

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)

Honorable Edmond E. Chang

Defendant.)

DEFENDANT’S LOCAL RULE 56.1
STATEMENT OF UNCONTESTED MATERIAL FACTS

NOW COMES Defendant, VILLAGE OF DOWNERS GROVE, ILLINOIS, an Illinois municipal corporation, by and through its attorneys, DAY & ROBERT, P.C., and pursuant to Fed. R. Civ. P. 56(a) and Local Rule 56.1(a)(3) respectfully submits the following statement of material facts in support of its Motion for Summary Judgment:

I. THE VILLAGE SIGN REGULATIONS

1. A true and accurate copy of the Certification Affidavit of Village Clerk, April K. Holden, certifying all of the Village of Downers Grove (“Village”) documents numbered and attached to this Statement of Uncontested Material Facts, attached hereto as **Exhibit 1**.¹

2. A true and accurate certified copy of the Village sign ordinance in effect as of the filing of Plaintiffs’ Verified First Amended Complaint (“Complaint”) (Dkt. 10) (and

¹ Public records of the Village, including all legislative and commission, committee and staff records to the board and commissions and committees are excluded from the rule against hearsay. Fed. R. Ev. 803(8), and are self-authenticating. Fed. R. Ev. 902(4).

incorporated as Exhibit A into said Complaint) is attached hereto as **Exhibit 2** (the “sign ordinance”).

3. The adopted purpose of the sign ordinance is found in Section 9.010, and states as follows:

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.

(Ex. 2, § 9.010.A).

4. The sign ordinance regulates every sign in the Village, and there are no signs permitted which are "exempt" (categorically or otherwise) from the sign ordinance. (Ex. 2, § 9.010.B). The sole exemption from any portion of any of the Village sign regulations relates to the necessity of filing for a sign permit. (Ex. 2, § 9.080). Certain signs are allowed without first obtaining a sign permit from the Village, (Ex. 2, § 9.030), but even the signs that may be posted without first obtaining a permit are nevertheless subject to both the applicable prohibitions and size regulations within the sign ordinance. (Ex. 2, § 9.030). No sign is exempt from the sign ordinance. (Ex. 2, § 9.010.B).

5. Section 9.020 of the sign ordinance which addresses signs painted directly onto a wall was amended on July 21, 2015, a true and accurate certified copy of Ordinance No. 5472 is attached hereto as **Exhibit 3**, which was processed with a Village staff report, a true and accurate certified copy of which is attached hereto as **Exhibit 4**. The Village Council incorporated additional findings relating to the purpose behind this recent amendment, stating:

1. Signs painted directly onto a wall, fence, or roof create a greater upkeep and maintenance problem than signs separately manufactured and hung or affixed to a wall, fence or roof, and such signs face increased fading, chipping, deterioration, loss of visibility, brick fracture, and other visual deterioration.
2. Signs painted directly onto a wall, fence, or roof present far more demanding and difficult methodology for removal than signs separately hung or affixed to a wall, fence, or roof, and whether by sand blasting, chemical removal, paint over or other method of obliteration, the after effects of removal of such signs painted directly onto a wall, fence, or roof often leave residual ghost signs, discolored building surfaces or other undesirable visual blight detrimental to the appearance of the Village.

3. Permitting signs painted directly onto a wall, fence, or roof would allow hand painted spray paint messages to lawfully exist on walls, fences, and roofs, which would cripple the enforcement ability of the Village to eradicate graffiti, and would legalize the very visual blight that the Village has been fighting for the past decade to eradicate.
4. Through enforcement efforts and the imposition of a decade long amortization schedule, nearly 100% of signs painted directly onto a wall, fence, or roof have been eradicated, and broadening the prohibition of signs painted directly onto a wall, fence, or roof to include the DB, DT, and Fairview business district will create a uniform rule to protect against the visual detriments of such signs, while leaving ample opportunities to post a multitude of code compliant signs throughout the Village.

(Ex. 3).

6. Section 9.020.P now prohibits any sign painted directly on a wall, roof, or fence everywhere in the Village. (Ex. 3, § 9.020). Thus, regardless of the content of the sign, and regardless of the zoning district, the Village sign regulations prohibit signs painted directly onto a wall. (Ex. 3, § 9.020.P). It does not matter if the sign is political, non-commercial, governmental, commercial memorial, or any other category or type of sign, nor is the text, message or content relevant as the Village sign ordinance prohibits signs painted directly onto a wall. (Ex. 3, § 9.020.P).

7. Section 9.050 regulates commercial signs, (Ex. 2 § 9.050) and Section 9.050.A is a commercial sign size limitation. (Ex. 2, § 9.050.A). Section 9.050.A permits up to 1.5 sq. ft. of commercial signage per linear foot of tenant frontage, not to exceed collectively 300 sq. ft. per tenant. (Ex. 2, § 9.050.A).

8. Section 9.050.C is a limitation on the number of commercial wall signs permitted based upon the number of tenants having frontage along a public roadway or drivable right-of-way (Ex. 2, § 9.050.C.1).

9. Section 9.050.C of the sign ordinance in relation to commercial wall signs was amended on July 21, 2015 by Ordinance No. 5472 to allow one additional commercial wall sign to face the BNSF railroad right-of-way for lots with frontage along the BNSF railroad right-of-way, which includes Leibundguth's property. (Ex. 3). The Village Council incorporated additional findings relating to the purpose behind this recent amendment, stating:

1. The Village sign regulations currently permit multiple signs facing the BNSF rail corridor, but wall signs are required to be posted so as to face a drivable right of way or public roadway so as to assure that the wayfinding safety function of wall signs can be fulfilled by making such signs visible to motorists attempting to locate their destination.
2. While monument signs, projection signs, window signs, and other signs are currently permitted facing the BNSF rail corridor, wall signs are not permitted by the current sign regulations.
3. Many properties along the BNSF corridor have structures which were built at a time when rear yard set back requirements of the Village Code permitted the structures to be at or near the BNSF property line, thus leaving inadequate rear yard for posting signs which are compliant with the current code provisions.
4. By permitting wall signs which face the BNSF, the Village will be providing broader opportunities for signage to those properties with frontage on the rail corridor, while maintaining consistency with the established policy of the Village to permit a broad variety of signage along the rail corridor.
5. By recognizing the additional frontage of the BNSF for purposes of allowing additional wall signs, the amendment will nevertheless maintain the drivable right of way and public road frontage as permitting wall signs facing such frontages and thus the amendment will not detract from the regulations which encourage the traffic safety function of wayfinding signs visible to drivers along those roadways.
6. By maintaining the gross signage limit of 300 SF per property as well as the limit on the number of signs per

tenant frontage, the amendment will still prohibit the unconstrained proliferation of signage and the accompanying visual blight, and the amendment will still require competitive balance by prohibiting one property owner from over signing their property to the detriment of neighboring property values or neighboring business interests.

(Ex. 3).

10. The sign ordinance permits “Vehicle signs...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.” (Ex. 2, § 9.030.N).

11. The sign ordinance permits Heritage Signs but only in the DB, DT or Fairview Concentrated Business District. However, in order to be deemed a Heritage Sign the owner of the sign must provide conclusive evidence to the community development director that the sign was in place before January 1, 1965. (Ex. 2, § 9.060).

12. The sign ordinance permits Leibundguth Storage & Van Service, Inc. (“Leibundguth”) to display many different types of commercial signs which it has elected not to display, including a monument sign, window signs, projection signs and a shingle sign. (Ex. 2; § 9.050)

II. VILLAGE PROCEDURES FOR IMPOSING SIGN REGULATIONS

13. The Village began consideration of a major rewrite of the Village sign regulations in May of 2004. (Ex. 1, #4395-4401 @ 4400). The motivation expressed by the Village Economic Development Commission was to reconcile the conflict between regulations which were business friendly and the visual environment of the Village. (Ex. 1, #4395-4401 @ 4400).

14. Between 2004 and May of 2005, the process implemented by the Village involved:

- a. Initial study of the sign regulations by the Economic Development Strategic Planning Subcommittee. (Ex. 1, #4404-4412 @ 4405).
- b. Gathering 180 photographs of existing signage problems in the Village and nearby communities. (Ex. 1, #4505-4615).
- c. The Village staff was directed to study the sign regulations of nearby communities (Ex. 1, #2-7 @ 7; #8-18 @ 14).
- d. The Village staff study of sign regulations included review of the sign regulations of nine nearby communities. (Ex. 1, #3652-3653; #4012-4356).
- e. 400 letters were prepared and sent to Village businesses addressing the review underway. (Ex. 1, #4418-4420 @ 4420).
- f. Formation of a Joint Commission and Sign Subcommittee made up of members of the Planning Commission and the Economic Development Commission. (Ex. 1, #4421-4424 @ 4422).
- g. 18 weeks of regular meetings of the Joint Commission and Sign Subcommittee. (Ex. 1, #4425-4439 @ 4425).
- h. Photographic studies of signs in LaGrange, Lisle, Naperville and Charlevoix, Michigan (Ex. 1, #4508-4615) and signs throughout Downers Grove. (Ex. 1, #4637-4718).

- i. Input was sought and received from the Downers Grove Downtown Management Board (Ex. 1, #606-608 @ 607) and the Downers Grove Chamber of Commerce. (Ex. 1, #581-583 @ 582).
- j. Formal public hearings were conducted by the Planning Commission with input from community individuals and businesses on February 21, 2005 (Ex. 1, #686-701) and again on February 28, 2005. (Ex. 1, #703-723).
- k. The first reading of the proposed text amendment was completed by the Village Council on April 25, 2005 (Ex. 1, #742-747), and the second reading on May 3, 2005 (Ex. 1, #748-754), with the final vote of approval on May 23, 2005 (Ex. 1, #762-764).

15. With the adoption of the new sign regulations in May of 2005, the Village afforded a seven-year amortization period to allow businesses a reasonable period of time to continue to use non-conforming signs. (Ex. 1, #762-764 w/Ordinance #4668 “An Ordinance Amending Sign Provisions”).

16. In May of 2012, the Village extended the amortization schedule to afford two additional years of extended use of signs rendered non-conforming by the 2005 amendments to the sign regulations. (Ex. 1, Report for the Village Council Meeting, 02/14/12 w/ Ordinance #5251 “An Ordinance Regulating Non-Conforming Signs”).

17. As of October 2014, Village staff prepared a report itemizing the impact of the sign ordinance which included the following: (Ex. 1, #4358-4385).

- a. As of October 2014, over 95% of properties in the Village with signs were in compliance with the Village sign ordinance. (Ex. 1, #4358-4385 @ 4360, 4365).

- b. 73 properties which were not then in conformity with the sign ordinance were in the process of correcting or eliminating their non-conforming signs. (Ex. 1, #4358-4385 @ 4365).
- c. Only 38 property owners in the Village had failed to take any steps to eliminate non-conforming signs. (Ex. 1, #4358-4385 @ 4360, 4365).
- d. Before and after photographs were included evidencing the visual aesthetics of the signs eliminated and the code-compliant signs which replaced the non-conforming signs. (Ex. 1, #4358-4385 @ 4373-4385).

18. As of the date of this filing, Leibundguth is the last property located within the entire Village with a commercial sign painted directly onto a brick wall. (Ex. 5, Peterson Dep., 55:15-24; 56:1-4).

III. DEPOSITION TRANSCRIPTS

19. True and accurate copies of the deposition transcripts are attached hereto for the following individuals: Robert E. Peterson (March 19, 2015) (**Exhibit 5**); Dr. Charles R. Taylor (May 7, 2015) (**Exhibit 6**); Stanley J. Popovich (March 18, 2015) (**Exhibit 7**); Patrick Ainsworth (March 18, 2015) (**Exhibit 8**); and N.J. "Pete" Pointner (June 2, 2015) (**Exhibit 9**).

III. LEIBUNDGUTH'S SIGNS

19. Contrary to the Complaint, Leibundguth Storage & Van Service, Inc. did not exist as a business entity until 1964. (Illinois Secretary of State Corporation File Detail Report attached hereto as **Exhibit 10**; Ex. 5, Peterson Dep., 14:21-24; 15:1-5). Contrary to the Complaint, Peterson does not have any knowledge of the name of the business prior to the 1964 incorporation. (Ex. 5, Peterson Dep., 15:6-11).

20. Contrary to the Complaint, when the Plaintiff's 400 sq. ft. sign painted on the back of the building was first created, (Compl., ¶ 1) it advertised Leibundguth's affiliation with Trans American Van Movers, not Wheaton World Wide Movers (Ex. 5, Peterson Dep., 21:18-23). Contrary to the Complaint, Peterson has no knowledge of when the 400 sq. ft. sign was painted onto the brick wall facing the rail corridor. (Ex. 5, Peterson Dep., 36:10-24; 37:1-18).

21. Contrary to the Complaint (Compl., ¶ 2), the Village inspected the property in 1977, and placed Leibundguth on written notice that the then existing signs on the property were non-conforming with the Village sign regulations in that Leibundguth had one sign painted directly onto the face brick (front of the building) and the total sign area of the two wall signs (only two signs are reported, not four signs as pleaded) exceeded the allowable square footage. (Ex. 5, Peterson Dep., Ex. 12). The signs photograph as of 1977 displayed neither Trans American World Wide Movers nor Wheaton World Wide Movers. (Ex. 5, Peterson Dep., Ex. 12 (photographs of signs as of 1977)).

22. Leibundguth was placed on written notice in March of 1977 that any change in the two signs then existing would require that the signs be brought into conformity with the Village sign regulations. (Ex. 5, Peterson Dep., Ex. 12).

23. The name Wheaton World Wide Moving was first adopted by Wheaton Van Lines in 1987. (Ex. 5, Peterson Dep., Ex. 10). Contrary to the Complaint, Peterson changed his painted signs in 1987 to advertise his affiliation with Wheaton World Wide Moving (Ex. 5, Peterson Dep., 42:22-24; 43:1-24; 44:1-19; 88:15-24; 89:1-15).

24. The current painted signs on the front on back of the building changed after 1987 and are thus less than 30 years old. (Ex. 5, Peterson Dep., 89:7-15).

25. The 400 sq. ft. sign painted directly onto the brick wall facing the rail corridor is not truthful because it advertises Leibundguth's affiliation with Wheaton World Wide **Movers**, a firm that does not exist. (Ex. 5, Peterson Dep., 45:20-24; 46:1-6). This misnomer was knowingly created by Leibundguth because the sign originally advertised Trans American World Wide Movers, and Leibundguth elected to just paint over Trans American and replace it with Wheaton, without changing the rest of the sign. (Ex. 5, Peterson Dep., 22:8-18).

26. Both the content and the size of the hand painted sign on the front of the Leibundguth building have been changed since the 1977 Village notice that **any** change in the Leibundguth signs would require the elimination of non-conformities including size and painted directly onto the face brick. (Ex. 5, Peterson Dep., 22:8-18; 100:7-24; 101:1-14).

27. Leibundguth has three trucks with commercial signs advertising their services. Each truck has an 8x12 sign on the back, two 20x12 signs on each side, a sign on each door, and a sign on the front. (Ex. 5, Peterson Dep., Ex. 7; 30:2-24; 31:1-22). The signs on the trucks are visible from the rail corridor (Ex. 5, Peterson Dep., 50:11-15; 125:13-20; 126:14-24; 128:7-16; 129:1-11), and also from the street, and are code-compliant under the Village commercial sign regulations (9.030.N).

28. Leibundguth is aware that the Village sign ordinance permits them to post signs that they currently do not post, including window signs, and a monument signs. (Ex. 5, Peterson Dep., 51:1-22; 52:16-18; 53:3-8).

29. Peterson has not investigated the extent to which he has other opportunities for alternative means of advertising his commercial messages. (Ex. 5, Peterson Dep., 74:23-24; 75:1-24; 76:1-24; 77:1-24; 78:1-24; 79:1-6).

30. The appearance of Leibundguth's 400 sq. ft. wall sign painted on the brick wall facing the BNSF railroad right-of-way as of July 22, 2015 is as depicted in photographs taken by Village Planner Stanley J. Popovich (Affidavit of Stanley J. Popovich, attached hereto as **Exhibit 11**).

31. The certified copies of 33 surrounding Village and municipal sign ordinances are attached hereto as **Exhibit 12**.²

32. The 33 different communities within Exhibit 12 were selected by the Village's expert witness, N. J. "Pete" Pointner, who reviewed the sign regulations for each community. (Ex. 9, Pointner Dep., 78:23-24; 79:1-6; 99:1-21).

33. Out of 33 communities studied, 26 prohibit signs painted directly on a wall, 31 out of 33 restrict the gross size of signage per parcel, and 31 out of 33 limit the number of wall signs permitted. (Ex. 12; and summary chart attached hereto as **Exhibit 13**).

34. **Exhibit 14**³ is a compilation of four publications that exist and contain content addressing how sign regulations may impact traffic safety and community aesthetics, and include the following:

a. Douglas Mace, *On-Premise Signs and Traffic Safety in Context-Sensitive Signage Design 9*, (Marya Morris et al. ed., Am. Planning Ass'n, June 2001);

b. Int'l Sign Ass'n, *Building Stronger Communities – Working Together to Create Reasonable Sign Codes*, (January, 2012);

c. Philip M. Garvey et al., Penn. Transportation Inst., *Sign Visibility Literature Review Final Report*, (December 1995);

² Pursuant to Fed. R. Ev. 201, the Village asks this Court to take judicial notice of the 33 sign ordinances as legislative enactments of the 33 communities, each of which is submitted along with the respective certification of accuracy and the fact that the document is an official public record of the community involved, and as such each is self-authenticated under Fed. R. Ev. 902(4).

³ Judicial notice of the existence of the published content of the materials within Exhibit 14 is requested in accordance with Fed. R. Ev. 201.

d. Daniel Mandelker et al., *Street Graphics and the Law*, Rev. Ed. in Planning Advisory Service Report Number 527 (Am. Planning Ass'n, 2004).

Respectfully Submitted,

VILLAGE OF DOWNERS GROVE, ILLINOIS, an
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EXHIBITS TO DEFENDANT’S LOCAL RULE 56.1
STATEMENT OF UNCONTESTED MATERIAL FACTS

- Exhibit 1 Certification Affidavit of Village Clerk, April K. Holden and documents
- Exhibit 2 Article 9 (Signs) of the Village of Downers Grove Municipal Code in effect as of the date of filing the Verified First Amended Complaint
- Exhibit 3 Ordinance 5472, An Ordinance Amending Certain Provisions of the Downers Grove Zoning Ordinance Regarding Signs
- Exhibit 4 Report of the Plan Commission dated July 6, 2015
- Exhibit 5 Deposition Transcript and Exhibits for Robert Peterson
- Exhibit 6 Deposition Transcript and Exhibits for Dr. Charles R. Taylor
- Exhibit 7 Deposition Transcript and Exhibits for Stanley J. Popovich
- Exhibit 8 Deposition Transcript and Exhibits for Patrick Ainsworth
- Exhibit 9 Deposition Transcript and Exhibits for N. J. “Pete” Pointner
- Exhibit 10 Illinois Secretary of State Corporation File Detail Report
- Exhibit 11 Affidavit of Stanley J. Popovich
- Exhibit 12 33 Communities Sign Regulations
- Exhibit 13 Summary Chart of 33 Communities Polled Regarding Painted Wall Signs
- Exhibit 14 Treatises

CERTIFICATE OF SERVICE

I, Scott M. Day, an attorney, certify that on July 24, 2015, I filed Defendant's Local Rule 56.1 Statement of Uncontested Material Facts 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