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

ROBERT PETERSON and LEIBUNDGUTH STORAGE & VAN SERVICE, INC. Plaintiffs, v. VILLAGE OF DOWNERS GROVE, ILLINOIS, an Illinois municipal corporation Defendant.	)	Civil Action No. 14-cv-9851 Judge: Honorable Edmond E. Chang Magistrate Judge: Honorable Young B. Kim

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

I. BACKGROUND

In 2005, the Village adopted an amended sign ordinance ("sign ordinance"). A nine year amortization schedule was given to allow all owners of a then existing non-conforming sign up through 2014 to eliminate any non-conformities, and bring their signs into lawful compliance with the sign ordinance.

Plaintiff, Robert Peterson is the owner of a moving and storage company known as Leibundguth Storage & Van Service, Inc. located at 1301 Warren Avenue, Downers Grove, Illinois 60515. The property contains one building and is located in the M-1 light manufacturing zoning district within the Village. The Plaintiffs have multiple wall signs on both the front and back of the building which advertise Plaintiffs' business. Upon adoption of the sign ordinance in 2005, three specific amended regulations rendered Plaintiffs' signs non-conforming in a number of respects because:

1. Plaintiffs had, and currently continue to have, a huge 400 square foot wall sign hand-painted directly on the brick of the back of their building facing the Burlington Northern Santa Fe ("BNSF") railroad corridor. This sign violates the prohibition against hand-painted wall signs, violates the prohibition against wall signs not facing a street and also violates the prohibition against commercial wall signs of that size.

2. Plaintiffs had, and currently continue to have, two additional wall signs located on the front of their building which, in and of themselves, violate the prohibition of more than one wall sign, and one of which is also prohibited for being painted directly onto the brick of the building. When adding the two wall signs on the front of the building to the 400 square foot wall sign facing the BNSF railroad corridor, the square footage of the signage also violates the sign ordinance as they collectively exceed the maximum commercial sign area permitted.

From 2005-2014, Plaintiffs did nothing to alter any of the non-conforming wall signs, and the Village withheld any enforcement proceedings during the nine year amortization period afforded to all impacted business owners within the Village. In 2014, the amortization period expired and Plaintiffs' wall signs therefore became illegal non-conforming signs.

A. The Text Amendment Requested By Plaintiffs

In September and October, 2014, after the amortization period expired, Plaintiffs asked the Village Council to amend the sign ordinance by way of a text amendment to permit wall signs which not only face a public roadway or drivable right-of-way, but also to allow wall signs to face a railroad right-of-way. (Compl. ¶ 59, Ex. C) This was requested in an effort to address the wall sign on the rear of Plaintiffs' building which faced the BNSF railroad corridor.

Critically, no other relief was requested. As a result, even if the text amendment were granted by the Village Council, the rear wall sign would still be illegal because it violates two other sign regulations -- it still exceeds the allowable size and is hand-painted on the exterior of building.

On October 7, 2014, the Village Council denied Plaintiffs' request for the text amendment. This denial is governed by 65 ILCS 5/11-13-25 which provides:

> (a) Any decision by the corporate authorities of any municipality, home rule or non-home rule, in regard to any petition or application for a special use, variance, rezoning, **or other amendment to a zoning ordinance** shall be subject to de novo judicial review as a legislative decision, regardless of whether the process in relation thereto is considered administrative for other purposes. **Any action seeking the judicial review of such a decision shall be commenced not later than 90 days after the date of the decision.**
>
> (b) The principles of substantive and procedural due process apply at all stages of the decision-making and review of all zoning decisions. (Emphasis added)

Thus, because the text amendment requested by Plaintiffs was denied on October 7, 2014, the statute of limitations for judicial review of the Village's denial ran on January 5, 2015. Any request that this Court undertake judicial review of the Village Council's legislative decision to deny the text amendment in the form of an as-applied constitutional challenge is also barred by the 90 day statute of limitations.

B. The Sign Ordinance Variations Requested By Plaintiffs

After the single text amendment was denied by the Village Council, Plaintiffs applied to the Village Zoning Board of Appeals ("ZBA") for three variations from the sign ordinance. The ZBA is a separate administrative body which, under Section 12.090.F of the Village Zoning Ordinance, holds the exclusive and final authority to vary the sign ordinance. 65 ILCS 5/11-13-5. The three variations requested by Plaintiffs were as follows:

1. A variation to maintain 557.7 square feet of signage where only 159 square feet of signage was allowed under Section 9.050.A of the sign ordinance;

2. A variation to maintain a wall sign that does not face a public roadway or drivable right-of-way per Section 9.050.C.1 of the sign ordinance; and

3. A variation to maintain signage that is painted on a wall where signs painted directly on a wall are not permitted per Section 9.020.P of the sign ordinance. (Compl. Ex. B)

On November 19, 2014, the ZBA conducted a public hearing which was attended by Plaintiff, Robert Peterson. The ZBA denied all three requested variations. (Compl. Ex. D) Section 5/11-13-13 of the Illinois Municipal Code (65 ILCS 5/1-1-1, *et seq.*) codifies that the November 19, 2014 ZBA decision was a "final administrative decision" subject to judicial review under the provisions of the Administrative Review Act (735 ILCS 5/3-101, *et seq.*). Section 12.090.F of the Village Zoning Ordinance reiterates this fact and specifies, "All decisions of the zoning board of appeals are final administrative determinations and are subject to judicial review only, in accordance with the Illinois Administrative Review Law, 735 ILCS 5/3-101 et seq." (Section 12.090.F is attached hereto and incorporated herein as **Exhibit A)**

Section 3-102 of the Administrative Review Act specifies:

> **Unless review of an administrative decision is sought within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision.** (Emphasis added) 735 ILCS 5/3-102.

Section 3-103 of the Administrative Review Act further provides:

> Every action to review a final administrative decision **shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision…** (Emphasis added) 735 ILCS 5/3-103.

Section 3-103 of the Administrative Review Act also requires **not only that the complaint be filed within 35 days of the decision being reviewed, but also that the summons be issued to all parties by the clerk of the court within this same time period.** 735 ILCS 5/3-103.

Applying the foregoing statutory provisions in this case, because the variations were denied by the ZBA on November 19, 2014, Plaintiffs had up through January 5, 2015 to file their complaint for administrative review. They filed no such complaint, and therefore Plaintiffs are now barred from obtaining review of the ZBA's denial of the three variations at issue. The ZBA would have been a necessary party to the administrative review complaint, and is not joined as a party defendant in this case. As a result, any judicial review of the ZBA decision to deny the variations in the form of an as-applied constitutional challenge is also barred as beyond the purview of this Court.

II. COUNT I SHOULD BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING

In Count I, Plaintiffs assert only a facial constitutional claim which generally challenges **the entire Village sign ordinance.** Count I fails, however, to assert or "causally connect" any injury to Plaintiffs resulting from the regulations pertaining to governmental, political, non-commercial, "no trespassing", memorial or real estate signs they reference in their Count I allegations. In no uncertain terms, the only injury Plaintiffs assert in Count I is based exclusively upon the **commercial wall sign regulations** within the sign ordinance. As detailed below, Plaintiffs therefore lack standing to bring a cause of action to generally challenge the entire Village sign ordinance.

The Constitution of the United States limits the subject matter jurisdiction of federal courts to "cases" and "controversies." U.S. Const., Art. III § 2. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). A plaintiff who invokes the

jurisdiction of a federal court bears the burden to show: (1) an injury in fact, meaning an injury that is concrete and particularized, and actual or imminent; (2) a **causal connection** between the injury and the causal conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Florida,* 351 F.3d 1112, 1116 (11th Cir. 2003) Each element is "an indispensable part of the plaintiff's case" and "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan,* at 561. See also, *Tanner Advertising Group, L.L.C. v. Fayette County, Georgia*, 451 F.3d 777 (11th Cir. 2006).

Neither the text amendment nor the variance applications filed by Plaintiffs address anything other than wall signs and the specific commercial wall sign regulations applicable to Plaintiffs' signs. This is critical because, "Standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.' " *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990) (citations omitted, overruled in part on other grounds by *City of Littleton v. Z.J. Gifts D–4, L.L.C.,* 541 U.S. 774 (2004)).

Simply stated, the injury Plaintiffs allege "causally connects" only to the Village's commercial wall sign regulations, and this same injury is the subject of the facial challenges to the three specific regulations in Counts II-IV of their Complaint. Because Plaintiffs' injury cannot be redressed under the numerous non-wall sign and other inapplicable regulations averred to in Count I, Plaintiffs lack standing to "generally" prosecute a facial constitutional challenge to the overall sign ordinance. *Advantage Advertising, LLC v. City of Hoover, Alabama*, 200 F.App'x 831 (2006); *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Florida,* 351

F.3d 1112 (11th Cir. 2003); *Tanner Advertising Group, L.L.C. v. Fayette County, Georgia*, 451 F.3d 777 (11th Cir. 2006). Count I should therefore be dismissed.

It should also be noted that in Plaintiffs prayer for relief they do not even ask this Court to declare the entire sign ordinance unconstitutional under Count I. Rather, the prayer for relief at the end of the Complaint pertains only to the three specific wall sign regulations challenged in Counts II-IV.

III. THE AS-APPLIED CLAIMS SUBMITTED BY PLAINTIFFS IN COUNTS II – IV SHOULD BE DISMISSED UNDER THE *CLARK* DECISION AND ITS PROGENY

In Counts II-IV, Plaintiffs assert four free speech challenges to the following three Village sign ordinance regulations:

> **Sec. 9.050.A Sign Regulations Generally**
>
> The regulations of this section (Sec. 9.050) apply to signs in all areas of the village except the DB and DT zoning districts and the Fairview concentrated business district.
>
> A. Maximum Total Sign Area
>
> The maximum allowable sign area may not exceed 1.5 square feet per linear foot of tenant frontage, plus any signs expressly excluded from maximum sign area calculations. Buildings set back more than 300 feet from the abutting street right-of-way are allowed a maximum allowable sign area of 2 square feet per linear foot of tenant frontage, plus any allowed excluding menu boards, window and temporary signs. In no case, may a single tenant exceed 300 square feet in total sign surface area.
>
> **Sec. 9.050.C.1 Sign Regulations Generally**
>
> The regulations of this section (Sec. 9.050) apply to signs in all areas of the village except the DB and DT zoning districts and the Fairview concentrated business district.
>
> C. Wall Signs

> 1. Each business or property owner is allowed to display one wall sign per tenant frontage along a public roadway or drivable right-of-way.
>
> **Section 9.020.P Prohibited Signs and Sign Characteristics**
>
> The following are expressly prohibited under this ordinance:
> P. any sign painted directly on a wall, roof, or fence, except in the DB, DT or Fairview concentrated business district;

(Compl. Ex. A)

The Complaint seeks constitutional review of these regulations both on their face and as-applied to Plaintiffs' specific property. As will be detailed below, as a matter of law, the Village submits that all three regulations are known as "content neutral time, place and manner" sign restrictions which this Court will rule are either facially valid or invalid as they apply to all properties in the Village, without consideration as to how they apply or impact Plaintiffs' specific property and individual commercial advertising desires.

A plain reading of the three sign ordinance regulations establishes that none regulates – or even references in any way – the content, text or message of the sign. They are all simply generic provisions that generally regulate the size of signs (Section 9.050.A), the location where signs can be displayed (Section 9.050.C.1), the number of signs that can be displayed (Section 9.050.C.1) and the manner in which signs can be affixed to a building (Section 9.020.P). Under well-established law, these types of sign regulations are deemed to be content neutral time, place and manner sign restrictions. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994); *Neighborhood Enterprises, Inc. v. City of St. Louis, Missouri*, 718 F.Supp.2d 1025 (2010); *Prime Media, Inc. v. City of Brentwood, Tennessee*, 398 F.3d 814 (6th Cir. 2005).

Content neutral time, place, and manner sign restrictions are to be judged by what is known as the *Clark* test articulated by the U.S. Supreme Court in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and thereafter reaffirmed by the U.S. Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Under the *Clark* test, a content neutral time, place and manner restriction is evaluated by using an "intermediate scrutiny test" whereby the court determines whether the sign restriction at issue is narrowly tailored to serve a significant governmental interest, and whether the restriction leaves open ample alternative channels of communication of the information (the speech at issue). *Clark*, at 293.

Critical to this Motion to Dismiss the as-applied claims in Counts II-IV, under the *Clark* test the three content neutral time, place, and manner sign restrictions at issue must be adjudicated by this Court to be either facially valid or invalid without regard to how the Village's interest is served in Plaintiffs' specific case. To this end, after rendering its decisions in *Clark* and *Ward*, the U.S. Supreme Court directly spoke to the nature of judicial scrutiny applicable to content neutral time, manner and place sign restrictions. In so doing, in *United States v. Edge Broadcasting Company*, 509 U.S. 418, 430-31 (1993), the U.S. Supreme Court held:

> In *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), we dealt with a **time, place, or manner** restriction that required the city to control the sound level of musical concerts in a city park, concerts that were fully protected by the First Amendment. We held there that the requirement of narrow tailoring was met if "the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," provided that it did not burden substantially more speech than necessary to further the government's legitimate interests. Id., at 799, 109 S.Ct., at 2758 (internal quotation marks omitted). In the course of upholding the restriction, we went on to say that **"the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case."** Id., at 801, 109 S.Ct., at 2759.

> The *Ward* holding is applicable here, for we have observed that the validity of **time, place, or manner** restrictions is determined under standards very similar to those applicable in the commercial speech context and that it would be incompatible with the subordinate position of commercial speech in the scale of First Amendment values to apply a more rigid standard to commercial speech than is applied to fully protected speech. *Fox*, *supra*, 492 U.S., at 477, 478, 109 S.Ct., at 3033. ***Ward* thus teaches us that we judge the validity of the restriction in this case by the relation it bears to the general problem of accommodating the policies of both lottery and non-lottery States, not by the extent to which it furthers the Government's interest in an individual case.** (Emphasis added)

Thereafter, the Seventh Circuit Federal Court of Appeals relied upon the *Edge* decision in *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1115 (7th Cir. 1999), to affirm the trial court's dismissal of an as-applied constitutional challenge tagged onto a facial challenge to a sign ordinance, stating:

> Our review of the text of the ordinance confirms, however, the district court's view that the ordinance is "carefully-crafted" to meet the safety and aesthetic goals it articulates. Mem. Op. at 16. Mr. Lavey's anecdotal descriptions of past errors in interpretation cannot change the fact that the language and structure of the ordinance is designed to "directly advance" the town's articulated interests. We must **"judge the validity of the restriction in this case by the relation it bears to the general problem ..., not by the extent to which it furthers the Government's interest in an individual case."** ***United States v. Edge Broadcasting. Co.*, 509 U.S. 418, 430-31, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993). Therefore, to the extent that Mr. Lavey's case may be construed as an "as applied" challenge to the validity of the ordinance, that challenge cannot be sustained.** (Emphasis added)

More recently, in *National Council of Arab Americans v. City of New York*, 331 F.Supp.2d 258, 270 (2004), the court specifically acknowledged that, "The framework governing as-applied challenges to time, place or manner restrictions on speech is the same as that for facial

challenges." (See also, *United for Peace & Justice v. City of New York*, 323 F.3d 175, 176 (2d Cir. 2003)).

Notwithstanding this precedent, in Counts II-IV Plaintiffs seek to bring as-applied challenges to the three regulations, and support them only with allegations as to how the regulations impact them personally. By way of example, the Complaint repeatedly alleges that:

- **Plaintiffs' signs are crucial to the advertising and success of Plaintiffs' business** and without the hand-painted sign on the back of Plaintiffs' building, Plaintiffs expect to lose $40,000 to $60,000 per year in revenues (15% - 20% of its business) due to the loss of thousands of Metra passengers seeing the sign every day. (Compl. ¶ 1, 18, 22, 61-62, 64)

- **No one has complained** to the Village **about Plaintiffs specific signs based on safety, aesthetics or any other reason**. (Compl. ¶ 2, 25)

- While Plaintiffs could display multiple other legal signs, they do not wish to do so because they will not be as effective in **communicating Plaintiffs' message**. (Compl. ¶ 37, 38)

Going further, at the January 30, 2015 initial status hearing in this case, Plaintiffs' counsel advised the Court that Plaintiffs' intend to retain a traffic safety expert and possibly an "aesthetics expert" to support their claims.

Under the *Edge*, *Lavey* and *Arab Americans* decisions, the constitutional validity of the Village's content neutral time, place and manner sign restrictions at issue are to be judged only by the relationship they bear to the overall **general problem** the Village seeks to address. As acknowledged in Plaintiffs' own Complaint, the stated purpose of the sign ordinance 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." (Compl. ¶ 27)

Filing an as-applied constitutional challenge does not permit the Plaintiffs to convert judicial review into a determination of whether Plaintiffs' specific signs are aesthetically

offensive or constitute a traffic safety hazard, or an examination as to the extent to which aesthetics and traffic safety are served by precluding Plaintiffs' specific signs. This sort of review has been expressly rejected by the courts, and to the extent Plaintiffs seek this review by way of as-applied constitutional claims in Counts II-IV, they should be dismissed.

Respectfully Submitted,

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

BY: /s/ Scott M. Day

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**EXHIBITS TO DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS**

EXHIBIT A Section 12.090.F

CERTIFICATE OF SERVICE

I, Scott M. Day, an attorney, certify that on February 5, 2015, I filed Defendant's Memorandum of Law in Support of Its Motion to Dismiss 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
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