with maintenance and minor repair, and therefore demands strict proof thereof.**

17. The sign on the back of Leibundguth's building is not visible to drivers on any roadway. It is visible only to the thousands of Metra commuter train passengers who travel past it every day.

**ANSWER: The Village denies the allegations within paragraph #17 of the Verified First Amended Complaint.**

18. The sign on the back of the building is crucial to Leibundguth's business because it makes potential customers riding the Metra aware of the business. According to Mr. Peterson, approximately 12 to 15 people per month who call seeking Leibundguth's services state that they learned about the business because of the sign facing the Metra. Based on this, Mr. Peterson estimates that Leibundguth generates between \$40,000 and \$60,000 per year in revenue from the sign facing the Metra, the equivalent of approximately 15 to 20 percent of revenue.

**ANSWER: The Village denies the allegations within paragraph #18 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively states that when Mr. Peterson was asked by the Zoning Board of Appeals if he had any records or bookkeeping that would substantiate his belief as to revenue generation or lost revenues, he could not produce any such records or bookkeeping.**

19. The front of the building also has a sign painted directly on the brick, with a white background and the words “Leibundguth Storage and Van Service” and its phone number, as shown below. That sign is 40 feet long and 2 feet high, for a total of 80 square feet. That sign, too, has existed on the building for over 70 years.

**ANSWER: The Village admits that the front of the building also has a sign painted directly on the brick, with a white background and the words “Leibundguth Storage and Van Service” and its phone number, as shown below paragraph #19 of the Verified First Amended Complaint.**

**Further answering, the Village denies that the sign is 40 feet long and 2 feet high, for a total of 80 square feet, and further affirmatively asserts that the sign is 108 square feet.**

**Further answering, the Village lacks knowledge or information sufficient to form a belief that the sign has existed on the building for over 70 years, and therefore demands strict proof thereof.**

20. The other side of the front of the building bears a sign with red and white hand-painted block letters spelling out “Leibundguth Storage & Van Service,” as shown below. That sign has been on the front of the building since before Mr. Peterson became an owner in 1971. It is 19 feet long by 2 feet high, for a total of 38 square feet.

**ANSWER: The Village admits that the other side of the front of the building bears a sign with red and white hand-painted block letters spelling out “Leibundguth Storage & Van Service,” as shown below paragraph #20 of the Verified First Amended Complaint.**

**Further answering, the Village lacks knowledge or information sufficient to form a belief that the sign has been on the front of the building since before Mr. Peterson became an owner in 1971, and therefore demands strict proof thereof.**

**Further answering, the Village denies that the sign is 19 feet long by 2 feet high, for a total of 38 square feet, and affirmatively asserts that the sign is 157.7 square feet as measured under the Village sign ordinance.**

21. Also on the front of the building, directly under the sign with block letters, is a small sign advertising Leibundguth’s relationship with Wheaton World Wide Movers, as shown below. That sign is 7 feet long by 4 feet high, for a total 28 square feet. Mr. Peterson posted the



Wheaton sign in 1987, replacing an almost identical sign that bore the company's former name, Wheaton Van Lines, which had been in place since the mid-1970's.

**ANSWER:** The Village admits that on the front of the building, directly under the sign with block letters, is a sign advertising Leibundguth's claimed relationship with Wheaton World Wide Movers, as shown below paragraph #21 of the Verified First Amended Complaint.

Further answering, the Village denies that the sign is "small" and denies that it is 7 feet long by 4 feet high, for a total 28 square feet, and affirmatively asserts that this sign is measured in combination with the sign referenced in paragraph #20 above and has a combined total of 157.7 square feet as measured under the Village sign ordinance.

Further answering, the Village lacks knowledge or information sufficient to form a belief Mr. Peterson posted the Wheaton sign in 1987, replacing an almost identical sign that bore the company's former name, Wheaton Van Lines, which had been in place since the mid-1970's, and therefore demands strict proof thereof.

22. The signs on the front of the building are important to identify the business to passersby and potential customers. The Wheaton sign is important to the business because it identifies Leibundguth's relationship with a well-known long-distance moving service that Leibundguth can provide to its customers. These four signs are the only signs on the property that identify and advertise the business.

**ANSWER:** The Village admits that the signs on the front of the building identify the business to passersby and potential customers, and that the Wheaton sign claims Leibundguth's relationship with a long-distance moving service that Leibundguth claims it can provide to its customers.

Further answering, the Village denies that the four signs are the only signs on the property that identify and advertise the business.

Further answering, the Village lacks knowledge or information sufficient to form a belief that the signs on the front of the building are important or that the Wheaton sign is important to the business, and therefore demands strict proof thereof.

23. All four of Plaintiffs' signs are truthful and not misleading. The signs communicate only the name of the business, the telephone number of the business, and Leibundguth's relationship with Wheaton World Wide Movers.

**ANSWER:** The Village admits that the four signs referenced in the Verified First Amended Complaint communicate only the name of the business, the

**telephone number of the business, and Leibundguth's claimed relationship with Wheaton World Wide Movers.**

**Further answering, the Village lacks knowledge or information to form a belief that all of Plaintiffs' four signs are truthful and not misleading, and therefore demands strict proof thereof.**

24. All four of Plaintiffs' signs advertise a lawful activity – moving and storage – for which Leibundguth is licensed.

**ANSWER: The Village admits the allegations within paragraph #24 of the Verified First Amended Complaint.**

25. No one has ever complained to Plaintiffs or, on information and belief, to the Village about any of the signs on the building based on safety, aesthetics, or any other reason.

**ANSWER: The Village denies the allegations within paragraph #25 of the Verified First Amended Complaint.**

#### **THE SIGN ORDINANCE**

26. On May 3, 2005, the Downers Grove Village Council adopted an amendment to the Village's sign ordinance, attached as Exhibit A, which reduced the size and amount of signage permitted and prohibited certain types of signs in Downers Grove.

**ANSWER: The Village admits that on May 3, 2005, by passage of Ordinance No. 4668, the Downers Grove Village Council adopted an amendment to the Village's sign ordinance which modified the regulations for certain types of signs in Downers Grove, and that Exhibit A is the current "clean" version of the sign ordinance as amended on May 3, 2005. The Village denies the remaining allegations within paragraph #26 of the Verified First Amended Complaint.**

27. The stated purpose of the sign restrictions is to create "a comprehensive but balanced system of sign regulations to promote effective communication and to prevent placement of signs that are potentially harmful to motorized and non-motorized traffic safety, property values, business opportunities and community appearance." Sec. 9.010(A).

**ANSWER: The Village denies the allegations within paragraph #27 of the Verified First Amended Complaint.**

**The Village affirmatively asserts that the "purpose" recital of the Village sign ordinance states:**

**Purpose:**

The sign regulations of this article are established to create a comprehensive but balanced system of sign regulations to promote effective communication and to prevent placement of signs that are potentially harmful to motorized and non-motorized traffic safety, property values, business opportunities and community appearance. This article is adopted for the following specific purposes:

1. to preserve, protect and promote public health, safety and welfare;
2. to preserve the value of private property by assuring the compatibility of signs with surrounding land uses;
3. to enhance the physical appearance of the village;
4. to enhance the village's economy, business and industry by promoting the reasonable, orderly and effective display of signs, and encouraging better communication between an activity and the public it seeks with its message;
5. to protect the general public from damage and injury, that may be caused by the faulty and uncontrolled construction and use of signs within the village;
6. to protect motorized and non-motorized travelers by reducing distraction that may increase the number and severity of traffic accidents; and
7. to encourage sound practices and lessen the objectionable effects of competition with respect to size and placement of street signs.

The Village also affirmatively asserts that the challenged sign regulations fulfill the following additional purposes:

**Section 1.060 Purposes**

This zoning ordinance is adopted for the purposes of:

- A. protecting and promoting the public health, safety and general welfare; and

- B. implementing the policies and goals contained within the comprehensive plan and other officially adopted plans of the village.**

**Section 3.010 Districts**

**M-1, Light Manufacturing District**

**The M-1 district is primarily intended to accommodate office, research and employment uses, including very low-impact industrial activities**

**SIGNS PAINTED DIRECTLY ON A WALL, ROOF, OR FENCE PROHIBITED**

28. The ordinance prohibits “any sign painted directly on a wall” except, without explanation, in the Downtown Business (DB), Downtown Transitional (DT), and Fairview concentrated business districts.” Sec. 9.020(P).

**ANSWER: The Village admits that one section of the ordinance prohibits “any sign painted directly on a wall” except, in the Downtown Business (DB), Downtown Transitional (DT), and Fairview concentrated business districts.” Sec. 9.020(P).**

**Further answering, the Village denies that the ordinance prohibits “any sign painted directly on a wall” except, without explanation, in the Downtown Business (DB), Downtown Transitional (DT), and Fairview concentrated business districts.” Sec. 9.020(P).**

**The Village affirmatively asserts that in addition to signs painted on a wall, the provision also prohibits signs painted on a roof or a fence, and that the “purpose” section of the Village sign ordinance asserts the purposes for all Village sign regulations, including Section 9.020(P).**

29. The sign ordinance prohibits Plaintiffs’ signs hand-painted directly on the front and back walls of the building, which is located in the Light Manufacturing zone (M1) one block away from the Downtown Business zone.

**ANSWER: The Village admits the allegations within paragraph #29 of the Verified First Amended Complaint.**

**WALL SIGNS FACING THE METRA COMMUTER RAIL TRACKS PROHIBITED**

30. The ordinance permits each business or property owner to display one wall sign (not painted directly on a wall, roof, or fence), which must face a public roadway or drivable right-of-way. Sec. 9.050(C).

**ANSWER:** The Village admits that a wall sign is required to face a public roadway or drivable right-of-way, and cannot be painted onto a wall, roof or fence.

The Village affirmatively states that the M1 zoning district permits each business or property owner to have one wall sign per tenant frontage along a public roadway or drivable right-of-way.

Further answering, the Village denies that that the ordinance permits each business or property owner to display only one wall sign.

31. "Public roadway or drivable right-of-way" is not defined in the sign ordinance, but the Village has concluded that it does not include the Metra tracks. (See Zoning Board of Appeals Staff Report, attached as Exhibit B and Minutes of Village Council meetings, attached as Exhibit C.) Therefore, the ordinance does not permit a sign that faces the Metra if that same sign does not also face a roadway. As a result, the ordinance bans the sign on the back of Leibundguth's building because it faces the Metra and not a roadway.

**ANSWER:** The Village admits that there is no specific definition for a "Public roadway or drivable right-of-way" in the sign ordinance. The Village admits that a "public roadway or drivable right-of-way" excludes the Burlington Northern Santa Fe Railroad right-of-way or any other railroad right-of-way. The Village admits the ordinance does not permit a wall sign that faces the Burlington Northern Santa Fe Railroad right-of-way if that same wall sign does not also face a roadway. The Village admits the ordinance prohibits the wall sign on the back of Leibundguth's building because it faces the Burlington Northern Santa Fe Railroad right-of-way and not a roadway.

32. The sign ordinances does not require any types of signs other than wall signs to be displayed "along a public roadway or drivable right-of-way." Sec. 9.050. Thus, monument signs, projecting signs, and window signs may all face the Metra without having to also face a roadway.

**ANSWER:** The Village admits that a wall sign must be displayed along a public roadway or drivable right-of-way. The Village admits that certain other types of signs other than wall signs do not need to be displayed along a public roadway or drivable right-of-way. The Village denies the remaining allegations within paragraph #32 of the Verified First Amended Complaint.

#### **EXCEPTIONS TO LIMITATIONS ON THE NUMBER OF SIGNS**

33. Although the sign ordinance limits a property to one wall sign, Sec. 9050(C)(1), upon information and belief, the Village has allowed some businesses in Downers Grove to have more than one wall sign per side on their buildings. Plaintiffs have three signs on the front wall of their building and one sign painted on the wall of the back of their building.

**ANSWER:** The Village admits that in certain circumstances when part of a planned unit development (PUD), some properties in Downers Grove are allowed to have more than one wall sign per side on their building, and that Plaintiffs have one sign painted on the brick on the wall on the back of their building.

**Further answering, the Village denies that the sign ordinance limits all properties to only one wall sign, and denies that for purposes of calculation of the sign area, Plaintiffs have three signs on the front wall of their building.**

34. The sign ordinance provides exceptions to this limitation, none of which apply to Plaintiffs' signs. For one, the sign ordinance allows buildings of four stories or more one wall sign up to three sides of the building, with a maximum area of 100 square feet per sign. Such signs are not counted in calculated maximum allowable sign area. Sec. 9.050(C)(4).

**ANSWER:** The Village lacks knowledge or information to form a belief that the sign ordinance provides exceptions to "this limitation" because the Village does not know which limitation is "this limitation", none of which applies to Plaintiffs' signs, and therefore the Village demands strict proof as to the allegations within paragraph #34 of the Verified First Amended Complaint.

35. The sign ordinance allows signs affixed to windows on a building without a limit on the number. Sec. 9.050(H).

**ANSWER:** The Village admits that window signs are permitted and that window signs are only regulated by percentage of the window covered and type of lettering permitted.

**Further answering, the Village denies that window signs may be "affixed" to windows.**

36. In addition to one wall sign, the sign ordinance allows a property owner to have multiple window signs, Sec. 9.050(H); a shingle sign or a monument sign, Sec. 9.050(B); a menu board, Sec. 9.050(D); a projecting sign, Sec. 9.050(E); an awning sign, Sec. 9.050(F); and an under-canopy sign, Sec. 9.050(G).

**ANSWER:** The Village admits that the Downers Grove sign regulations permit, in certain circumstances, each category of sign type referenced.

**Further answering, the Village denies the balance of the allegations within paragraph #36 of the Verified First Amended Complaint.**

37. Thus, Plaintiffs could display multiple windows signs, a shingle sign, a monument sign, a menu board, a projecting sign, an awning sign, and an under-canopy sign on their property, but they cannot display more than one wall sign.

**ANSWER: The Village denies the allegations within paragraph #37 of the Verified First Amended Complaint.**

**Further answering, the Village admits that Plaintiffs are afforded a multitude of commercial speech opportunities which could be executed in full compliance with the Village sign ordinance. The Village further affirmatively asserts that Plaintiffs' existing signs violate the time, place and manner regulations of the Village which, until brought into conformity, would prohibit additional signs.**

38. Plaintiffs do not wish to display window signs, a shingle sign, a monument signs, a menu board, projecting signs, awning signs, or under-canopy signs on their property because those signs are not as effective in communicating Plaintiffs' message as their four wall signs currently on the building.

**ANSWER: The Village lacks knowledge or information to form a belief as to the allegations within paragraph #38 of the Verified First Amended Complaint and therefore demands strict proof thereof.**

#### **SIGNS ARE LIMITED TO A MAXIMUM TOTAL AREA**

39. The ordinance also limits the "maximum total sign area" to 1.5 square feet per linear foot of tenant frontage, except for buildings set back more than 300 feet from the abutting street right-of-way, which may have a total sign of up to two square feet per linear foot of tenant frontage. However, in no case may a single tenant exceed 300 square feet in total sign surface area. Sec. 9.050(A).

**ANSWER: The Village denies the allegations within paragraph #39 of the Verified First Amended Complaint. The Village affirmatively asserts that Section 9.050(A) permits, in addition to 1.5 square feet per linear foot of tenant frontage, any signs expressly excluded from maximum sign area calculations.**

40. Leibundguth's building is set back less than 300 feet from the abutting street right-of-way.

**ANSWER: The Village admits the allegations within paragraph #40 of the Verified First Amended Complaint.**

41. According to the Village's calculations, Plaintiffs are permitted only 159 square feet for all of their signs. Ex. B.

**ANSWER: The Village admits that according to the Village's calculations, Plaintiffs are permitted only 159 square feet for all of their existing commercial advertising signs. The Village denies all remaining allegations within paragraph #41 of the Verified First Amended Complaint.**

42. Plaintiffs' sign on the back of their building facing the Metra is approximately 400 square feet, while the signs on the front of the building total approximately 146 square feet.

**ANSWER: The Village admits that Plaintiffs' sign on the back of their building facing the Burlington Northern Santa Fe Railroad is approximately 400 square feet.**

**Further answering, the Village denies the signs on the front of the building total approximately 146 square feet.**

#### **EXCEPTIONS TO THE MAXIMUM TOTAL SIGN AREA**

43. Upon information and belief, the Village has allowed some businesses in Downers Grove to have signs totaling more than 300 square feet.

**ANSWER: The Village admits that some businesses in the Village are lawfully permitted to have signs totaling more than 300 square feet.**

44. In addition, the sign ordinance provides several exceptions to the maximum allowable sign area. First, Properties abutting I-88 or I-355 are allowed a second monument sign to reach drivers on those highways that does not count in calculating the lot's total sign area. Sec. 9.050(B)(3).

**ANSWER: The Village admits the allegations within paragraph #44 of the Verified First Amended Complaint.**

45. Buildings of four stories or more are allowed one wall sign of 100 square feet or less on no more than three sides of the building, which are not counted against the maximum allowable sign area. Sec. 9.050(C)(4).

**ANSWER: The Village admits the allegations within paragraph #45 of the Verified First Amended Complaint.**

46. Further, for multi-tenant shopping centers, a tenant's panel sign is not counted toward the allowable sign surface area. Sec. 9.050(B)(2).

**ANSWER: The Village admits the allegations within paragraph #46 of the Verified First Amended Complaint.**

47. Finally, window signs, Sec. 9.050(H), and menu boards, Sec. 9.050(D), also are not counted in calculating the maximum allowable sign area.

**ANSWER: The Village admits the allegations within paragraph #47 of the Verified First Amended Complaint.**



## CONTENT-BASED EXCEPTIONS TO THE SIGN ORDINANCE

48. The sign ordinance exempts 15 types of signs from its provisions based on the content of those signs.

**ANSWER:** The Village admits that the sign ordinance allows properties and owners to display a multitude of specific sign types without a permit, subject to regulations.

Further answering, the Village denies the remaining allegations within paragraph #48 of the Verified First Amended Complaint, and affirmatively asserts that the 15 types of signs which may be displayed without a permit are not “exempt” from the Village sign ordinance, and are actually regulated and subject to the Village sign ordinance.

49. These content-based exemptions include:

- Governmental signs, public signs and other signs incidental to those signs or identification, information or directional purposes;
- “No trespassing” or similar signs regulating the use of property;
- Noncommercial flags of any country, state, or unit of local government;
- Real estate signs;
- Political signs and other noncommercial signs;
- “Memorial signs and tablets, names of buildings and date of erection when cut into masonry, surface or inlaid so as to be part of the building or when constructed of bronze or other noncombustible material.”

Sec. 9.030.

**ANSWER:** The Village denies the allegations within paragraph #49 of the Verified First Amended Complaint.

Further answering, the Village admits the sign regulations allow the following signs without a permit, and subject to the following regulations:

### **Sec. 9.030 Signs Allowed without a Sign Permit**

The following signs do not require a sign permit and are subject to the following regulations:

- A. **Governmental signs, public signs and other signs incidental to those signs for identification, information or directional purposes erected or required by governmental bodies, or authorized for a public purpose by any law, statute or ordinance.**
- B. **Railroad crossing and signs of public utility companies indicating danger or that serve as an aid to public safety or that show the location of underground facilities.**
- C. **Street address signs up to 4 square feet in area.**
- D. **Decorations temporarily displayed in connection with a village-sponsored or approved event or a generally recognized or national holiday.**
- E. **Temporary signs at a residence commemorating a personal event, such as a birth, birthday, anniversary or graduation.**
- F. **“No trespassing” or similar signs regulating the use of property, provided such signs are no more than 2 square feet in area.**
- G. **Noncommercial flags of any country, state or unit of local government.**
- H. **Real estate signs, provide that in residential zoning districts, real estate signs may not exceed 5.5 square feet in area, including all attached tags. In nonresidential zoning districts, real estate signs may not exceed 36 square feet in area. Real estate signs may be used solely for advertising the sale, rental or lease of the property where such sign is located. Real estate signs may not exceed 10 feet in height. No more than one real estate sign is allowed per lot where such lot contains a single use, except on a corner lot one real estate sign is allowed per street frontage. When a lot contains multiple uses one real estate sign is allowed per use. Real estate signs may not be placed in the public right-of-way, except that “open house” signs may be placed in the public right-of-way on Friday, Saturday and Sunday of the weekend that the open house will take place. Such open house signs may be posted only between the hours of 5:00 a.m. Friday to 10:00 p.m. on Sunday, provided that:**
  - 1. **the open house sign may not exceed 4 square feet in area;**
  - 2. **the open house sign must be freestanding, not attached to any utility pole, traffic control sign or other similar structured and must be placed at least 3 feet from the curb or edge of the pavement;**

3. only one open house sign is permitted within 150 feet of another sign that relates to the same address. There may be one open house sign relating to the same address placed in on a single lot;
  4. no attention-getting or attracting devices may be attached to any open house sign;
  5. each open house sign must have attached to it an adhesive label or other means to identify the name, address and telephone number of the person responsible for placement and removal of the sign; and
  6. a minimum of \$75.00, per Section 1.16(f) of the municipal code, will be levied on the person whose name is on the sign if the sign does not comply with the preceding regulations. If no names are found on the sign the fine will be levied on the owner of the property identified on the sign.
- I. Political signs and noncommercial signs, provided that total area of all such signs together may not exceed a maximum of 12 square feet per lot. Political and noncommercial signs may not be placed in the public right-of-way.
- J. Garage sale, rummage sale, yard sale and estate sale signs, provided that such signs may be placed in the public right-of-way only on Friday, Saturday, Sunday and federal holidays that are observed on Mondays of the weekend that the sale will take place. Such sale signs may be posted only between the hours of 5:00 a.m. to 10:00 p.m. on Sunday, provided that:
1. the sign may not exceed 4 square feet in area;
  2. the sign must be freestanding, not attached to any utility pole, traffic control sign or other similar structured and must be placed at least 3 feet from the curb or edge of the pavement;
  3. only one sale sign is permitted within 150 feet of another sign that relates to the same address. There may be one sale sign relating to the same address placed in on a single lot;
  4. no attention-getting or attracting devices may be attached to any sale sign;

5. each sale sign must have attached to it an adhesive label or other means to identify the name, address and telephone number of the person responsible for placement and removal of the sign; and
  6. a minimum of \$75.00, per Section 1.16(f) of the municipal code, will be levied on the person whose name is on the sign if the sign does not comply with the preceding regulations. If no names are found on the sign the fine will be levied on the owner of the property identified on the sign.
- K. Memorial signs and tablets, names of buildings and date of erection when cut into masonry surface or inlaid so as to be part of the building or when constructed of bronze or other noncombustible material.
  - L. "Help wanted" signs up to 2 square feet in area. The "help wanted" sign text must be the predominant text on the sign. Help wanted signs may only be located on a window or door.
  - M. Public notice signs are permitted on property that is the subject of a public meeting or hearing. Such signs may not exceed 9 square feet in area or 6 feet in height.
  - N. Vehicle signs are allowed when the vehicle to which the sign is attached is licensed, insured, and operational. The vehicle must be used for the operation of the business and may not remain stationary for an extended period of time for the purpose of attracting attention to a business.
  - O. Up to one contractor sign is allowed per lot. Such sign may not exceed 6 square feet in area and must be removed upon completion of related work.
50. These signs are exempt from the permit requirement.

**ANSWER:** The Village denies the allegations within paragraph #50 of the Verified First Amended Complaint.

Further answering, the Village admits the signs referenced in Section 9.030 are permitted without obtaining a permit, but affirmatively asserts that these signs are subject to regulations and are not exempt from the sign ordinance.

51. These signs are not subject to the requirement that a sign be "along a public roadway or drivable right-of-way," which would prohibit them from facing the Metra.

**ANSWER: The Village admits that the signs allowed without a permit under Section 9.030 are not subject to the wall sign requirement that they face a public roadway or drivable right-of-way.**

52. Accordingly, Plaintiffs could display a sign facing the Metra if the content of their sign was political or noncommercial, advertised the sale or lease of the property, stated “no trespassing”, or was a memorial sign or tablet cut into masonry surface or inlaid so as to be part of the building. And if Plaintiffs were a governmental entity, their identification signs would be permitted to face the Metra.

**ANSWER: Because this is an incomplete hypothetical, the Village lacks sufficient knowledge or information to form a belief as to the allegations within paragraph #52 of the Verified First Amended Complaint and therefore demands strict proof thereof.**

53. The sign ordinance does not limit the number of those exempt signs that a property owner may erect.

**ANSWER: The Village denies the allegations within paragraph #53 of the Verified First Amended Complaint.**

54. Accordingly, Plaintiffs could display more than one wall sign if the content of their signs were political or noncommercial, advertised the sale or lease of the property, stated “no trespassing,” or were memorial signs or tablets cut into masonry surface or inlaid so as to be part of the building. And if Plaintiffs were a governmental entity, they would not be limited to one wall sign.

**ANSWER: The Village denies the allegations within paragraph #54 of the Verified First Amended Complaint.**

55. Because Plaintiffs’ signs advertise a commercial business, however, they are limited to one wall sign, which is limited in size and is prohibited from facing the Metra.

**ANSWER: The Village admits that the wall sign regulations prohibit Plaintiffs’ wall signs based on size, number and location. The Village denies the remaining allegations within paragraph #55 of the Verified First Amended Complaint.**

#### **EFFECT OF THE SIGN ORDINANCE AND EXEMPTIONS FOR SOME SIGNS**

56. The amendment to the sign ordinance established an amortization period requiring all signs to comply with the sign ordinance by May 4, 2012, which was later extended to May 5, 2014. The amortization period is non-compensated. Sec. 9.090(G). Any sign previously granted a variance could continue to be nonconforming until discontinued, abandoned, altered, moved or sold. Sec. 9.090(H).

**ANSWER: The Village admits the allegations of paragraph #56 of the Verified First Amended Complaint.**

57. The only exceptions to the requirement of full compliance is that signs in place in the DB and DT zoning districts or Fairview concentrated business district before January 1, 1965 are deemed “heritage signs” and are allowed to remain in place and be maintained in any manner to allow for continued use. Sec. 9.060(K).

**ANSWER: The Village denies the allegations within paragraph #57 of the Verified First Amended Complaint. Further answering, the Village affirmatively states that any owner of a “heritage sign” must submit conclusive evidence to the Village’s community development director that the sign was in place before January 1, 1965.**

58. Both of Plaintiffs’ hand-painted wall signs were in place before January 1, 1965, but Plaintiffs’ property is not located in the Downtown Business, Downtown Transitional or Fairview concentrated business district.

**ANSWER: The Village admits that Plaintiffs’ property is not located in the Downtown Business, Downtown Transitional or Fairview concentrated business district. The Village denies the remaining allegations within paragraph #58 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively states that Mr. Peterson submitted no conclusive evidence to the Zoning Board of Appeals or anyone at the Village that Plaintiffs’ hand-painted wall signs were in place before January 1, 1965.**

59. At Village Council meetings on September 2, September 9, and October 7, 2014, Mr. Peterson asked the Village Council to amend the sign ordinance to allow signs to face the Metra. Resolutions introduced at Village Council meetings on September 2 and October 7, which would have allowed signs to face the Metra, failed. Ex. C.

**ANSWER: The Village denies the allegations within paragraph #59 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively states that: (i) Mr. Peterson offered public comment regarding the sign ordinance at multiple Village Council meetings in 2014; and (ii) the Village Council formally considered Mr. Peterson’s request for a text amendment to amend the sign ordinance to permit wall signs on building facades that face the BNSF right-of-way at their September 2, 2014 and October 7, 2014 meetings, and at both meetings the motion to amend the sign ordinance failed and the Village Council did not direct staff to pursue the text amendment as required by Section 12.020(A) of the Village Code, and no resolutions were therefore prepared.**

**Further answering, the denial of the text amendment to amend the sign ordinance to permit wall signs on building facades that face the BNSF right-of-way by the Village Council on September 2, 2014 and again on October 7, 2014 was a legislative decision, and any action seeking judicial review of that decision is now barred as the 90 day statute of limitation period to do so under Section 5/11-13-25 of the Municipal Code has expired (65 ILCS 5/11-13-25).**

60. Mr. Peterson also applied for a variance with the Downers Grove Zoning Board of Appeals that would have allowed him to have a sign facing the Metra, have a sign directly painted on the wall of the building, and exceed the maximum aggregate sign area. On November 19, 2014, the Zoning Board of Appeals denied Mr. Peterson's variance request. The Board's letter denying the variance is attached as Exhibit D.

**ANSWER: The Village denies that Mr. Peterson asked for a variance.**

**Further answering, the Village admits that Robert Peterson asked for three separate variances.**

**Further answering, the Village affirmatively asserts that the denial of variances by the Village Zoning Board of Appeals constitutes a final administrative decision (Section 12.090 Village Code) subject to judicial review in accordance with the Illinois Administrative Review Law (735 ILCS 5/3-101). Administrative Review is the sole and exclusive means of judicial review of the variance denials (735 ILCS 5/3-102). Because the decision of the Village Zoning Board of Appeals occurred on November 26, 2014, the 35 day statute of limitations for Plaintiffs to seek judicial review of the denial of the variances expired on January 5, 2015 (735 ILCS 5/3-103). Any and all state court claims seeking judicial review of the Zoning Board of Appeals denial of Plaintiffs' request for variations from the Village sign ordinance, other than a facial constitutional challenge to the sign ordinance, are therefore forever barred.**

#### **THE VILLAGE'S SIGN ORDINANCE AND ENFORCEMENT HAVE INJURED PLAINTIFFS**

61. Leibundguth seeks to continue to use its unique, historic, hand-painted wall sign facing the Metra, which is an important and effective method of reaching members of the public, as it has done for the past 70-plus years.

**ANSWER: The Village lacks sufficient knowledge or information to form a belief as to the allegations within paragraph #61 of the Verified First Amended Complaint and therefore demands strict proof thereof.**

62. Plaintiffs' sign facing the Metra rail is a significant source of Leibundguth's revenues, which Mr. Peterson estimates could drop by approximately \$40,000 to \$60,000 if Plaintiffs were forced to remove the sign.

**ANSWER: The Village denies the allegations within paragraph #62 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively states that when Mr. Peterson was asked by the Zoning Board of Appeals if he had any records or bookkeeping that would substantiate his belief as to revenue generation or lost revenues, he could not produce any such records or bookkeeping.**

**Further answering, the Village affirmatively asserts that the sign ordinance provides abundant lawful alternative means for Plaintiffs to communicate their commercial message and offering.**

63. If Plaintiffs do not remove their wall signs, they could be subject to fines of \$50 to \$750 per violation per day. Village of Downers Grove, Municipal Code, Chapter 1, Section 1.15, attached as Exhibit E.

**ANSWER: The Village admits the allegations within paragraph #63 of the Verified First Amended Complaint. (The fine amount is between \$75 and \$750 per day per violation)**

64. The Village, through its sign ordinance, is forcing Plaintiffs to decide between paying steep daily fines to keep their historic 70-year-old painted wall sign, which serves as one of their best sources of revenue, and painting over the historic sign, losing their best source of revenue, in order to comply with the sign ordinance and avoid such fines.

**ANSWER: The Village denies the allegations within paragraph #64 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively asserts that the sign ordinance provides abundant lawful alternative means for Plaintiffs to communicate their commercial message and offering.**

#### COUNT I

#### **THE SIGN ORDINANCE'S CONTENT-BASED RESTRICTIONS VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 4 OF THE ILLINOIS CONSTITUTION.**

65. The allegations contained in all preceding paragraphs are incorporated herein by reference.

**The Village hereby adopts and restates its answers and responses to all preceding paragraphs which are incorporated herein by reference.**



66. The sign ordinance places greater restrictions on some signs than others based on the sign's content and therefore violates the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution.

**ANSWER: The Village denies the allegations within paragraph #66 of the Verified First Amended Complaint.**

67. Section 9.030 of the Village sign ordinance exempts certain signs from its requirements, so that the owners of those signs do not require a sign permit and the signs are not subject to the same regulations as other signs, including the prohibition on signs facing the Metra rail tracks (but not a roadway) and the limits on the number of wall signs.

**ANSWER: The Village admits that the sign ordinance permits certain signs without obtaining a sign permit and further admits that some signs are not subject to the same regulations as other signs.**

**Further answering, the Village denies the remaining allegations within paragraph #67 of the Verified First Amended Complaint.**

68. Plaintiffs could display a sign facing the Metra if the content of their sign was political or noncommercial, advertised the sale or lease of the property, or stated "no trespassing," or if it were a memorial sign or tablet cut into masonry surface or inlaid so as to be part of the building. If Plaintiffs were a governmental entity, its signs identifying itself would be permitted to face the Metra.

**ANSWER: The Village denies the allegations within paragraph #68 of the Verified First Amended Complaint.**

69. Plaintiffs could display more than one wall sign if the content of the signs were political or noncommercial, advertised the sale or lease of the property, or stated "no trespassing," or if it were a memorial sign or tablet cut into masonry surface or inlaid so as to be part of the building. If Plaintiffs were a governmental entity, they would not be limited to one wall sign.

**ANSWER: The Village denies the allegations within paragraph #69 of the Verified First Amended Complaint.**

70. Because Plaintiffs' signs advertise their business, they are limited to one wall sign, are limited in size, and may not have a sign facing the Metra.

**ANSWER: The Village denies the allegations within paragraph #70 of the Verified First Amended Complaint.**

71. Defendant has no compelling governmental interest in public health or safety for discriminating against signs based on their content.

**ANSWER: The Village denies the allegations within paragraph #71 of the Verified First Amended Complaint.**

Further answering, the Village affirmatively asserts that the challenged restrictions within the Village's sign ordinance are content neutral time, place and manner restrictions that are subject to intermediate scrutiny under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), are narrowly tailored to serve a significant governmental interest and leave ample alternative channels for Plaintiffs to communicate their message.

72. The sign ordinance's discrimination against signs based on their content is not narrowly tailored to serve any health or safety interest.

**ANSWER: The Village denies the allegations within paragraph #72 of the Verified First Amended Complaint.**

Further answering, the Village affirmatively asserts that the challenged restrictions within the Village's sign ordinance are content neutral time, place and manner restrictions that are subject to intermediate scrutiny under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), are narrowly tailored to serve a significant governmental interest and leave ample alternative channels for Plaintiffs to communicate their message.

73. The sign ordinance's discrimination against signs based on their content is not the least restrictive means of serving any health or safety interest.

**ANSWER: The Village denies the allegations within paragraph #73 of the Verified First Amended Complaint.**

Further answering, the Village affirmatively asserts that the challenged restrictions within the Village's sign ordinance are content neutral time, place and manner restrictions that are subject to intermediate scrutiny under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), are narrowly tailored to serve a significant governmental interest and leave ample alternative channels for Plaintiffs to communicate their message.

74. This violation of Plaintiffs' rights under the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution causes Plaintiffs irreparable harm for which they have no adequate remedy at law.

**ANSWER: The Village denies the allegations within paragraph #74 of the Verified First Amended Complaint.**

Further answering, the Village affirmatively asserts that Plaintiffs lack standing to assert a facial challenge to the sign ordinance under the "overbreadth doctrine".

**COUNT II**

**THE SIGN ORDINANCE'S BAN ON PAINTED WALL SIGNS  
VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES  
CONSTITUTION AND ARTICLE I, SECTION 4 OF THE ILLINOIS  
CONSTITUTION ON ITS FACE AND AS APPLIED TO PLAINTIFFS**

75. The allegations contained in all preceding paragraphs are incorporated herein by reference.

**The Village hereby adopts and restates its answers and responses to all preceding paragraphs which are incorporated herein by reference.**

76. Section 9.020(P)'s ban on any sign painted directly on a wall except in the Downtown Business, Downtown Transitional or Fairview concentrated business districts violates the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution on its face and as applied to Plaintiffs' hand-painted signs on the front and back walls of their building.

**ANSWER: The Village denies the allegations within paragraph #76 of the Verified First Amended Complaint.**

77. The Village does not possess a compelling, important, or even rational justification for Section 9.020(P)'s prohibition of any sign painted directly on a wall, including Plaintiffs' hand-painted signs, outside of the Downtown Business, Downtown Transitional or Fairview concentrated business districts.

**ANSWER: The Village denies the allegations within paragraph #77 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively asserts that the challenged restriction within Section 9.020(P) of the Village's sign ordinance is a content neutral time, place and manner restriction that is subject to intermediate scrutiny under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), is narrowly tailored to serve a significant governmental interest and leaves ample alternative channels for Plaintiffs to communicate their message.**

78. Upon information and belief, the Village possesses no evidence that Section 9.020(P)'s ban on any sign painted directly on a wall, including the ban of Plaintiffs' signs, outside the Downtown Business, Downtown Transitional or Fairview concentrated business districts advances public health and safety or enhances the Village's appearance.

**ANSWER: The Village denies the allegations within paragraph #78 of the Verified First Amended Complaint.**

79. The restriction on any sign painted directly on a wall of a building, including Plaintiffs' hand-painted signs, is not narrowly tailored to serve any governmental interests in public health and safety or enhancing the Village's appearance.

**ANSWER: The Village denies the allegations within paragraph #79 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively asserts that the challenged restriction within Section 9.020(P) of the Village's sign ordinance is a content neutral time, place and manner restriction that is subject to intermediate scrutiny under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), is narrowly tailored to serve a significant governmental interest and leaves ample alternative channels for Plaintiffs to communicate their message.**

80. Upon information and belief, the Village possesses no evidence that prohibiting Plaintiffs' signs hand-painted directly on the wall of their building is no more extensive than necessary to advance its interests in public health and safety or enhancing the Village's appearance.

**ANSWER: The Village denies the allegations within paragraph #80 of the Verified First Amended Complaint.**

81. This violation of Plaintiff's rights under the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution causes Plaintiffs irreparable harm for which they have no adequate remedy at law.

**ANSWER: The Village denies the allegations within paragraph #81 of the Verified First Amended Complaint.**

### COUNT III

#### **THE SIGN ORDINANCE'S BAN ON SIGNS FACING THE METRA VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 4 OF THE ILLINOIS CONSTITUTION ON ITS FACE AND AS APPLIED TO PLAINTIFFS**

82. The allegations contained in all preceding paragraphs are incorporated herein by reference.

**The Village hereby adopts and restates its answers and responses to all preceding paragraphs which are incorporated herein by reference.**

83. Section 9.020(C)'s ban on any sign facing the Metra that does not face a right-of-way violates the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution on its face and as applied to Plaintiffs' sign on the back of their building facing the Metra.

**ANSWER: The Village denies the allegations within paragraph #83 of the Verified First Amended Complaint.**

84. The Village does not possess a compelling, important, or even rational justification for Section 9.020(C)'s prohibition of signs facing only the Metra, including Plaintiffs' sign on the back of their building.

**ANSWER: The Village denies the allegations within paragraph #84 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively asserts that the challenged restriction within Section 9.020(C) of the Village's sign ordinance is a content neutral time, place and manner restriction that is subject to intermediate scrutiny under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), is narrowly tailored to serve a significant governmental interest and leaves ample alternative channels for Plaintiffs to communicate their message.**

85. Upon information and belief, the Village possesses no evidence that Section 9.020(C)'s ban on a sign facing the Metra, including Plaintiffs' sign, advances public health and safety or enhances the Village's appearance.

**ANSWER: The Village denies the allegations within paragraph #85 of the Verified First Amended Complaint.**

86. The restriction on any sign facing only the Metra is not narrowly tailored to serve any governmental interests in public health and safety or enhancing the Village's appearance.

**ANSWER: The Village denies the allegations within paragraph #86 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively asserts that the challenged restriction within Section 9.020(C) of the Village's sign ordinance is a content neutral time, place and manner restriction that is subject to intermediate scrutiny under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), is narrowly tailored to serve a significant governmental interest and leaves ample alternative channels for Plaintiffs to communicate their message.**

87. Upon information and belief, the Village possesses no evidence that prohibiting Plaintiffs' sign facing the Metra is no more extensive than necessary to advance its interests in public health and safety or enhancing the Village's appearance.

**ANSWER: The Village denies the allegations within paragraph #87 of the Verified First Amended Complaint.**

88. This violation of Plaintiff's rights under the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution causes Plaintiffs irreparable harm for which they have no adequate remedy at law.

**ANSWER: The Village denies the allegations within paragraph #88 of the Verified First Amended Complaint.**

**COUNT IV**

**THE SIGN ORDINANCE'S LIMITS ON TOTAL SIGN AREA AND THE NUMBER OF WALL SIGNS VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 4 OF THE ILLINOIS CONSTITUTION ON ITS FACE AND AS APPLIED TO PLAINTIFFS**

89. The allegations contained in all preceding paragraphs are incorporated herein by reference.

**The Village hereby adopts and restates its answers and responses to all preceding paragraphs which are incorporated herein by reference.**

90. Section 9.050(A)'s limit on the maximum total sign size and Section 9.050(C)'s limit on the number of wall signs violate the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution on its face and as applied to Plaintiffs' signs.

**ANSWER: The Village denies the allegations within paragraph #90 of the Verified First Amended Complaint.**

91. The Village does not possess a compelling, important, or even rational justification for Section 9.050(C)'s restriction on the number of wall signs and Section 9.050(A)'s restriction on the size of all signs, including Plaintiffs' signs, while exempting other signs from the number and size restrictions.

**ANSWER: The Village denies the allegations within paragraph #91 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively asserts that the challenged restrictions within Sections 9.020(C) and 9.050(A) of the Village's sign ordinance are content neutral time, place and manner restrictions that are subject to intermediate scrutiny under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), are narrowly tailored to serve a significant governmental interest and leave ample alternative channels for Plaintiffs to communicate their message.**

92. Upon information and belief, the Village possesses no evidence that Section 9.050(C)'s limitation of only one wall sign and Section 9.050(A)'s limitation on total sign area, including such limitations on Plaintiffs' signs, advances public health and safety or enhances the Village's appearance.

**ANSWER: The Village denies the allegations within paragraph #92 of the Verified First Amended Complaint.**

93. The ordinance's restrictions on the number of signs on the wall of a property and the size of all signs, including Plaintiffs' signs, are not narrowly tailored to serve any governmental interests in public health and safety or enhancing the Village's appearance.

**ANSWER: The Village denies the allegations within paragraph #93 of the Verified First Amended Complaint.**

**Further answering, the Village affirmatively asserts that the challenged restrictions within Sections 9.020(C) and 9.050(A) of the Village's sign ordinance are content neutral time, place and manner restrictions that are subject to intermediate scrutiny under *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), are narrowly tailored to serve a significant governmental interest and leave ample alternative channels for Plaintiffs to communicate their message.**

94. Upon information and belief, the Village possesses no evidence that its limitation of the total area and number of Plaintiffs' signs is no more extensive than necessary to advance its interests in public health and safety or enhancing the Village's appearance.

**ANSWER: The Village denies the allegations within paragraph #94 of the Verified First Amended Complaint.**

95. This violation of Plaintiff's rights under the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution causes Plaintiffs irreparable harm for which they have no adequate remedy at law.

**ANSWER: The Village denies the allegations within paragraph #95 of the Verified First Amended Complaint.**

WHEREFORE, Defendant, VILLAGE OF DOWNERS GROVE, ILLINOIS, denies that Plaintiffs, Robert Peterson and Leibundguth Storage and Van Service, Inc., are entitled to a judgment or relief in any amount.

**COUNTERCLAIM**

For its counterclaim against Robert Peterson and Leibundguth Storage & Van Service, Inc., the Village of Downers Grove, an Illinois municipal corporation, alleges and asserts as follows:

**PARTIES**

1. The Village of Downers Grove (“Village”) is a home rule Illinois municipal corporation, with its principal place of business located at 801 Burlington Avenue, Downers Grove, Illinois 60515.

2. According to paragraphs 10 and 11 of the Verified First Amended Complaint, Plaintiff, Robert Peterson resides in Downers Grove, Illinois, and is the sole owner of Plaintiff, Leibundguth Storage & Van Service, Inc., and Illinois corporation located in Downers Grove, Illinois.

**JURISDICTION**

3. The Court has jurisdiction over the subject matter of this counterclaim as Plaintiffs have submitted to jurisdiction by commencing this action, and the nature of this counterclaim stems directly from the action submitted by Plaintiffs.

4. The Village further adopts and re-alleges its answers to paragraphs 4, 5 and 9 of Plaintiffs’ Verified First Amended Complaint as if fully set forth herein.

**COUNT I**

5. The Village incorporates and re-alleges the allegations within paragraphs 1 – 4 of this counterclaim as if though fully set forth herein.

6. After a public hearing, significant deliberation by multiple Village sub-committees and referral to a Joint Commission, consultation with the Downers Grove Chamber



of Commerce, consultation with the Downtown Downers Grove Management Corp., public meetings with both commercial and residential property owners, active and repeated solicitation of Village business owners and other investigation over the course of approximately one year, on May 3, 2005, the Village Council adopted an amendment to the then existing sign ordinance under Village Ordinance No. 4668. Exhibit A to Plaintiffs' Verified First Amended Complaint is the current "clean" version of the sign ordinance as amended on May 3, 2005, and said Exhibit A is hereby incorporated into this counterclaim.

7. The sign ordinance originally provided a seven year, later extended to a nine year, amortization schedule to permit all owners of then existing non-conforming signs with nine years, up through 2014, to eliminate non-conformities and bring their signs into lawful compliance with the sign ordinance.

8. Plaintiffs have failed to bring the signs on their building located at 1301 Warren Avenue, Downers Grove, Illinois 60515, into conformity with the sign ordinance.

9. The wall sign located on the back of Plaintiffs' building is currently, and has been as of the expiration of the nine year amortization period, illegal and in violation of Sections 9.050.A, 9.020.P and 9.050.C.1, in that the sign: (1) is too large (400 square feet when a maximum total allowable signage for the whole building is 159 square feet); (2) is hand-painted on the exterior of the building; and (3) is a wall sign that does not face a public roadway or drivable right-of-way.

10. The signs on the front of Plaintiffs' building are currently, and have been as of the expiration of the nine year amortization period, in violation of Sections 9.020.P, 9.050.C.1 and 9.050.A of the sign ordinance in that: (1) one of the signs is hand-painted on the exterior of the

building; and (2) collectively, the signs exceed both the number of walls signs allowed and the maximum allowable signage of 159 square feet for the whole building.

11. The regulations at issue which prohibit Plaintiffs current non-conforming signs are constitutional and valid content neutral time, place and manner restrictions, and are fully and legally enforceable against Plaintiffs.

12. No variations or text amendments from the sign ordinance have been granted by the Village to Plaintiffs to cure any of the sign non-conformities.

13. There are 67 parcels of property within the Village that are located adjacent to the Burlington Northern Santa Fe right-of-way, as is Plaintiffs' property. There are 33 buildings located on those 67 parcels. As of the filing of this counterclaim, Plaintiffs' property is the only remaining property with a wall sign facing onto the Burlington Northern Santa Fe right-of-way in violation of the sign ordinance.

14. As of the filing of this counterclaim, 97% of all properties with non-conforming signs as of the adoption of the sign ordinance have come into lawful compliance with the sign ordinance.

15. The Village has notified Plaintiffs of the foregoing violations, and on November 26, 2014 sent correspondence to Plaintiffs requiring that all signs on the property be brought into conformity no later than April 17, 2015, or Plaintiffs would be subject to further enforcement action by the Village (see Exhibit D to Plaintiffs' Verified First Amended Complaint).

16. Section 9.120 of the sign ordinance vests the community development director of the Village to enforce all provisions of the sign ordinance.

17. Section 13.020 of the Village Zoning Ordinance authorizes the Village to impose fines against Plaintiffs for each day their sign violations remain uncorrected after receiving notice of the violations.

18. Under Section 13.020, the Village is also entitled to file a lien against Plaintiffs' property for their failure to pay levied fines, and for fees to cover any expenses incurred by the Village for remedying the violations.

19. Pursuant to the order entered with this Court on January 30, 2015, the Village has agreed to withhold imposing fines and enforcement against Plaintiffs' for the existing violations until after ruling on the anticipated cross-motions for summary judgment.

20. By the filing of this counterclaim, the Village seeks to preserve its right to seek enforcement, fines and any other remedies allowed under the sign ordinance and the Village Zoning Ordinance, if needed, after the anticipated rulings on the cross-motions for summary judgment.

WHEREFORE, Defendant, VILLAGE OF DOWNERS GROVE, an Illinois municipal corporation, respectfully requests that this Court grant the following relief:

- A. Declare each of the three sign regulations at issue within the sign ordinance to be constitutional, valid and legal sign restrictions;
- B. Order Plaintiffs to bring all of the non-conformities into strict compliance with the sign ordinance within thirty (30) days after declaring the three sign regulations at issue to be constitutional, valid and legal sign restrictions;
- C. In the event Plaintiffs fail to timely bring the signs into compliance, award the Village fines and any additional relief afforded to the Village under the Village Zoning Ordinance; and

D. For such other relief this Court deems equitable and just.

VILLAGE OF DOWNERS GROVE, ILLINOIS, an  
Illinois municipal corporation, Defendant

BY: /s/ Scott M. Day

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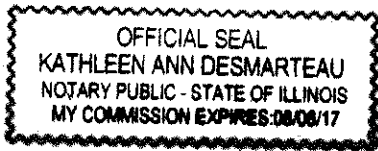
VERIFICATION

I, Stanley Popovich, declare under penalty of perjury that the allegations in this Verified Answer and Counterclaim to Verified First Amended Complaint are true and correct to the best of my knowledge, except as to matters stated to be on information and belief, and as to such matters I certify that I verily believe the same to be true.

  
\_\_\_\_\_  
Stanley Popovich

SUBSCRIBED and SWORN to  
before me this 5<sup>th</sup> day of February, 2015

  
\_\_\_\_\_  
Notary Public



**CERTIFICATE OF SERVICE**

I, Scott M. Day, an attorney, certify that on February 5, 2015, I filed Defendant's Verified Answer and Counterclaim to Verified First Amended Complaint with the Clerk of the Court, United States District Court for the Northern District of Illinois using the CM/ECF System, which also served same upon all parties of record by the CM/ECF System.

/s/ Scott M. Day

Scott M. Day