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.	)	Case No. 14-cv-9851 Hon. Edmond E. Chang

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant Downers Grove ("the Village") has not met its burden of showing that the provisions of the sign ordinance that Plaintiff Leibundguth Storage & Van Service, Inc. ("Leibundguth") challenges – (1) the prohibition on signs painted directly on a wall of a building ("painted sign ban"); (2) the size limit for wall signs along the BNSF railway; (3) the total aggregate sign size limit; and (4) the limit on the number of wall signs (2, 3 and 4 collectively referred to as the "size and number restrictions") – advance a government interest in a narrowly tailored way. The Village's arguments in response to Leibundguth's alternative claim that the painted sign ban and certain size and number restrictions are content based also fail. Therefore, the Court should grant Leibundguth's Motion for Summary Judgment.

ARGUMENT

I. The painted sign ban does not serve traffic safety or aesthetics and is not narrowly tailored to serve those interests.

Under the "time, place and manner" test of *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984), which the parties agree applies to the painted sign ban, a regulation must be (1) justified without reference to the content of the regulated speech, (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information. For purposes of the *Clark* analysis, Leibundguth assumes the Village has satisfied the first and third prongs;[1] however, the Village has failed to satisfy its

[1] Although the Village claims that "Plaintiff admits that the Village prohibition of signs painted directly on a wall is content-neutral," (Dkt. 45, Def. Resp. 4), Leibundguth argues,

burden of showing that the prohibition is narrowly tailored to serve a significant government interest under the second prong. (Dkt. 41, Pl. Memo 7.)

A. The Village fails to provide sufficient evidence to support its purported justifications for the painted sign ban.

In a First Amendment challenge, the Village bears the burden of showing that there is evidence that supports its proffered justification. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 829 (7th Cir. 1999). The Village has failed to provide adequate evidence that the painted sign ban supports its traffic-safety or aesthetic interests.[2]

The Village argues that the Court should defer to its conclusion that its painted-sign ban advances traffic safety and aesthetics, but the cases it relies on are inapposite because they address restrictions on billboards, not on-premise signs. (*See, e.g.*, Pl. SOF 43). In *Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814 (6th Cir. 2005) – which the Village cites for the proposition that it is entitled to "reasonable deference," (Def. Resp. 6) – the parties had simply agreed that *billboards* "cause visual blight and interfere with traffic safety." *Id*. at 823; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) ("*billboards* are real and substantial hazards to traffic safety (emphasis added)). *Prime Media* limited such deference and required a more "demanding review for situations . . . where the 'broad sweep of the regulations' themselves show that the government did not

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in the alternative, that "the Village places a content-based restriction on painted wall signs." (Dkt. 41, Pl. Memo. 22; *see* Section III, below.)

[2] The Village insists that Leibundguth claims that its painted wall signs should be treated as, or are akin to "heritage signs," (Def. Resp. 3), but Leibundguth has never argued that its painted wall signs should be treated or are akin to heritage signs (Dkt. 10, Complaint, ¶¶ 57-58.)

reasonably weigh the costs and benefits of regulating speech." *Id*. at 824 (*quoting Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001)).

The Village also cites *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. 1999), for the proposition that the legislative process is determinative evidence to support the contention that painted signs are a threat to traffic safety and aesthetics. (Def. Resp. 7.) But *Lavey* was based on its conclusion that "'billboards are real and substantial hazards to traffic safety.'" *Id*. at 1114 (*quoting Metromedia*, 453 U.S. at 509). The *Lavey* court did not decide what constitutes sufficient proof for a city in defense of an ordinance; rather, it found that the city did not have to produce a voluminous record when common-sense restrictions were challenged. *Id*. at 1116. Here, the Village has not established that there is any consensus on the relationship between on-premise signs and traffic safety, and the challenged regulations are not "common sense"; on the contrary, as Leibundguth has shown, they are arbitrary and nonsensical.

Seventh Circuit case law makes clear that the Village must provide objective evidence to show that the painted sign ban supports its interests in traffic safety and aesthetics, not that the Village is entitled to deference. In *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2002), a case challenging the prohibition of the sale of books on the sidewalk outside the United Center, the Seventh Circuit recognized that the city had legitimate safety concerns about heavy traffic around the United Center but found that infringements on First Amendment rights demand more from the government that imposes them than mere facial assertions

and held that the city could not blindly invoke safety and congestion concerns without more. *Id* at 1038. The city could not prevail, despite its interest in traffic safety, where it provided no objective evidence that traffic flow on the sidewalk or street was disrupted when plaintiff was selling his book; it offered no empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed. *Id*. at 1039; *see also Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1556 (7th Cir. 1986) ("[A] conclusory assertion by an interested party, particularly when unsupported by any statistics or firsthand knowledge of any actual crimes, lends little if any support to [the city's] claim.").

To attempt to justify the challenged provisions of its sign ordinance, the Village relies entirely on the text of 33 hand-picked sign ordinances of surrounding communities, documentation of the process undertaken by the Village in adopting the current sign ordinance,[3] and staff reports submitted to the Village Council when it – after the close of discovery – amended two of the challenged provisions of the sign ordinance.[4] (Def. Resp. 6-8.) The Village has produced no studies or independent evidence that shows that its painted sign ban serves its interests in a

[3] The Village has simply produced some 900 pages without pointing to any specific document that shows that the painted sign ban or the size and number restrictions advance its interests in traffic safety and aesthetics in a narrowly tailored manner. (Pl. Memo 14-15.) If there are documents that actually provide anything relevant to the provisions that Leibundguth challenges in this lawsuit, certainly the Village would have pointed them out.

[4] The Village also submits as evidence the condition of Plaintiff's signs. This evidence is not relevant because, as the Village pointed out in its Motion to Dismiss (Dkt. 14, Def. Memo. Mot. Dismiss at 10), "the validity of the restriction" must be judged "by the relation it bears to the general problem" and not "by the extent to which it furthers the Government's interest in an individual case." *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. 1999). But even if Leibundguth's signs were relevant evidence, completely banning painted wall signs is not narrowly tailored to serve the Village's interests in aesthetics and traffic safety because the Village could – and in fact *already does* – simply require property owners to maintain their signs in a readable manner. (Dkt. 37, Def. SOF, Ex. 2.)

narrowly tailored way. But the Village asserts that "[t]he First Amendment does not require a city, before enacting *such an ordinance*, to conduct new studies or produce evidence independent of that generated by other cities . . . ." (Def. Resp. 6; *DiMa Corporation v. Town of Hallie*, 185 F.3d 823, 829 (7th Cir. 1999) (*quoting Renton v. Playtime Theatres*, 475 U.S. 41, 51 (1986)) (emphasis added).) Aside from the fact that the ordinances referred to in *DiMa* and *Renton* were adult theater zoning ordinances, not commercial speech regulations, the Village simply fails to produce or cite any studies or evidence generated by other cities that show that the painted sign ban serves its interests in traffic safety and aesthetics. *See Weinberg*, 310 F.3d at 1038-39. The mere existence of similar bans in other communities is insufficient evidence to meet the Village's burden. See *DiMa*, 185 F.3d at 829 ("conclusory assertions regarding [the city's] goals and its effect are insufficient by themselves to survive a First Amendment challenge because they are not 'evidence'"). *DiMa* upheld the adult-oriented business ordinance in that case only because the city had copied another city's ordinance and that city "had done considerable analysis of studies from other cities, which its ordinance specifically cited." *Id*. at 831. The Village has not done that: it has merely cited the text of other ordinances, not any evidence justifying them, which does not suffice. *See id.* at 131 ("We would expect a municipality defending a more substantial set of regulations to create a more substantial record in support of summary judgment.").

In sum, the Village's "evidence" – the text of 33 signs ordinances and documentation of the process of adopting the sign ordinance – is not objective nor

sufficient to support the Village's claim that the painted sign ban advances the Village's interests in traffic safety and aesthetics in narrowly tailored way. *See Weinberg*, 310 F.3d at 1039.

B. The painted sign ban does not advance the Village's interests in traffic safety or aesthetics.

The painted sign ban does not advance the Village's interest in traffic safety. The only evidence in the record on this point comes from Leibundguth's expert, who has testified that signs that are readable and conspicuous do not pose a threat to traffic safety and that signs painted directly on a wall are no less readable or conspicuous than other wall signs. (Pl. SOF 43.) The Village has presented no evidence to the contrary. (Pl. Reply SOF 44.) And even if the Village was entitled to deference on the question of whether the painted sign ban advances its interests – which it is not – Leibundguth's evidence shows that the painted sign ban does not advance such interests.

The Village allows some flags and murals painted on a building, but prohibits painted signs, even though there is no reason to believe that painted flags and murals have a different effect on traffic safety than other types of signs. (Pl. SOF 33; Def. Resp. Pl. SOF 33.) This "raises serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown v. Entm't Merchs. Ass'n*, 131 S.Ct. 2729, 2740 (2011). It also reveals that the sign ordinance does not actually advance the purported interests in traffic safety and aesthetics because signs painted directly on a wall are no less readable or conspicuous than other wall

signs and thus pose no greater threat to traffic safety, and the Village has presented no evidence to the contrary. (Pl. SOF 43; Def. Resp. SOF 43.)

The Village asserts that some flags and murals do not communicate commercial or noncommercial speech, and therefore those flags and murals do not meet the definition of "sign" under the Zoning Code. (Def. Resp. 1.) But flags and murals *do* communicate a message and thus convey constitutionally protected speech. (Pl. Memo 18 and citations therein.) The Village's own municipal code undermines its argument that decorative painted flags and murals are not signs. The term "sign" is defined broadly to include:

> Any object, device, display or structure, or part thereof, . . . that is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business, product, service, event, or location by any means including words, letters, figures, designs, symbols, fixtures, colors, or illumination whether affixed to a building or separate from any building.

(Dkt. 40, Pl. Mot., Ex. E, Sect. 15.220.) The term "noncommercial sign" is also defined broadly as: "A sign that does not promote commercial activity, such as ornamental entry gate signs." (Dkt. 40, Pl. Mot., Ex. E, Sect. 15.220.) Both of these definitions plainly encompass painted flags and murals; therefore painted flags and murals are noncommercial signs under the ordinance.

The purported aesthetics justifications for the painted sign ban given by the Village when adopting it – (1) painted wall signs require on-going maintenance; (2) paint on a wall of a building is subject to water damage; and (3) painted signs on a wall are usually permanent or hard to remove – are undermined by the facts that the Village allows brick walls to be painted solid colors and that the Village

suggested that Leibundguth remove its painted signs *by painting directly over them* with a solid color (and delayed enforcement by four months so that the weather would be warm enough to paint). (Pls. Memo 4.) The Village's purported anti-graffiti justification for the painted sign ban is undermined by the fact that the Village allows some painted murals. (Pl. Memo. 4-5.) These facts reveal that the painted sign ban does not actually advance the interests in traffic safety and aesthetics.

C. The painted sign ban is not narrowly tailored.

The Village asserts that Leibundguth's arguments that the painted sign ban are not narrowly tailored address whether painted signs present any real threat to traffic safety and aesthetics, not to whether the prohibition is broader than necessary. (Def. Resp. 4-5.) Leibundguth's arguments do show why painted signs present no real threat to traffic safety and aesthetics and therefore why the painted sign ban does not advance the Village's interests in traffic safety and aesthetics. (See Section B above.)

The Village argues that Leibundguth's narrow tailoring argument "amounts to an assertion that the painted sign prohibition is too narrowly drawn, not that it is not narrowly drawn enough." (Def. Resp. 5.) But underinclusiveness in a sign ordinance can "raise[] serious doubts about whether the government is in fact pursuing the interest it invokes." *Brown*, 131 S.Ct. at 2740. It can also reveal that the sign ordinance does not actually advance the purported interests in traffic safety and aesthetics. (See Section B above.)

The Village disregards Leibundguth's point that "even if the Village could show that *some* painted signs threaten traffic safety – which it has not shown – the restriction would still not be narrowly tailored because banning painted wall signs altogether bans readable and conspicuous painted signs, which are not a threat to traffic safety." (Pl. Memo. 8.) Additionally, the Village does not address Leibundguth's point that one of the aesthetic justifications given for the painted sign ban – that allowing painted signs would cripple law enforcement's efforts to eradicate graffiti – is not narrowly tailored because the Village could simply ban spray painted signs in particular. (Pl. Memo 9.)

In sum, the painted sign ban does not actually advance traffic safety and aesthetics, as the underinclusiveness of the ban demonstrates. The prohibition is also not narrowly tailored to serve the Village's interests in traffic safety and aesthetics. Therefore, the painted sign ban is unconstitutional.

II. The restrictions on the size and number of signs do not advance traffic safety or aesthetics and are not narrowly tailored to serve those interests.

A. Leibundguth has four wall signs and its challenge to the size and number restrictions is not moot.

The Village argues that Leibundguth only has three signs, not four and that therefore Leibundguth's challenge to the size and number restrictions are moot. (Def. Resp. 2.) This assertion simply defies common sense and finds no basis in the Village's sign ordinance. (*See* Pl. Reply SOF 6 for discussion.) But even if the Village were correct that these two signs are one, the Village would still be wrong to assert that this is "substantive." (Def. Resp. 2.) The Village asserts that if the Court

upholds the painted sign ban, then Leibundguth will have only one wall sign remaining on the front of the building which would be lawful and code-compliant as it would not exceed the size and number limitations for wall signs, therefore rendering Leibundguth's challenge to the size and number limitations moot.[5] (Def. Resp. 2.) The Village accuses Leibundguth of trying to "gain judicial review of a First Amendment injury which the Village expressly does not impose" and attempting to self-impose a 'case and controversy' that does not exist." (Def. Resp. 2-3.) But the Court has not ruled on the issue of whether the painted sign ban is constitutional, so Leibundguth's challenge to the size and number restrictions is not moot.

Additionally, this case began because the Village sent violation notices to Leibundguth – included as Exhibits to the Village's Motion to for Summary Judgment – stating that Leibundguth was in violation of the ordinance because the "total square footage [of signs] exceeds allowable amount" and threatening to impose daily fines. (Def SOF Ex 7, Dep. Popovich, Exs. 9, 10, 11 #3742-45.) The threat of daily fines for exceeding the aggregate size limit – which the Village now, for the first time, says were never imposed – certainly constitutes an injury to Leibundguth imposed by the Village and creates a "case and controversy." The Village's argument to the contrary is baseless.

Further, Leibundguth's challenge to the Village's size and number restrictions on wall signs would not be moot *even if the Court were to uphold the painted sign*

[5] The Village did not include any reference to the "substantive" issue of the number of signs in its Statement of Facts in support of its Motion to for Summary Judgment.

ban because Leibundguth has challenged the size and number restrictions on wall signs both as applied and *on their face*. Were Plaintiff required to paint over its painted wall signs, it likely would seek to replace those signs with regular wall signs, but it would be prohibited from doing so because of the size and number restrictions.

B. The size and number restrictions do not advance the Village's interests in traffic safety or aesthetics in a narrowly tailored manner.

The parties agree that the proper test in evaluating Leibundguth's First Amendment challenge to the size and number restrictions is the *Central Hudson* test, that considers whether: (1) the commercial speech concerns a lawful activity and is not false or misleading; (2) the asserted governmental interest is substantial; (3) the regulation directly advances the governmental interest asserted; and (4) the restriction is no more extensive than necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447* U.S. 557, 566 (1980).

The Village continues to assert that the first prong of the *Central Hudson* test is not met because Leibundguth's painted wall sign facing the railway is allegedly untruthful and therefore not protected by the First Amendment.[6] As Plaintiff has

[6] The Village notes that it did not raise this in its Motion to Dismiss because it did not become aware of this issue until Bob Peterson's deposition on March 19, 2015, six days after the motion to dismiss briefing was completed. But the Village could have easily made this determination from the face of the Complaint, which contains a picture of the painted sign on the back of the building which says "Wheaton World Wide Movers" and a picture of the sign on the front of the building which says "Wheaton World Wide Moving." A review of Mr. Peterson's deposition transcript reveals that the Village's counsel appears aware that Wheaton World Wide Movers does not exist and Mr. Peterson appears unaware of this fact until it is explained to him. For example, the Village's counsel asks: "And Wheaton World Wide Movers as a business entity does not exist?" (Dep. Peterson 45:4-5) and later Mr.

explained, this argument is meritless. (*See* Pl. Memo. 6-7; Pl. Resp. Def. SOF 25; Pl. SOF 14; Pl. Reply SOF 14 for discussion).

Leibundguth assumes, here, that the Village has met the second prong of the *Central Hudson* test – the asserted government interests are substantial – however, the Village fails the third and fourth prongs of that test because the restrictions do not advance the substantial government interests and are more extensive than necessary to serve those interests.

The Village relies on *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2232 (2015), for the proposition that "[a] municipality has a lawful right to make a legislative determination as to how many wall signs can be posted [and] how big the signs should be." (Def. Resp. 10.) *Reed* stated that municipalities have "ample content-neutral options available to resolve problems with safety and aesthetics" including "size, building materials, lighting, moving parts, and portability." *Id.* (*Reed* says nothing about the number of wall signs.) *Reed's* acknowledgment that these regulations are content-neutral does not address the question presented here: whether the Village's specific size and number restrictions advance its interests in traffic safety and aesthetics in a narrowly tailored way.[7]

The Village accuses Leibundguth of suggesting that traffic safety is unaffected by the size, height, location and number of signs and that such a suggestion "not only conflicts with the published treatises, it also defies common sense and

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Peterson states: "I actually never realized it." (Dep. Peterson 46:10; see generally, Dep. Peterson 44:20 – 47:10.)

[7] *Reed* certainly does *not* stand for the proposition that size and number restrictions on signs that are *based on the content of the sign* are constitutional. *See* Section III below.

embraces intellectual myopia." (Def. Resp. 11.) But that is not what Leibundguth argues at all. Leibundguth's expert, who has provided the only admissible[8] testimony on the subject, has testified that the relevant factors related to a sign's effect on traffic safety are a sign's readability and conspicuousness, a conclusion that the Village explicitly acknowledges. (Def Resp. 11.) The Village asserts that "[s]igns that are visible, properly placed, of sufficient size and unblocked by other signs unquestionably help motorists navigate to their destination," factors which go to readability and conspicuousness. (Def. Resp. 11.)

The problem is that the Village's size and number restrictions do not have anything to do with readability or conspicuousness and therefore do not advance the government interest in traffic safety. Wall signs, affixed to a wall of a building by definition, cannot block other signs. The fact that signs must be sufficiently *large* to be safe does not support the Village's assertion that sign size need to be *limited*. Indeed, the Village does not cite any of the treatises for the proposition that a *limitation* on the size of signs is necessary to advance traffic safety. And the limitation on the number of wall signs has nothing to do with a sign being "visible, properly placed, of sufficient size, and unblocked by other signs." (Def. Resp. 11.) As Leibundguth's expert has explained, academic studies – which the Village has not refuted – show that sign proliferation does not cause driver distraction. (Pl. SOF 44.) The Village provides no evidence, even in its inadmissible general reference to

[8] The treatises on which the Village attempts to rely are inadmissible because they are not supported by any expert report or testimony. (Pl. Memo. 10-11, citing Fed. R. Evid. 803(18).)

treatises, that support the argument that the size and number limitations on wall size advance its interest in traffic safety.

In addition, the size and number restrictions are more extensive than necessary to advance the interests of traffic safety and aesthetics. In the first place, if readable and conspicuous signs are necessary to advance traffic safety, then a limitation on size is not narrowly tailored because it would prohibit wall signs that are readable and conspicuous. Similarly, limiting the number of wall signs would prohibit a readable and conspicuous wall sign if another readable and conspicuous wall sign existed on the building. The restrictions on size and number of wall signs are more extensive than necessary to serve the Village's interest in aesthetics because the sign ordinance exempts some signs in determining a building's total sign area and because the sign ordinance places no limits on the number of other types of signs affixed to buildings.

The Village characterizes Leibundguth's narrow tailoring argument as "Plaintiff's shotgun attack" and a "whack-a-mole strategy" (Def. Resp. 12-13), but Leibundguth is merely pointing out ways in which the Village and the sign ordinance do not limit the size and number of wall signs, which undermine the traffic safety and aesthetic justifications for limiting the size and number of signs. The number of exceptions to the size and number restrictions show that the restrictions are more extensive than necessary.

The Village asserts that "a four story building presents a very different proportional aesthetic concern than does a one story building." (Def. Resp. 12.) But

the "proportional aesthetic" does not explain why four-story buildings are permitted to have wall signs on up to three sides of the building while buildings less than four stories are only allowed one. It also does not explain why wall signs on four-story buildings do not count against the total size restriction, since that would allow four-story buildings with wall signs more square feet to use for signs not affixed to the building, like monument signs, while smaller buildings with wall signs would have less square footage for such signs.

The Village asserts that panel signs in a multi-tenant shopping center, window signs, or menu boards are "distinctly different from commercial on-premise wall signs" (Def. Resp. 13), but it fails to explain why those distinctions justify not counting the size of those signs against the total size limitation.

With respect to the size limitation on wall signs along the BNSF railway that arbitrarily treats buildings with the same amount of wall space differently because it is calculated by reference to the linear frontage of the building rather than the wall surface, the Village does not explain how this calculus advances the Village's interests in traffic safety and aesthetics. (Def. Resp. 13.) The Village's reliance on *Prime Media* is irrelevant for the reasons explained above.

Finally, the Village asserts that the Planned Development Amendment it gave to Art Van Furniture allowing it 990 square feet of signs and seven wall signs, (Pl. SOF 39), is irrelevant because "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*." (Def. Resp. 13.) The fact that the Village can

simply grant some properties a significant exception to restrictions in the sign ordinance severely undermines its assertion that these restrictions are necessary to serve the interests of traffic safety and aesthetics. The record of the Planned Development Amendment for Art Van Furniture's seven wall signs and over 900 square feet of signage – 600 feet more than the maximum the sign ordinance allows – does not discuss the effect on traffic safety and aesthetics at all. (Pl. SOF 40; Dkt. 46, Def. Resp. SOF, Ex. 1.) The Village has not explained how Art Van Furniture's exception for size and number of wall signs is consistent with its interests in traffic safety and aesthetics.

III. In the alternative, certain provisions in the sign ordinance are content-based restrictions on speech under *Reed v. Gilbert*.

The Village incorrectly characterizes Leibundguth's overbreadth challenge as one to "be applied to the entire Village sign ordinance." (Def. Resp. 14.) But as the Court acknowledged in its Order denying the Village's motion to dismiss, Leibundguth is not challenging the entire sign ordinance, but rather challenging "specific type-and-scale restrictions and the exemption for certain non-commercial speech, nothing more." (Dkt. 29 at 14.) Leibundguth challenges only the content-based nature of the painted wall sign ban and size and number restrictions. (Dkt. 41, Pl. Memo. 18.) The Village does not contradict Leibundguth's assertion that these provisions of the sign ordinance are content-based, rather it asserts that Leibundguth does not have standing to challenge them and that recent amendments to the sign ordinance negate its claim. (Def. Resp. 14.)

A. Leibundguth has standing to challenge certain provisions in the sign ordinance as content-based.

"Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 348, 348 (6th Cir. 2007). The overbreadth doctrine gives Leibundguth standing to challenge the noncommercial aspect of a speech regulation, even if the regulation is valid as applied to commercial speech. *Bd. of Trs. v. Fox*, 492 U.S. 469, 481 (1989).

Here, the painted sign ban applies to both commercial and noncommercial speech but provides content-based exceptions for noncommercial murals and flags. (Pl. SOF 33.) Therefore, Plaintiff has standing to challenge the painted sign ban under the overbreadth doctrine. Similarly, the sign ordinance contains restrictions on the size and number of commercial and noncommercial signs. But the Village treats certain noncommercial signs better than others by providing different size, location, and number restrictions based on the content of the sign, which is unconstitutional. Because the sign ordinance applies size and number restrictions on both commercial and noncommercial signs, Leibundguth has standing to challenge the noncommercial aspect of the size and number restrictions, even if the size and number restrictions are valid as applied to Leibundguth's commercial speech. *Fox*, 492 U.S. at 481.

B. Defendant's new ordinance language does not apply to Leibundguth's challenge.

The Village Council's amendment of its sign ordinance[9] to include a substitution clause and a severability clause (Dkt. 45, Def. Resp., Ex. C) cannot save the Village from the fact that the painted sign ban and the size and number restrictions are unconstitutional content-based restrictions on speech.

1. The substitution clause does not apply to Leibundguth's challenge.

The substitution clause in the amended ordinance allows the owner of an existing permitted sign to change the copy of that sign to any noncommercial message without having to obtain a permit from the Village. But the purpose of a substitution clause is to ensure that a sign ordinance is not content-based by favoring *commercial* speech over noncommercial speech. *See Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 902 (9th Cir. 2007).

Here, the Village's painted sign ban does not favor commercial speech over noncommercial speech; it favors some noncommercial speech over other noncommercial and commercial speech. Even with the substitution clause, painted signs on a wall are still prohibited unless they happen to be decorative flags or murals. Similarly, the substitution clause does not materially affect Leibundguth's challenge that the ordinance imposes a content-based restriction because some *noncommercial* signs that do not require a permit have size, number, and location limitations while other *noncommercial* signs do not. Even with the substitution clause, while noncommercial signs are permitted in excess of size and number limits

[9] The Village Council amended the sign ordinance after Leibundguth filed its Motion for Summary Judgment.

if they replace an existing permitted sign, some new noncommercial signs will still have more lenient size and number restrictions than other noncommercial signs.

2. The severability clause does not prevent the Court from granting Leibundguth's motion for summary judgment.

Contrary to the Village's argument (Def. Resp. 18-20), the Village's addition of a severability clause to the ordinance cannot save its painted sign ban. The existence of a severability clause creates a rebuttable presumption, which is overcome if the legislature would not have passed the statute without the provision deemed invalid. *Jacobson v. Dep't of Pub. Aid*, 171 Ill. 2d 314, 329 (1996). The entire act will be struck down, even if a severability clause exists, if "the act that remains does not reflect the legislative purpose in enacting the legislation." *Best v. Taylor Mach. Work*s, 179 Ill. 2d 367, 462 (1997).

The entire painted sign ban must be struck down because striking it down only as it relates to noncommercial signs runs contrary to the original intent of the legislation – to protect aesthetics and traffic safety by prohibiting *all* painted signs. *See Village of Schaumburg v. Jeep Eagle Sales Corp.*, 285 Ill. App. 3d 481, 489 (1996). Similarly, all of the sign ordinance's restrictions on the size and number of signs should be struck down because striking only the size and number restrictions that relate to noncommercial signs runs contrary to the intent of the legislation – to protect traffic safety and aesthetics by limiting the size and number of signs. The goal of protecting aesthetics and traffic safety via size and number limitations is undermined if there are no such restrictions on noncommercial signs. *See id.* at 488-

89 (entire ordinance must be invalidated unless the ordinance would have been passed without the invalid portion).

Even if these provisions were severable, it would still be proper for the Court to enter summary judgment in favor of Leibundguth in the form of declaratory and injunctive relief finding that the noncommercial aspects of these restrictions are unconstitutional.

CONCLUSION

For the reason stated above and in Leibundguth's motion, the Court should grant summary judgment in favor of Leibundguth and against the Village.

Dated: October 5, 2015

Respectfully submitted,

LEIBUNDGUTH STORAGE & VAN SERVICE, INC.

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CERTIFICATE OF SERVICE

I, Jeffrey M. Schwab, an attorney, hereby certify that on October 5, 2015, I served Plaintiff's Reply in Support of its Motion for Summary Judgment on Defendant's counsel by filing it through the Court's electronic case filing system.

/s/ Jeffrey M. Schwab