

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

ROBERT PETERSON and LEIBUNDGUTH STORAGE & VAN SERVICE, INC.)	
)	
Plaintiffs,)	
)	Case No. 14-cv-9851
v.)	
)	Hon. Edmond E. Chang
VILLAGE OF DOWNERS GROVE, ILLINOIS, an Illinois municipal corporation)	
)	
Defendant.)	

**PLAINTIFF’S STATEMENT OF FACTS IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT’S STATEMENT
OF FACTS**

Plaintiff submits, pursuant to Local Rule 56.1(b)(3), its Response to Defendant’s Local Rule 56.1 Statement of Uncontested Material Facts.

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**.

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

Response: Undisputed.

¹ Plaintiff notes that contrary to Local Rule 56.1(a)(3)((A)-(B), Defendant’s Statement of Facts does not include a description of the parties and all facts supporting venue and jurisdiction in this court.

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).

Response: Undisputed except that Plaintiff disputes that all the provisions of the sign ordinance serve these purposes. (See Plaintiff's Memorandum of Law, generally.)

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).

Response: Plaintiff does not dispute that all signs are subject to the sign ordinance and no sign is exempt from the sign ordinance; however, some signs are not required to meet certain provisions of the sign ordinance, either explicitly in the text of the sign ordinance or as the result of action taken by the Village. (Defs. Ex. 2, Sign Ordinance § 9.030.) Plaintiff does not dispute that the Village does not require a sign permit for certain signs. Signs that may be posted with first obtaining a permit are subject to different size and number requirements than signs that may be posted only after obtaining a permit. (Defs. Ex. 2, Sign Ordinance § 9.030.) The prohibitions and size and number regulations of signs that do not require a permit are, in some cases, different depending on the content of the sign. (Defs. Ex. 2, Sign Ordinance § 9.030.)

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).

Response: Undisputed except that Plaintiff disputes the accuracy of the additional findings relating to the purpose behind the amendment listed in the Ordinance.

(See Plaintiff's Memorandum of Law, Section I.A.)

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).

Response: Plaintiff does not dispute that Section 9.020(P) now prohibits any sign painted directly on a wall, roof, or fence everywhere in the Village, except that flags or murals painted on buildings are permitted by the sign ordinance on the basis

that they are decorative. (Def. Ex. 4, Report of Plan Commission, July 6, 2015, at 3.)

Plaintiff does not dispute that the prohibition on signs painted directly on a wall, roof, or fence applies to both commercial and noncommercial signs, except for flags and murals. Therefore, Plaintiff disputes the remaining facts listed in Paragraph 6.

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).

Response: Undisputed.

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).

Response: Undisputed.

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).

Response: Undisputed except that Plaintiff disputes the accuracy of the additional findings relating to the purpose behind the amendment listed in the Ordinance.

Plaintiff additionally states that the amendment to Section 9.050(C) limits the size of a wall sign with frontage along the BNSF railroad right-of-way to 1.5 square feet per lineal foot of tenant frontage. (Def. Ex. 2, Sign Ordinance, Sec. 9.050(C)(5).)

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).

Response: Undisputed.

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).

Response: Undisputed.

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)

Response: Undisputed.

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).

Response: Undisputed.

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).

Response: Undisputed.

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”).

Response: Undisputed.

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”).

Response: Undisputed.

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).

Response: Undisputed.

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).

Response: Undisputed.

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).

Response: Undisputed.

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).

Response: The Village identifies a minor error in the Complaint, which states that Leibundguth “began in 1928 and was incorporated in 1965.” (Dkt. 10, Am. Compl. ¶

11.) As the Village states – and Plaintiff does not dispute – it appears that

Leibundguth was actually incorporated in 1964 rather than 1965. Plaintiff disputes

that Peterson does not have any knowledge of the name of the business prior to the 1964 incorporation. Mr. Peterson testified that he assumed that the name of the business in 1928 was Leibundguth Moving & Storage, but said he did not know what the name was in 1928. (Def. 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).

Response: Plaintiff does not dispute that prior to advertising Leibundguth's relationship with "Wheaton World Wide Movers," the 400 square foot sign painted on the back of the building advertised Leibundguth's affiliation with Trans American Van Movers. Plaintiff disputes that this is contrary to the Complaint.

Paragraph 1 of the Amended Complaint states:

Leibundguth Moving & Storage 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. . . .

(Dkt. 10, Am. Compl. ¶ 1.) Plaintiff does not dispute that Peterson does not know exactly when the sign on the back wall of the building was painted, but disputes that this is contrary to the Complaint. (Dkt. 10, Am. Compl. ¶ 1.)

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)).

Response: Plaintiff does not dispute that the Village inspected the property in 1977. Plaintiff does not dispute that in 1977 the Village inspected the signs on the property and found them non-conforming with the sign ordinance that the Village had just amended at the time. However, the Village also noted that Leibundguth's signs complied with the sign ordinance because they were existing at the time of the amendment (that is, they were allowed because they were grandfathered under the ordinance). (Defs. Ex. 5, Peterson Dep., Ex. 12, PageID #2313-14). Plaintiff does not dispute that the notice stated that Leibundguth had one sign painted directly onto the face brick and the total sign area of the two wall signs exceeded the allowable square footage for new signs at that time. Plaintiff disputes that this is contrary to the Complaint. Paragraph 2 of the Complaint states: "No one has ever complained about the sign to Plaintiffs, nor, upon information and belief, to Downers Grove." (Dkt. 10, Am. Compl. ¶ 2.) Plaintiff disputes that the 1977 inspection and notice constituted a complaint. Plaintiff does not dispute that the pictures taken on the two signs in 1977 did not display Trans American World Wide Movers or Wheaton World Wide Movers. Plaintiff disputes any implication that, because the 1977 report only mentions two signs, the property contained only two signs. Plaintiff notes that the inspection report does not contain any pictures of the back wall of the building. (Def. Ex. 5, Peterson Dep., Ex. 12, PageID #2313-14.)

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).

Response: Undisputed, but the notice also provided that all permanent signs in conflict with the amended sign ordinance may remain in their present state and may be maintained. (Defs. Ex. 5, Peterson Dep., Ex. 12, PageID #2313-14.)

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).

Response: Undisputed except that Plaintiff disputes that Peterson changed his painted signs in 1987 to advertise his affiliation with Wheaton World Wide Moving. Rather, as the Complaint says and Mr. Peterson indicated in his deposition, he replaced the wall sign on the front of the building, which previously stated Wheaton Van Lines, with a nearly identical sign that said “Wheaton World Wide Moving.” Mr. Peterson never indicated that he changed the painted signs after 1987. (Defs. Ex. 5, Peterson Dep., 42:22-24; 43:1-24; 44:1-19; 88:15-24; 89:1-15; Dkt. 10, Am. Compl. ¶ 21; Dkt. 12, Ans. ¶ 21.)

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

Response: Plaintiff disputes that the painted sign on the front of the building changed after 1987 and that it is thus less than 30 years old. The deposition of Mr. Peterson does not indicate that the painted sign on the front of the building changed at all. Rather, the sign stating “Wheaton World Wide Moving,” which is not a painted sign, was updated in 1987 to reflect the name change of that company. (Def. Ex. 5, Peterson Dep., 89:7-15.) Plaintiff also disputes that the painted sign on the back of the building is less than 30 years old. While Plaintiff admitted that a

portion of that sign was altered when Leibundguth changed its long distance carrier from Trans American to Wheaton, the rest of the sign stayed the same. (Def. Ex. 5, Peterson Dep., 89:7-15.) Thus, it is simply not correct to say that the sign painted on the back of the building is less than 30 years old.

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).

Response: Plaintiff disputes that the sign painted directly onto the back of the building is not truthful because it advertises Leibundguth's affiliation with Wheaton World Wide Movers. The sign simply uses an informal variation on the business's name that could not mislead anyone. There is no company called "Wheaton World Wide Movers" that a person could believe the sign refers to. A reasonable person who is aware of Wheaton World Wide Moving would assume that the sign refers to that company. Plaintiff admits that the sign along the railway originally advertised Trans American World Wide Movers and that Leibundguth, rather than repaint the entire sign, replaced Trans American with Wheaton. Plaintiff disputes that the misnomer was knowingly created because it appears from his deposition that Bob Peterson, owner of Leibundguth, thought the sign on the back stated the correct name of Wheaton. (Def. Ex. 5, Peterson Dep., 45:18-22; 46:10-15.)

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).

Response: Plaintiff disputes that the size and content of the hand painted sign on the front of the building has changed. Indeed, the testimony of Peterson referenced by the deposition transcript does not even address the painted sign on the front of the building. And, in any event, that testimony only states that the sign it refers to was “touched up.” (Def. 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).

Response: Undisputed.

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).

Response: Undisputed.

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).

Response: Plaintiff disputes that Peterson has not investigated the extent to which he has other opportunities for alternative means of advertising his commercial messages. In his deposition, Peterson answered questions about specific alternative means of advertising, many of which he said he had not investigated. But he did testify that he has done some advertising using other means. Peterson also stated

that he has made a business decision to limit his advertising. (Def. 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).

Response: Undisputed.

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

Response: Undisputed.

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. 78:23-24; 79:1-6; 99:1-21).

Response: Plaintiff does not dispute that Exhibit 12 contains 33 communities selected by Mr. Pointner. Plaintiff disputes that Mr. Pointner reviewed the sign regulations for each community. (Def. Ex. 9, Pointner Dep., 102: 14-18.) Mr. Pointer testified that he did not look at any of the other municipalities' ordinances to determine whether they allowed a wall sign to be along the frontage of a rail right of way (Def. Ex. 9, Pointner Dep. 101: 6-10), nor did he look at the purposes listed in the sign ordinances of all 33 communities he purportedly reviewed. (Def. Ex. 9, Pointner Dep. 110:3-14.)

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).

Response: Undisputed.

34. Exhibit 14 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);

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

Response: Plaintiff does not dispute that Exhibit 14 is a compilation of four publications that exist and contain content addressing how sign regulations may impact traffic safety and community aesthetics. Plaintiff disputes that such publications are relevant to the safety and community aesthetics issues raised in this case. Plaintiff also disputes that the publications are admissible for the truth of what they assert. (See Plaintiff's Memorandum of Law, Section I.B.2.a.)

Plaintiff's Combined Local Rule 56.1(a)(3) Statement of Facts in Support of its Motion to Dismiss and Local Rule 56.1(b)(3)(C) Statement of Additional Facts Requiring the Denial of Defendant's Motion for Summary Judgment

Plaintiff hereby asserts the following additional facts in support of its Motion for Summary Judgment and that require the denial of Defendant's Motion for Summary Judgment.

The Parties

1. Leibundguth is an Illinois corporation located in Downers Grove, Illinois, that provides moving and storage services for its customers. (Dkt. 10, Am. Compl. ¶ 11.) Robert Peterson is the sole owner of Leibundguth. (Dkt. 10, Am. Compl. ¶ 10.)

2. The Village of Downers Grove is an Illinois municipal corporation located in DuPage County, Illinois. (Dkt. 10, Am. Compl. ¶ 12; Dkt. 12, Ans. ¶ 12.)

Jurisdiction and Venue

3. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343, and 2201 because Plaintiff brought this suit under 42 U.S.C. §§ 1983 and 1988 to seek relief for alleged violations of their federal constitutional rights. (Dkt. 10, Am. Compl. ¶¶ 4, 5; Dkt. 12, Ans. ¶¶ 4, 5.)

4. 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. (Dkt. 10, Am. Compl. ¶ 9; Dkt. 12, Ans. ¶ 9.)

FACTS

Leibundguth's Business and Signs

5. Leibundguth is located at the property and building at 1301 Warren Avenue in Downers Grove. The back wall of the building runs parallel to the BNSF railroad tracks. (Dkt. 10, Am. Compl. ¶ 14; Dkt. 12, Ans. ¶ 14.)

6. The building bears four signs advertising Leibundguth's business. (Dkt. 10, Am. Compl. ¶ 23; Dkt. 12, Ans. ¶ 23.)

7. The back of the building bears a sign that is painted directly on the wall of the building that advertises to train commuters riding Metra along the BNSF railway. (Dkt. 10, Am. Compl. ¶ 16; Dkt. 12, Ans. ¶ 16.)

8. The sign on the back wall of Plaintiff's building exceeds Section 9.050(C)(5)'s size limit, (Dkt. 10, Am. Compl. ¶ 16) and violates Section 9.020(P)'s prohibition on signs painted directly on a wall. (Dkt. 10, Am. Compl. ¶ 29).

9. The front of the building bears a smaller sign that is also painted directly on the wall of the building. (Dkt. 10, Am. Compl. ¶ 19; Dkt. 12, Ans. ¶ 19.) The sign painted on the front of the building violates Section 9.020(P)'s prohibition on signs painted directly on a wall. (Dkt. 10, Am. Compl. ¶ 29.)

10. These painted signs predate the ownership interest of Robert Peterson, the sole owners of Leibundguth, Peterson believes that these signs were erected shortly after the building was built in the 1930s. (Def. Ex. 5, Peterson Dep., 21:11-15; 36:10 – 38:11; Dkt. 10, Am. Compl. ¶¶ 16, 19.)

11. The front of the building also contains a sign with "Leibundguth Storage & Van Service" in red and white hand-painted block letters. This sign was erected in 1965. (Dkt. 10, Am. Compl. ¶ 20; Dkt. 12, Ans. ¶ 20; Def. Ex. 5, Peterson Dep., 39:20 – 40:5.)

12. Directly under that sign is a sign that says "Wheaton World Wide Moving," which advertises Leibundguth's relationship with its long-distance mover. That sign was erected in 1987, replacing a similar sign with the previous business name of

Wheaton. (Dkt. 10, Am. Compl. ¶ 21; Dkt. 12, Ans. ¶ 21; Def. Ex. 5, Peterson Dep., 42:22-24; 43:1-24; 44:1-19; 88:15-24; 89:1-15.)

13. Collectively, according to the Village, the signs on the front of the building violate Section 9.050(A)'s limitation on the total aggregate size of signs. (Dkt. 10, Am. Compl. ¶ 39; **Pl. Ex. A**, Downers Grove Zoning Board of Appeals Minutes, Nov. 19, 2014.) Collectively, the signs on the front of the building violate Section 9.050(C)'s limit on the total number of wall signs per tenant frontage. (Dkt. 10, Am. Compl. ¶ 30.)

14. 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. (Dkt. 10, Am. Compl. ¶ 23; Dkt. 12, Ans. ¶ 23.)

15. All four of Plaintiffs' signs advertise a lawful activity – moving and storage – for which Leibundguth is licensed. (Dkt. 10, Am. Compl. ¶ 24; Dkt. 12, Ans. ¶ 24.)

16. The sign on the back of Leibundguth's building accounts for about 15 to 20 percent of the business's revenue. (Dkt. 10, Am. Compl. ¶ 18; **Pl. Ex. B**, Taylor Expert Report 14-17.)

Village Actions Denying Plaintiff Relief from the Sign Ordinance

17. At meetings on September 2, September 9, and October 7, 2014, the Village Council discussed a proposed amendment to the sign ordinance, suggested by Leibundguth, to allow signs to face the BNSF railway. Resolutions introduced at the September 2 and October 7 Village Council meetings, which would have allowed

signs to face the railway, failed. (**Pl. Ex. C**, Downers Grove Village Council Meeting Minutes, Sept. 2, 2014 at 9-11; Sept. 9, 2014 at 2; and Oct. 7, 2014 at 7-9.)

18. Mr. Peterson also applied to the Downers Grove Zoning Board of Appeals for a variance that would have allowed him to have a sign facing the Metra, have a sign directly painted on the wall of the building, and have signs exceeding the maximum aggregate sign area. On November 19, 2014, the Zoning Board of Appeals denied Mr. Peterson's variance request. (**Pl. Ex. A**, Downers Grove Zoning Board of Appeals Meeting Minutes, Nov. 19, 2014, at 2-9.)

19. In a letter denying Leibundguth's petition for a variance, Patrick Ainsworth, Village Planner, stated that, to comply with the sign ordinance, Leibundguth could remove its two painted signs by applying a solid paint color over them. The letter also gave Leibundguth until April 17, 2015, to paint the building walls over those signs because an average temperature of 50 degrees Fahrenheit is required. (**Pl. Ex. D**, Letter from Ainsworth, Nov. 26, 2014.)

Village Ordinances

20. The sign ordinance does not restrict the size, location, or number of governmental signs, temporary decorations and signs, noncommercial flags, and memorial signs and tablets. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

21. The sign ordinance limits street address signs to four square feet. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

22. The sign ordinance limits "no trespassing" signs to two square feet. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

23. The sign ordinance limits political and noncommercial signs, which it defines to include home occupation signs, to a total of 12 square feet for all such signs per lot, and these signs may not be placed on the public right-of-way. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

24. The sign ordinance limits real estate signs to 5.5 square feet in residential zones and 36 square feet in nonresidential zones, but real estate signs may not exceed 10 feet in height. The sign ordinance also limits the number of real estate signs and prohibits them in the public right-of-way, except that open house signs are allowed only on Friday, Saturday, and Sunday at certain times. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

25. The sign ordinance states that garage sale, rummage sale, yard sale and estate sale signs may not exceed four square feet and are allowed in the public right-of-way, except that such signs are allowed only on Friday, Saturday, and Sunday at certain times. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

26. The sign ordinance states that help wanted signs must not exceed two square feet and may only be placed on a window or door. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

27. The sign ordinance does not permit vehicle signs to remain stationary for an extended period of time for the purpose of attracting attention to a business. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

28. The sign ordinance does not count certain signs in calculating Section 9.050(A)'s limit on total aggregate sign size. Properties abutting the right-of-way of

I-88 or I-355 are allowed an additional monument sign that may not exceed 225 square feet, which does not count in calculating the lot's total sign area. (Def. Ex. 2, Sign Ordinance, Sec. 9.050(B)(3).) A building of four stories or more is allowed one wall sign of 100 square feet or less on no more than three sides of the building, and these are not counted against the maximum allowable sign area. (Def. Ex. 2, Sign Ordinance, Sec. 9.050(C)(4).) The Village also does not count a panel sign in a multi-tenant shopping center (Def. Ex. 2, Sign Ordinance, Sec. 9.050(B)(2)), window signs (Def. Ex. 2, Sign Ordinance, Sec. 9.050(H)), or menu boards (Def. Ex. 2, Sign Ordinance, Sec. 9.050(D)) in calculating a building's sign area.

29. The sign ordinance places no limit on the number of window signs or shingle signs a property may have (Def. Ex. 2, Sign Ordinance, Sec. 9.050(H), (B)(4)); allows multiple window signs (Def. Ex. 2, Sign Ordinance, Sec. 9.050(H)); and, in addition to a wall sign, allows building owners to display a shingle sign or a monument sign (Def. Ex. 2, Sign Ordinance, Sec. 9.050(B)), a menu board (Def. Ex. 2, Sign Ordinance, Sec. 9.050(D)), a projecting sign, (Def. Ex. 2, Sign Ordinance, Sec. 9.050(E)) an awning sign (Def. Ex. 2, Sign Ordinance, Sec. 9.050(F)), and an under-canopy sign (Def. Ex. 2, Sign Ordinance, Sec. 9.050(G)).

30. The Zoning Code, of which the Sign Ordinance is part, defines "Commercial Sign" as "A sign that identifies, advertises, or directs attention to a commercial business, or is intended to induce the purchase of goods, property, or service; including, without limitation, a sign naming a brand of goods or service." (Pl. Ex. E, Zoning Code, Sec. 15.220.)

31. The Zoning Code defines “Noncommercial sign” as “A sign that does not promote commercial activity, such as ornamental entry gate signs. Home occupation signs are also deemed noncommercial signs.” (Pl. Ex. E, Zoning Code, Sec. 15.220.)

32. The Village does not prohibit a brick exterior wall of a building from being painted. (Pl. Ex. F, Municipal Code, Sections 7.1901, 7.104.)

33. The Village staff report accompanying Ordinance No. 5472 states: “There are instances of flags and murals painted on buildings and these are permitted by the code on the basis that they are decorative, and do not convey constitutionally protected commercial or non-commercial speech.” (Def. Ex. 4, Report of Plan Commission, July 6, 2015, at 3.)

34. The Village staff report accompanying Ordinance No. 5472 states: “The allowance of painted signs in limited locations of the Village versus other locations may be somewhat more difficult to defend relative to the intent and purpose of the Sign Ordinance as detailed in Section 9.010.” (Def. Ex. 4, Report of Plan Commission, July 6, 2015, at 3.)

35. The Village staff report accompanying Ordinance No. 5472 does not identify any reasons why, or ways in which, the prohibition on signs painted on a wall, roof, or fence advances traffic safety. (Def. Ex. 4, Report of Plan Commission, July 6, 2015, at 3.)

36. On July 6, 2015, the Village of Downers Grove Plan Commission held a hearing on a petition to approve multiple text amendments, including the amendments to the sign ordinance to allow a wall sign along the railway but limit

the size of such wall sign and to prohibit signs painted on a wall, roof, or fence in all zoning districts in the Village. During the hearing the only public comment was from Bob Peterson, owner of Plaintiff Leibundguth, Jeffrey Schwab, attorney for Plaintiff, and one other citizen from Downers Grove, whose only relevant comment was that the Village staff in discussing signs only addressed the negatives and did not mention the positive aspects of signs, like advertising. The members of the Plan Commission had no relevant discussion and passed the petition unanimously. (**Pl. Ex. G**, Plan Commission Meeting Minutes, July 6, 2015, at 9-11.)

37. On July 14, 2015, the Village of Downers Grove Council heard the first reading of a proposed ordinance to approve multiple text amendments, including the amendments to the sign ordinance to allow a wall sign along the railway but limit the size of such wall sign and to prohibit signs painted on a wall, roof, or fence in all zoning districts in the Village. Only two members of the public spoke about this proposed ordinance at this meeting: Bob Peterson, owner of Leibundguth, and another member of the public, who stated that modern technology allows painted bricks to breathe, but stated that he does not like painted masonry. He also questioned who gets to decide when a mural is not advertising. Commissioner Barnett spoke in favor of the amendments. Commissioner White stated that the regulation of painted wall signs should be consistent; either they should be allowed everywhere or prohibited everywhere. He stated that he prefers to remove the prohibition on painted wall signs across the Village. (**Pl. Ex. H**, Village Council Meeting Minutes, July 14, 2015, at 9-10.)

38. On July 21, 2015, the Village of Downers Grove Council held a hearing on the proposed ordinance to approve multiple text amendments, including the amendments to the sign ordinance to allow a wall sign along the railway but limit the size of such wall sign and to prohibit signs painted on a wall, roof, or fence in all zoning districts in the Village. During public comment, only Bob Peterson, owner of Leibundguth, and Jeffrey Schwab, Plaintiff's attorney, spoke. After a short discussion by the Commissioners in which three commissioners expressed support, the Village Council passed the ordinance unanimously. The Commissioners did not discuss traffic safety or aesthetics implications of this ordinance. (**Pl. Ex. I**, Village Council Meeting Minutes, July 21, 2015, at 7-8.)

Planned Development Amendment for Art Van Furniture

39. On November 18, 2014, the Village Council approved a Planned Development Amendment to grant the Art Van Furniture store at 1021 Butterfield Drive in Downers Grove three variations from sign regulations: to increase the total sign area from 300 square feet to 990 square feet; to permit a sign on the east façade of the building with no frontage where no sign is allowed; and to allow two signs each on the north, south, and west façades of the building where only one sign each is permitted. (**Pl. Exs. J and K**, Village Council Meeting Minutes, Nov. 11, 2014, at 9-11, and Nov. 18, 2014, at 6.)

40. During the discussion on the Planned Development Amendment for the Art Van Furniture store at 1021 Butterfield Drive at the Village Council meeting on November 11, 2014, there was no discussion about the traffic safety consequences of

allowing 990 square feet of signs, allowing a wall sign that was not along a right-of-way, or allowing two wall signs on three sides of the building where only one is permitted. The only discussion of aesthetics was the Mayor's comment that these variances would improve the aesthetics of the Village. (**Pl. Ex. J**, Village Council Meeting Minutes, November 11, 2014, at 9-11.)

41. The Village is providing a tax incentive to Art Van Furniture, rebating 50% of the sales tax generated over 15 years. (**Pl. Exs. J and K**, Village Council Meeting Minutes, November 11, 2014, at 9-11, and November 18, 2014 at 6.)

42. On November 11, 2014, during the discussion on the Planned Development Amendment for the Art Van Furniture store, Stan Popovich, Planning Manager of the Village of Downers Grove stated that the Village staff believed that the variations from the sign ordinance were important for the store's success. (**Pl. Ex. J**, Village Council Meeting Minutes, November 11, 2014, at 9-11.)

Plaintiff's Expert Testimony

43. Academic research indicates that signs that are readable and conspicuous do not pose a threat to traffic safety. Signs painted directly on the wall of a building pose no greater risk to traffic safety because they inherently pose no different issues related to readability, visibility, and obstruction of a driver's view than other signs. The Federal Highway Administration's reviews of signage and traffic safety have found that there is no conclusive link between signs and traffic accidents. (**Pl. Ex. B**, Taylor Expert Report 4-9.)

44. Limiting the size of signs may be more likely to threaten traffic safety than enhance it because a driver looking for a particular business (and thus its sign) will be more distracted and have a harder time finding the business if the signs are smaller, thus threatening traffic safety. Signage deficiency has been an issue in tort cases where signs have been too small. For that reason, the Federal Highway Administration has mandated a minimum size for traffic signs. Additionally, on-premises signs can actually enhance traffic safety, because they can assist in keeping drivers alert and in finding their way. “[A] FHWA study showed that on-premise signs located at high traffic intersection[s] increased traffic safety provided they met FHWA standards for legibility, conspicuity, [and] readability.” (Pl. Ex. B, Taylor Expert Report 8-9.)

45. The individual academic studies over the past sixty years that have explicitly researched the issue and controlled for other factors have found no evidence of a correlation between signs and traffic accidents. Studies by insurance companies and law enforcement have also support the conclusion that there is no correlation between on-premise signs and traffic accidents. (Pl. Ex. B, Taylor Expert Report 7.)

46. “Section 9.020 (P)’s prohibition of painted signs does not advance traffic safety interests as painted signs can be readable and visible and cannot block drivers’ views when making turns unless the building itself blocks drivers’ views when making turns.” (Pl. Ex. B, Taylor Expert Report 9.)

Dated: August 24, 2015

Respectfully submitted,

**LEIBUNDGUTH STORAGE & VAN SERVICE,
INC.**

By: /s/ Jeffrey M. Schwab

Jacob H. Huebert
Jeffrey M. Schwab
Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
Telephone (312) 263-7668
Facsimile (312) 263-7702
jhuebert@libertyjusticecenter.org
jschwab@libertyjusticecenter.org