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 Honorable Edmond E. Chang

DEFENDANT'S COMBINED REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Publications

Webinar

I. PLAINTIFF ASSERTS THREE CRITICAL FALSE LEGAL POSITIONS

A. Flags And Murals Are Not Exempt From The Sign Ordinance

Plaintiff's Combined Memorandum of Law in Support of Its Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment ("Pl. Memo") (Dkt. 41) repeatedly misstates the legal restrictions of the Village sign ordinance. Flags and murals are not "exempt" from the Village sign ordinance, nor are flags and murals "exempt" from the Village municipal code. (Def. Rep. to Pl. Resp. to Def. SOF 6).

Not every flag or mural is a "sign" as defined under the Village's zoning ordinance. (Dkt. 41, Pl. Memo Ex. E, §15.220). Not every flag conveys a commercial or non-commercial message, and the same applies to a mural. Flags and murals that do not convey a commercial or non-commercial message do not meet the definition of a "sign" under the Village sign ordinance. (Pl. Memo Ex. E, § 15.220). The fact that such flags and murals are not signs does not make them "exempt" from the sign ordinance, they simply are not "signs." They are, nevertheless, still regulated by the Village municipal code, including the building code and maintenance code.[1]

In contrast, if a flag or mural does contain a commercial or non-commercial message they **are** legally "signs" under the Village sign ordinance, and as a sign, the flag or mural would be prohibited from being painted directly onto a wall, roof, or fence everywhere in the Village. (Def. SOF Ex. B, § 9.020.P). Plaintiff's insistence to the contrary is false and stands in direct conflict with the Village sign ordinance.

[1] Excerpts from the International Property Maintenance Code with local amendments attached hereto and incorporated herein as **Def. Ex. A**, Section 301(General); Section 301.2 (Responsibility); Section 301.3 (Vacant structures and land); Section 302 (Exterior Property Areas); Section 302.1 (Sanitation); Section 304 (Exterior Structure); Section 304.1 (General); Section 304.2 (Protective treatment); Local Amendment to Section 304; Section 305 (Interior Structure); Section 305.1 (General); Section 305.1.1 (Unsafe conditions). **Judicial notice is requested in accordance with Fed. R. Ev. 201.

B. Plaintiff Misstates The Number Of Wall Signs

Plaintiff repeatedly misrepresents that the three wall signs recognized by the Village on Plaintiff's building are four separate wall signs. This misrepresentation is substantive in the legal context of these cross-motions for summary judgment. (Def. Resp. to Pl. SOF 6, 11, 12, 14).

The signs identified in paragraphs 20 and 21 (and depicted together in paragraph 21) of the Complaint (Dkt. 10, Compl. 20, 21) constitute a **single** wall sign under the Village sign ordinance because of their immediate adjacency to each other. This recognition as a **single** wall sign is documented in the Village's Answer (Dkt. 12, Ans. 20), the deposition testimony of Planning Manager, Stan Popovich (Def. SOF Ex. 7) and the detailed staff report prepared in conjunction with Plaintiff's failed application for variations from the sign ordinance. (Dkt. 10, Compl. Ex. B).

This misrepresentation is substantive. If this Court upholds the uniform time, place, and manner painted wall sign regulation in Section 9.020.P, then Plaintiff's two painted signs must be removed. Upon removal of the painted signs, Plaintiff will have only **one single wall sign** remaining on the front of the building, and that single wall sign is 157.7 sq. ft. which is below the 159 foot maximum for Plaintiff's frontage. (Dkt. 10, Compl. Ex. B). Thus, the sole remaining wall sign would be lawful and code-compliant. Plaintiff's repeated effort to describe the signs as two separate signs is an effort to avoid dismissal for mootness. If a single code-compliant wall sign remains, the balance of this case is rendered moot. Conversely, if by Plaintiff's unilateral insistence two separate wall signs remain, Plaintiff's challenge to the single wall sign limitation in Section 9.050.C still requires judicial resolution. In no uncertain terms, Plaintiff is attempting to gain judicial review of a First Amendment injury which the Village expressly does **not**

impose. Plaintiff cannot self-impose a "case and controversy" that does not exist, and the First Amendment only protects Plaintiff from a restriction on speech imposed by the State.

C. Plaintiff's Signs

Plaintiff's signs are not 70 years old, and Plaintiff's claim they should be treated as, or are akin to, "heritage signs" is simply false. (Dkt. 10, Compl. 57, 58). The 400 sq. ft. painted wall sign on the BNSF right-of-way advertises a "business-partner" that does not exist and was unquestionably changed to a different "partnership" less than 30 years ago (in 1987) when the name "Wheaton World Wide Movers" first came in existence and was painted over the prior painted sign which read "Trans American World Wide Movers," as admitted by Peterson. (Def. Rep. to Pl. Resp. SOF 20, 23).

The painted sign on the front of the building was also altered **after** the Village's inspection and photographs of the building were taken in March, 1977. The size and height of the painted area was increased, a telephone number was added within the increased area, and the word "and" and another illegible word at the right edge of the 1977 version were removed. Visual examination of the current sign and the 1977 photograph of the sign make these facts beyond fair dispute. (Dkt. 10, Compl. 19; Def. SOF Ex. 5, Ex. 12).

The single remaining sign (which Plaintiff insists is two separate signs) is a manufactured wall sign. The plastic letter portion of the sign was affixed to the wall in 1965 and was clearly legible in 1977 when inspected. The manufactured "Wheaton World Wide Moving" portion of the sign was not sent to Plaintiff until 1987, and was unquestionably **not** present in the 1977 photographs of the building. As a result, it cannot be legitimately disputed that Plaintiff also expanded this single wall sign in 1987, ten years **after** the Village inspection. Each of Plaintiff's

three wall signs has been altered in size, content or both after 1977. (Dkt. 10, Compl. 21; Def. SOF Ex. 5, Ex. 12; Def. Rep. to Pl. Resp. to Def. SOF 23, 24).

II. THE VILLAGE PAINTED SIGN PROHIBITION MEETS THE *CLARK* TEST

A. The *Clark* Test Applies

Plaintiff admits that the Village prohibition of signs painted directly on a wall is content-neutral, and thus is a "time, place, and manner" restriction governed by the *Clark* test.[2] (Dkt. 10, Compl. 2).

B. Significant Governmental Interest Is Undisputed

Traffic safety, aesthetics and preservation of property values are significant governmental interests. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-508 (1981), and Plaintiff now concedes the courts have concluded that traffic safety and aesthetics are substantial governmental interests. (Dkt. 41, Pl. Memo p. 7). This element of the *Clark* test is therefore satisfied.

C. Ample Alternatives Of Communication Is Admitted

It remains undisputed that commercial wall signs are still legally permitted by the Village, as are a broad variety of other on-premise commercial signage as admitted by Plaintiff. (Dkt. 10, Compl. 35, 36, 37; Pl. Resp. to Def. SOF 27, 28). Thus, the *Clark* element of ample alternatives for communication is satisfied.

D. Narrow Tailoring Of The Regulation Has Been Established

Plaintiff attempts to argue that the painted sign prohibition is not "narrowly tailored," however, none of the propositions offered in support of this argument actually addresses "narrow tailoring" as defined by the U.S. Supreme Court. Each of Plaintiff's assertions runs to whether or

[2] *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

not painted signs present any real threat to traffic safety and aesthetics, not to whether the prohibition is broader than necessary. While Plaintiff denies that signs painted on a wall present any risk to traffic safety and further that the Village had a **basis** for finding that painted signs pose a risk to traffic safety, aesthetics, or property values, these arguments do **not** address, nor are they relevant to, narrow tailoring. Both arguments go to whether a sufficient basis exists for the Village to believe that the admittedly significant governmental interests are actually threatened by painted wall signs.

If the Village has a sufficient basis for believing that signs painted directly on a wall diminish traffic safety or are unattractive, "then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981). By barring signs painted directly on a wall, the Village has done nothing more than eliminate the exact source of the evil it seeks to remedy. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 790 (1984); *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 489 (1989) (Blackmun, dissenting).

As detailed earlier, Plaintiff's claim that the regulation allows flag signs or mural signs to be painted directly on a wall is legally incorrect. But even if this were true, it amounts to an assertion that the painted sign prohibition is **too** narrowly drawn, not that it is not narrowly drawn enough. The U.S. Supreme Court has held that a content-neutral time, place, and manner restriction must be upheld unless it "is substantially **broader** than necessary to protect the [state's] interest." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). Simply stated, Plaintiff's (incorrect) argument that flags and murals can be painted on a wall is an under-inclusive claim irrelevant to "narrow tailoring."

Based on the legal precedent of *Taxpayers for Vincent*, *Metromedia* and *Fox*, the Village's content-neutral ban on all painted wall signs has been conclusively established to be "narrowly tailored." This element of the *Clark* test has been satisfied, as a matter of law.

E. The Village Has Valid Undisputed Bases For The Painted Sign Prohibition

1. Judicial Deference

There is no suggestion in the Complaint, discovery or any other pleading filed by Plaintiff that the Village has prohibited painted wall signs and claimed aesthetic concerns as a pretext for some ulterior motive. Because no such suggestion exists, the Village's aesthetic determination is entitled to reasonable deference. *Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 823 (6th Cir. 2005); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 531 (1981).

2. The Village's Burden

While the Village admits it has the burden to present evidence that supports its perceived problem from a type of signage, that burden is **not** overwhelming. *DiMa Corporation v. Town of Hallie*, 185 F.3d 823, 829 (7th Cir. 1999) instructs:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by **other** cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925.

3. Evidence Submitted Satisfying The Village's Burden

(a) The 33 communities studied and the published treatises are evidence.

Seventh Circuit precedent holds that the Village may make a record for summary judgment with evidence to justify or support a legislative decision to impose a sign regulation which may not have been before the Village when the ordinance was adopted. *DiMa*

Corporation v. Town of Hallie, 185 F.3d 823, 829-830 (7th Cir. 1999). Thus, Plaintiff's attempt to block this Court from considering the 33 different sign ordinances of surrounding communities submitted for judicial notice is contrary to law. Similarly, the published treatises submitted by the Village on the significance of sign size, visibility, aesthetics and overabundance problems are relevant and admissible.

(b) The lengthy legislative process undertaken is evidence.

The Village has submitted extensive evidence of the administrative and legislative process undertaken in 2004 and 2005 prior to adopting the Village sign regulations, including the prohibition of Plaintiff's painted signs. The legislative history and the Village's study of nine other communities at that time stand undisputed. (Pl. Resp. SOF 13, 14). Plaintiff's only response is that the process is "irrelevant" to this Court's evaluation of the basis for the sign regulations. As previously argued, precedential authority suggests not only is this legislative process relevant, it is determinative of the legislative basis for sign regulation. *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1114-1115 (7th Cir. 1999); *Long Island Bd. Of Realtors, Inc. v. Inc. Vill. Of Massapequa Park*, 277 F.3d 622, 627 (2nd Cir. 2002); *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073-74 (9th Cir. 2006); *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 894 (9th Cir. 2007). Notably, Plaintiff offers no basis in law to disregard this controlling authority.

(c) The 2005 and 2015 staff reports and findings are evidence.

The "purpose and intent" section of the 2005 Village sign regulations is also evidence. The 2015 expansion of the painted sign prohibition was adopted based upon an eight page staff report, and Ordinance #5472 incorporated specific findings detailing the Village reasoning behind banning painted wall signs throughout the Village. While Plaintiff denies the findings are

accurate (Pl. Resp. to Def. SOF 5), Plaintiff once again offers no evidence to rebut the accuracy of the legislative findings.

(d) The condition of Plaintiff's signs is evidence.

The photographs of the current state of Plaintiffs painted signs is "living" evidence of the detriments posed by painted wall signs. (Def. SOF Ex. 11). The 2015 photograph of the rear painted sign reveals fading, chipping, brick fracture deterioration and fundamental loss of visibility. (Def. SOF 30). The 1977 photograph of the front painted sign contains a word so badly faded and chipped that it cannot be read. (Def. SOF Ex. 5, Ex. 12). And in stark contrast, the non-painted manufactured plastic letters in the third wall sign are just as clear and legible today as they were when it was first installed 50 years ago. (Def. SOF, Ex. 5, Ex. 12).

4. Impact On Traffic Safety And Property Values

While the Village has primarily focused on the **aesthetic** harms to be avoided from painted wall signs, both traffic safety and preservation of property values were also motivating factors identified in the general purpose clause of the 2005 sign ordinance and the findings in the recently adopted Ordinance #5472. (Dkt. 10, Compl. Ex. A, § 9.010).[3]

Concerning traffic safety, both loss of visibility and visual deterioration are recited as justifications for prohibiting painted wall signs because the visibility of wayfinding signage is directly related to traffic safety. The relationship of visibility to traffic safety is also at issue in how the Village size and number limitations on wall signs meet the *Central Hudson* test in Counts III and IV, and as such the argument will not be duplicated here.

Addressing property values, both assisting in the eradication of graffiti-like messages and avoiding the aftermath created by the various methods of obliterating painted signs are cited as

[3] Should this case proceed to bench trial, other interests cited in the purpose clause will be shown to be significant interests and served by this provision.

creating undesirable visual blight. Prohibiting this blight unquestionably serves to protect the property values of nearby properties within view of that blight. The fact that the Village permits painted wall signs to be obliterated by painting over them is not evidence that the painted signs are therefore not a problem, and Plaintiff's assertion that the Village instructed or directed Peterson to do so is disputed and false. (Def. Resp. to Pl. SOF 19). Rather, this fact is further evidence that even the options for obliteration of painted signs are legitimate concerns because the removal process itself confronts procedures that are less than optimal as expressed within Ordinance #5472.

The controlling precedent holds that the foregoing evidence meets – and exceeds – that needed to establish a sufficient basis for the Village to believe that signs painted directly on a wall (or fence or roof) can be detrimental to aesthetics, traffic safety and preservation of property values. Tellingly also, Plaintiff now admits that 26 of the 33 communities studied by the Village's expert also prohibit signs painted directly on a wall (Def. Resp. to Pl. SOF 33), so it cannot be suggested that the Village's concerns are unfounded or that the prohibition is in any way unique. The 2005 regulation has been undisputedly successful over the last ten years (Pl. Resp. to Def. SOF 17), and Plaintiff is the only one left in the entire Village with a painted wall sign. (Pl. Resp. to Def. SOF 18). The *Pearson* and *Edenfield* cases cited by Plaintiff have no application in the face of this evidence. Because all prongs of the *Clark* test have been met, summary judgment should be granted to the Village on Count II.

III. THE WALL SIGN SIZE AND NUMBER RESTRICTION

A. *Reed* and *Central Hudson*

The *Reed* decision has clarified that a municipality like the Village has the constitutional authority to limit the size and number of commercial signs. *Reed v. Town of Gilbert, Ariz.*, 135

S.Ct. 2218, 2232 (2015). Plaintiff and the Village agree that the size and number restrictions are commercial sign regulations subject to intermediate scrutiny under the *Central Hudson* test.[4] (Pl. Memo p. 5)

B. False Or Misleading

It is undisputed that Wheaton World Wide **"Movers"** does not exist. Plaintiff responds that the sign is "close enough" to being accurate. (Def. SOF Ex. 5). The First Amendment does not protect Plaintiff's right to advertise a business/partnership that is **almost** accurate.[5]

C. Significant Governmental Interest

There is no dispute that traffic safety and aesthetics (along with preservation of property values) are significant governmental interests. (Pl. Memo p. 7). This element of *Central Hudson* has been proven.

D. The Size And Number Limits Serve Significant Governmental Interests

1. Aesthetics

The detailed law and evidence recited in Section II equally apply to prove this prong of the *Central Hudson* test. A municipality has a lawful right to make a legislative determination as to how many wall signs can be posted before aesthetics are harmed, and the same applies to how big the signs should be before the wayfinding goals of traffic safety defeat the aesthetics of the community. *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2232 (2015).

2. Traffic Safety

There is no dispute that extensive published literature exists and advocates that the size, location and visibility of commercial on-premise signs impacts traffic safety. Avoiding overload,

[4] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 573 (1980) (Blackmun, concurring)

[5] The Village did not assert untruthfulness of the rear sign in its motion to dismiss because it was filed and fully briefed as of March 13, 2015 before the Village became aware of the issue, and Peterson admitted it at his March 19, 2015 deposition.

while providing for adequate wayfinding and maintaining a check on competitive business balance, is critical. For ease of reference, attached hereto and incorporated herein as **Def. Ex. B** are excerpts in support of these propositions from the treatises previously submitted by the Village. (Def. SOF Ex. 14).

Any effort to suggest that traffic safety is unaffected by the size, height, location and number of signs not only conflicts with the published treatises, it also defies common sense and embraces intellectual myopia. Signs that are visible, properly placed, of sufficient size and unblocked by other signs unquestionably help motorists navigate to their destination. In contrast, an overabundance of signs, or improperly located signs that impede or block visibility, defeat the navigation function and present an undesirable "cluttered" appearance in the minds of many. Tellingly, Plaintiff's own expert agrees that properly placed and sized signs enhance traffic safety, and making sure that signs are visible serves and enhances traffic safety. (Def. SOF Ex. 6, Taylor Dep. 132:23-24; 133:1-5; 141:20-24; 142:1-2).

Thus, as detailed in Defendant's underlying Memorandum, the legislative task of adopting sign regulations requires the balancing of competing interests, and sometimes contradictory goals, as neither safe wayfinding nor aesthetics should be permitted to defeat the other. On-premise commercial signs need to be large enough and legible enough to serve safe wayfinding by motorists, and these signs need to be small enough to assure that aesthetics are not defeated by proportion, density or volume. The legislative history behind the Village's adoption of the sign ordinance establishes this balancing of interests occurred. The Village has a legitimate and established basis for submitting that the size and number of commercial on-premise signs impact both traffic safety and aesthetics. This element of the *Central Hudson* test has also been proven by the undisputed facts of record.

E. The Size And Number Regulations Are A "Reasonable Fit"

Notwithstanding the limits, Plaintiff can still have up to 159 sq. ft. of wall sign on the Warren Avenue frontage and up to 159 sq. ft. of wall sign on the BNSF frontage, as long as the combined signage does not exceed 300 sq. ft. Plaintiff can also post window signs, shingle signs, monument signs, projecting signs, awning signs and under-canopy signs, and can also continue to maintain all of the undisputed signage on the trucks used in Plaintiff's daily moving operation. (Pl. Memo p. 12; Dkt. 10, Compl. 32, 37; Pl. SOF 27). Plaintiff does not dispute that 31 of the 33 communities polled by the Village restrict the gross size of signage per property, and 31 of 33 limit the number of wall signs permitted. (Pl. Resp. to Def. SOF 33). While the Village addresses the "shotgun attack" made by Plaintiff on the regulations in the following Section, the Village stands on the arguments in its underlying motion that the regulations were carefully crafted by way of a lengthy legislative process, and are a "reasonable fit" which is all that is required by the case law defining this *Central Hudson* prong.

F. Plaintiff's Shotgun Attack

Plaintiff first complains that the size limitation is under-inclusive because certain signs for properties along the I-88 or I-355 expressway, or buildings that contain four stories, are not included in calculating the 300 sq. ft. limitation. The Village submits it is obvious that properties located on a controlled access regional interstate highway have significantly different visibility demands. The number of vehicles, speed limit, complexity of driving environment and topographical variation between the interstate and adjacent properties are all very different than those for interior residential and commercial streets within the Village. Similarly, a four story building presents a very different proportional aesthetic concern than does a one story building.

Plaintiff's argument that the First Amendment is violated if these signs are not counted in the gross size calculation defies simple logic, and is not supported by Plaintiff's case law.

Plaintiff then argues numerous other types of signs which are also distinctly different from commercial on-premise wall signs. Multi-tenant shopping center signs are different in type, purpose and intended viewer, as are menu boards for restaurants. These differences drive different regulations, and the reasonable fit between menu boards, multi-tenant shopping center signs and traffic safety is for another case with a different plaintiff who has standing. The same applies to tollway signs and four story office building signs.

Continuing the "whack-a-mole" strategy, Plaintiff next argues that the First Amendment is offended because the allowed size of a wall sign is calculated by reference to the linear frontage of the building rather than the wall surface area. Such "regulatory stargazing" is not supported by a single case cited by Plaintiff, and has been directly rejected as the type of judicial "re-calibration" the courts have held to be best left to legislative prerogative. *Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 823-824 (6th Cir. 2005).

Plaintiff lastly demands that this Court consider the propriety of the Village granting variations for the planned unit development Art Van Furniture property located along the I-88 regional expressway, with only certain meeting minutes attached in support. In light of this claim, the Village has now provided the full record on the property (Def. Resp. to Pl. SOF 39, 40, 41, 42; Def. SOF Ex. 1), and believes that a cursory review of the record will reveal the lack of merit to Plaintiff's claim. Going further, judicial review of non-comparable variation approvals in scrutinizing sign regulations is beyond the scope of this case, and has nothing to do with *Central Hudson*.

Because all prongs of *Central Hudson* have been met, summary judgment should be awarded to the Village on Counts III and IV.

IV. PLAINTIFF NOW DEMANDS JUDICIAL REVIEW OF THE ENTIRE SIGN ORDINANCE

Despite acknowledging the three relevant sign regulations at issue are subject to intermediate scrutiny, Plaintiff now asserts Count I to be an "overbreadth" challenge requiring strict scrutiny be applied to the entire Village sign ordinance. This is precisely the "overbreadth" challenge the Village accused Plaintiff of asserting when the Village filed its motion to dismiss, and precisely the "overbreadth" challenge this Court held was **not** pleaded in Count I when the Court denied the Village's motion to dismiss.[6] It is fundamentally unfair to permit Plaintiff to assert by cross-motion for summary judgment, after discovery is closed, a claim which the Court has already held is **not** stated within the Complaint. Yet here we are. The Village is now called upon to defend the entirety of the non-commercial sign regulations against strict scrutiny, despite the fact that none applies to any of Plaintiff's signs. As detailed below, Plaintiff's overbreadth claim should be rejected for multiple reasons.

A. Plaintiff Lacks Standing To Challenge All Non-Commercial Sign Regulations

The "overbreadth" doctrine does not excuse a plaintiff's failure to "allege an injury arising from the specific rule being challenged, rather than an entirely separate rule that happens to appear in the same section of the municipal code." *Midwest Media Property, L.L.C. v. Symmes Township, Ohio*, 503 F.3d 456, 463 (6th Cir. 2007), citing to *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007).

[6] "…the amended complaint does not seek to invalidate the entirety of the sign ordinance, only the unconstitutional 'content-based restrictions' currently affecting Leibundguth. Am. Compl., Count I. Those questioned portions are the three specific type-and-scale restrictions and the exemption for certain non-commercial speech, nothing more. The Court accordingly need not, and does not, interpret Count One in the impermissibly expansive way that the Village suggests applies."

In *Prime Media*, the plaintiff asserted injury from a billboard size regulation, and in nearly identical advocacy to Plaintiff here, also attempted to challenge the entirety of the non-commercial municipal sign regulations, including:

> … "snipe signs" (those attached to trees or poles), balloons, banners, or pennants…. traffic directional or warning signs, private street or road name signs, official signs or notices required to be displayed by a court or public agency, signs denoting a property as historic, decorative flags, holiday and seasonable signs, and temporary free standing real estate signs, residential subdivision signs, bed and breakfast lodge signs, and of course, the ever-troublesome sports scoreboard,…

Prime Media, Inc. v. City of Brentwood, 485 F.3d 343, 353 (6th Cir. 2007).

In rejecting Plaintiff's standing to bring the overbreadth claim, the *Prime Media* court stated:

> …a plaintiff is required to establish injury in fact as to **each provision challenged, even under the overbreadth doctrine.**
>
> ***
>
> **…conferring standing based on an independent provision of a statute or ordinance, merely because they are codified under the same heading—would be the epitome of advancing form over substance. The critical inquiry is whether the plaintiff can allege an injury arising from the specific rule being challenged, rather than an entirely separate rule that happens to appear in the same section of the municipal code.**

Prime Media, Inc. v. City of Brentwood, 485 F.3d 343, 350-351 (6th Cir. 2007).

Plaintiff attempts to side-step its clear lack of standing with reliance upon *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469 (1989). This reliance is misplaced. The *Fox* decision recognized "overbreadth" standing to facially challenge the non-commercial aspects of a speech regulation, despite the fact that the **same challenged regulation** was constitutionally valid as applied to that plaintiff's commercial speech. Stated another way, the key point of *Fox* was that the speech regulation impacting plaintiff's speech had both a commercial speech

application which was valid, and a non-commercial speech application which the underlying court refused to consider. The Supreme Court in *Fox* therefore held:

> We see no reason, however, why the [overbreadth] doctrine may not be invoked in the unusual situation, as here, where the plaintiff has *standing* to challenge *all* the applications of the statute he contends are unlawful, but his challenge to *some* of them (here, the commercial applications of the statute, assuming for the moment they are valid) will fail unless the doctrine of overbreadth is invoked.

Bd. of Trs. of State Univ. of New York v. Fox, 492 U.S. 469, 484 (1989)

Thus, *Fox* does not grant Plaintiff standing via the "overbreadth" doctrine to challenge the constitutionality of a host of non-commercial sign regulations which have nothing to do with any of Plaintiff's signs, and arise in an entirely different section of the sign ordinance. As recognized by this Court, Count I of the Complaint fails to seek any relief or state a claim for judicial review of anything beyond the three specific provisions challenged in Counts II – IV.

B. The Village Sign Ordinance Now Includes A Substitution Clause

Prior to the Supreme Court decision in *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218 (2015), the Seventh Circuit Court of Appeals applied the "purposive" approach to determining the "content neutrality" of non-commercial sign regulations. *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. 1999); *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012). This "purposive" test upheld differing non-commercial sign regulations driven by the differing types of non-commercial signs being regulated. *See Brown v. Town of Cary*, 706 F.3d 294, 303 (4th Cir. 2013). After *Reed*, the Seventh Circuit reversed its embrace of the "purposive" test, stating:

> Reed understands content discrimination differently. It wrote that regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. 135 S.Ct. at 2227.
>
> ***
>
> "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus

> toward the ideas contained' in the regulated speech." It is added: "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." Id. At 2230
>
> ***
>
> The majority opinion Reed effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.

Norton v. City of Springfield, Illinois, 2015 WL 4714073, *1-2 (Aug. 7, 2015).

On September 8, 2015, in express recognition of *Reed* and the Seventh Circuit's new embrace of the "absolutist" test of content neutrality, the Village adopted Ordinance #5478 which amended and added the following substitution clause into the sign ordinance:

> Sec. 9010.E No Discrimination Against Non-Commercial Signs Or Speech.
>
> The owner of any sign which is otherwise allowed under this Article 9 may substitute non-commercial copy in lieu of any other commercial or non-commercial copy. This substitution of copy may be made without any additional approval or permitting. The purpose of this provision is to prevent any inadvertent favoring of commercial speech over non-commercial speech, or favoring of any particular non-commercial message over any other non-commercial message. This provision prevails over any more specific provision to the contrary. This provision does not create a right to increase the total amount of signage on a parcel or allow the substitution of an off-site commercial message in place of an on-site commercial message.

A true and accurate copy of the Certification Affidavit of Village Clerk, April K. Holden, certifying, Ordinance #5478, the staff report, legal memorandum, minutes and related documents are attached hereto and incorporated herein as **Def. Ex. C**.

After *Reed* came down, legal scholars have recommended the addition of a substitution clause. John Baker, Randal Morrison, Mike Giaimo, & Dan Mandelker, *Signs: A Different Kind of Land Use* (especially after the *Reed* decision), Illinois Municipal Lawyers Association webinar (July 20, 2015). Critically also, multiple decisions have upheld municipal sign regulations as "content-neutral" (thus avoiding "strict scrutiny" under *Reed*) when such a

substitution clause exists within a sign ordinance. *Citizens for Free Speech, LLC v. County of Alameda*, 62 F.Supp.3d 1129, 1139 (N.D. Cal. 2014); *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 902 (9th Cir. 2007); *Get Outdoors II, LLC v. City of San Diego*, 381 F.Supp.2d 1250, 1268-69 (S.D. Cal. 2005); *Clear Channel Outdoor Inc., a Delaware Corp. v. City of Los Angeles*, 340 F.3d 810, 814 (9th Cir. 2003); *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 612 (9th Cir. 1993).

The Village ordinance adopting this substitution clause specifically provides:

> WHEREAS, the substitution clause adopted by this Ordinance under Section 9.010.E is expressly intended to allow the existing categories of non-commercial sign regulations to be maintained because they have been historically legislated with an intention of allowing the purpose and function of the non-commercial sign to impact the regulations. In light of the *Reed* decision, however, the substitution clause will also now permit the owner of a lawful sign to substitute non-commercial sign copy in lieu of any other commercial or non-commercial sign copy, because the federal courts have broadly and consistently held that such substitution clauses render municipal sign regulations to be content-neutral;

Thus, not only does Plaintiff lack standing to challenge the Village non-commercial sign regulations, but those non-commercial sign regulations claimed to be content-based have been rendered content-neutral by the newly adopted substitution clause. Thus, even if a proper plaintiff were before the Court, the substitution clause would render the specific regulations challenged to be content-neutral.

C. The Severance Clause Amendment To The Sign Ordinance Also Defeats Plaintiff

Even if one ignores Plaintiff's lack of standing, and also disregards the substitution clause rendering the non-commercial sign regulations to be content-neutral, Plaintiff's broad based challenge to the entire sign ordinance fails because the three commercial sign regulations which prohibit Plaintiff's signs are severable from the non-commercial sign provisions within the sign ordinance.

Severability of a local ordinance in federal litigation is a question of state law, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988). In Illinois, whether a portion of an act is severable is a question of legislative intent. *Russell Stewart Oil Co. v. State*, 124 Ill.2d 116, 128 (Ill. 1988); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill.2d 221, 237 (Ill. 1986). This inquiry is twofold: the legislature must have intended that the act be severable, and the act must be capable of being severed. *City of Chicago Heights v. Public Service Co. of Northern Ill.*, 408 Ill. 604, 610 (Ill. 1951).

While the existence of a severability clause within the legislation at issue is not conclusive, it may be viewed as a rebuttable presumption that the legislature intends severance. *Jacobson v. Dep't of Pub. Aid*, 171 Ill.2d 314, 329 (Ill. 1996). General severability statutes carry less weight in ascertaining legislative intent than specific severability clauses. (*See* 2 N. Singer, Sutherland on Statutory Construction § 44.11, at 517 (4th ed. 1986).

In the face of the foregoing law, Section 1.130 of the Village zoning ordinance contains the following **general** severance provision (Def. Ex. C):

> Sec. 1.130 Severability.
>
> If any portion of this zoning ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, that portion is to be deemed severed from the zoning ordinance and in no way affects or diminishes the validity of the remainder of the zoning ordinance.

Ordinance #5478 adopted on September 8, 2015 amended the sign ordinance and added a new **specific** severability provision applicable to the sign regulations:

> Sec. 9.130 Severability.
>
> If any portion of this Article 9 or any regulation contained herein is held to be invalid or unconstitutional by a court of competent jurisdiction, it is the Village's specific legislative intent that said portion or regulation is to be deemed severed from this Article 9 and should in no way affect or diminish the validity of the remainder of Article 9 or any other sign regulation set forth herein.

This specific severance clause was adopted with the following Village Council findings:

> WHEREAS, the severance clause adopted by this Ordinance under Section 9.130 is expressly intended to articulate the Village Council's specific legislative determination and intent that individual regulation within the sign ordinance stand separate and distinct from one another, such that should one portion or regulation within the sign ordinance be declared to violate the U.S. Constitution, the remainder of the sign ordinance and regulations should be severed and remain valid and in full force and effect.

Thus, notwithstanding the substitution clause adopted by the Village, if this Court were to somehow agree that the differing Village regulations for different types of non-commercial signs constitutes content-based classification after *Reed*, severance of the non-commercial content-based regulations is the relief that should apply under the law. The Village has both generally and specifically expressed its legislative intent to sever any non-commercial regulation deemed to be unconstitutional or invalid. The three specific commercial sign regulations applicable to Plaintiff would therefore survive as valid.

WHEREFORE, Defendant, VILLAGE OF DOWNERS GROVE, ILLINOIS, an Illinois municipal corporation, respectfully requests that summary judgment be granted in its favor and against Plaintiff on Counts I – IV, and for whatever further relief this Court deems just and equitable.

Respectfully Submitted,

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

BY: /s/ Scott M. Day

Scott M. Day
Rachel K. Robert
Day & Robert, P.C.
300 East 5th Avenue, Suite 365
Naperville, Illinois 60563
Telephone: (630) 637-9811
Facsimile: (630) 637-9814
smd@dayrobert.com
rkr@dayrobert.com

Scott M. Day (#03128840)
Rachel K. Robert (#06209863)
DAY & ROBERT, P.C.
300 East 5th Avenue, Suite 365
Naperville, Illinois 60563
(630) 637-9811

EXHIBITS TO DEFENDANT'S COMBINED REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Exhibit A	Excerpts from International Property Maintenance Code with local amendments
Exhibit B	Excerpts from treatises
Exhibit C	Certification Affidavit of Village Clerk, April K. Holden with documents

CERTIFICATE OF SERVICE

I, Scott M. Day, an attorney, certify that on September 21, 2015, I filed Defendant's Combined Reply in Support of Its Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment 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