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June 5, 2024

VIA E-MAIL & U.S. MAIL
Ms. Heather K. Peacon-Corn
City Clerk
City of Smyrna
2800 King Street
Smyrna, GA 30080
hcorn@smyrnaga.gov

Re: Appeal for Atlantic Billboards, LLC

Dear Ms. Peacon-Corn:

I write to you in your capacity as City Clerk for the City of Smyrna on behalf of my client Atlantic Billboards, LLC ("Atlantic"). Pursuant to Section 82-17(e) of the Smyrna Code of Ordinances, please accept this letter as Atlantic's written notice of appeal from the City's failure to timely process my client's eight sign applications. The grounds for appeal articulated herein are not exhaustive, and Atlantic reserves the right to present additional arguments prior to and at the appeal hearing before the Mayor and City Council.

On March 28, 2024, Atlantic submitted ten sign application packages to the City. Section 82-5(f) of the City Code provides:

> The community development department ***shall*** process all sign permit applications within 45 business days of the actual receipt of a completed application and sign permit fee. The community development department or its designee ***shall*** give notice to the applicant of its decision ***by hand delivery or by mailing a notice to the address on the sign permit application*** on or before the 45th business day after receipt of the completed application.

(emphasis added). Forty-five business days from March 28, 2024 was June 3, 2024. However, by June 3, 2024 the community development department failed to provide notice to Atlantic of

its decision regarding its applications either by hand delivery or by mailing a notice to the address on the sign permit application as required by Section 82-5(f).[1]

Georgia courts never have any reluctance in deciding that the word "shall" means that a government must 100% do exactly as the ordinance requires. For example, in Hall County Board of Tax Assessors v. Westrec Props., Inc., 303 Ga. 69, 75 (2018), the Georgia Supreme Court held that: "the word 'shall' is generally construed as a word of command. The import of the language is mandatory." See also Beach v. B.F. Saul Prop. Co., 303 Ga. App. 689, 695 (2010) ("'Shall' is generally construed as a mandatory directive"). "Shall" means "shall" and, in this instance, that means that City was required to give Atlantic notice of its decision either by hand delivery or by mail to the address on the sign permit applications. It did neither.

Time limits are required for sign permitting. If a sign ordinance does not include a strict time limit, then the entire sign ordinance is unconstitutional and invalid in its entirety. E.g., Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1271 (11th Cir. 2005). When Georgia cities or counties have blown time limits in processing sign applications, Georgia courts have ordered them to issue the permits. E.g., Railroad Outdoor, LLC v. DeKalb County, Case No. 17CV3976-8 (DeKalb Super. Ct. Aug. 24, 2017) (Exhibit A hereto); The Lamar Co. v. City of College Park, Case No. 2013CV225613 (Fulton Super. Ct. Jan. 28, 2015) (Exhibit B hereto); Tinsley Media, Inc. v. City of Woodstock, Case No. 06-CV-2785 (Cherokee Super. Ct. Mar. 20, 2009) (Exhibit C hereto); ; SMD, LLP v. City of Roswell, Slip Op., p. 6, Civ. No. E-65358 (Fulton Super. Ct. Nov. 18, 1999) (Exhibit D hereto). Because the City failed to timely respond to Atlantic's applications in accordance with Section 82-5(f), the City must now issue the requested permits.

In addition to the fact that the City failed to timely act on Atlantic's applications, any attempt by the City to deny Atlantic's applications would be ineffective for at least three additional reasons. First, as to some of the applications, the City has disavowed its ability to control signs or other land uses because my client's proposed signs will be located on unzoned property owned by the Norfolk Southern and CSX Railroads. As confirmed by the City's Zoning Map, the railroad property within the City of Smyrna has not been zoned. Therefore, Georgia law requires that my client be allowed to install the requested signs. The general rule is that the owner of property has the right to use their property in any lawful manner. E.g., Cherokee County v. Martin, 253 Ga. App. 395, 396 (2002); Picadilly Place Condo. Ass'n v. Frantz, 210 Ga. App. 676, 678 (1993). Because zoning regulations restrict this right, they must be strictly construed in favor of the property owner, and more specifically, the owner's free use of their property. DeKalb County v. Post Apartment Homes, L.P., 234 Ga. App. 409, 410(1) (1998); Martin, 253 Ga. App. at 396; Glynn County v. Palmatary, 247 Ga. 570, 574 (1981); also Fayette County v. Seagraves, 245 Ga. 196, 197-98, 264 S.E.2d 13 (1980). Consequently, land use limitations must (i) be clearly established, (ii) be enforced only as to their plain and explicit terms, and (iii) any ambiguities therein must be resolved in the owner's favor. E.g., Northside

[1] Note, the City did inform Atlantic via email that two of the ten applications were for sites located just outside of the City limits. Atlantic agreed to withdraw those applications.

Corp. v. City of Atlanta, 278 Ga. 416 (2005); JWIC, Inc. v. City of Sylvester, 278 Ga. 416, 417 (2004); Martin, 253 Ga. App. at 396; Picadilly, 210 Ga. App. at 678; Bo Fancy Productions v. Rabun County Bd. of Comm's, 267 Ga. 341, 343 (1996); Beugnot v. Coweta County, 231 Ga. App. 715, 722 (1998).

Here, the railroad properties are unzoned and thus not restricted by any applicable zoning regulations. Although the railroad property has been inside the City limits for decades, the City has chosen not to zone the property. As such, Norfolk Southern and CSX have never had any opportunity to appear before the City Council to show the City what zoning and land use restrictions would be appropriate for the railroad property. Thus, any restrictions that might be enforced by the City would be invalid and void. E.g., Davidson Mineral Props., Inc. v. Monroe County, 257 Ga. 215, 217 (1987) (holding county could not restrict use of property). Because the City's official zoning map unambiguously shows that the railroad property has not been zoned, the requested signs must be allowed.

Atlantic will also show that Chapter 82 "Signs" of the City's Code of Ordinances, and other mandatory elements of the City's land use regulations were adopted in an improper manner. Georgia's Zoning Procedures Law is mandatory and strict compliance is required. Under Georgia law, an application must be granted if the ordinance is invalid for any reason. E.g., Tilley Props., Inc. v. Bartow County, 261 Ga. 153, 165 (1991) (holding that "[w]here, as in this case, the zoning ordinance is invalid, there is no valid restriction on the property, and the appellant has the right under the law to use the property as it so desires"); Davidson Mineral, 257 Ga. at 216-17 (invalidating basis of denial and then mandating that applicant was authorized to proceed with proposed use). As such, Atlantic is entitled to the requested permits.

Atlantic will also show that Chapter 82 "Signs" of the City's Code of Ordinances runs afoul of the Georgia Supreme Court's requirement that cities and counties employ the "least restrictive means" when regulating speech activity. E.g., Coffey v. Fayette County, 279 Ga. 111, 111 (2005) ("Coffey I"); Statesboro Publ'g Co. v. City of Sylvania, 271 Ga. 92, 95-96 (1999). Under this standard, cities and counties must carry a heavy burden in order to justify their sign restrictions. Coffey v. Fayette County, 280 Ga. 656, 657-58 (2006). In order to meet this high threshold, the Georgia Supreme Court requires that evidence be presented to support the regulations. Id. This is because Georgia law is the most protective in the nation toward the use of signs for free speech activity. Coffey I, 279 Ga. at 111 ("This Court has interpreted the Georgia Constitution to provide even broader protection than the First Amendment"). Smyrna cannot meet this strict standard as to its sign code.

Chapter 82 "Signs" of the City Code is also unconstitutional under Georgia law. As but one example of the City's improper restrictions on speech activity, it cannot be denied that Atlantic's proposed signs would all be allowed if the City wanted to display the types of signs proposed by Atlantic, it could do so, as government signs are completely exempt from the requirements of the sign code. See City Code, § 82-3(1) ("Signs erected on behalf of a governmental authority in the exercise of its proper jurisdiction . . . are exempt from the regulations of this article"). This blanket allowance for certain favored messages, while

simultaneously denying the same rights to anyone choosing to post different content on a sign, could never be justified under any constitutional test.

Smyrna's sign code also impermissibly prohibits all signs not expressly allowed. Section 82-16 of the code provides: "any sign not specifically allowed in a zoning district as provided under this section . . . shall be prohibited in that district." This type of regulation is the "antithesis" of the First Amendment and is unconstitutional. E.g., Fulton County v. Galberaith, 282 Ga. 314, 318-19 (2007) (holding that "[b]anning all signs . . . and then deciding on a case-by-case basis which ones will be permitted is the antithesis of the narrow tailoring that is required under the First Amendment" and striking down the Fulton County sign ordinance as a result of this deficiency). The Supreme Court, in another unanimous decision, clarified that this deficiency was enough to invalidate the entire Fulton County sign ordinance. Fulton County v. Action Outdoor Adver. Co., JV, 289 Ga. 347, 348-49 (2011). Based on the clear and unanimous rulings of the Supreme Court in the Fulton County case, Smyrna's sign code cannot survive court review.

If you have any questions regarding this appeal or need any additional information regarding the same, please do not hesitate to contact me. I look forward to the hearing in front of the Mayor and City Council.

Respectfully yours,

E. Adam Webb

E. Adam Webb

EAW/ss

Attachments/Enclosures

cc: Mr. Mike Fitzgerald (via email only)

Exhibit “A”

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

RAILROAD OUTDOOR, LLC,

Petitioner,

v.

DEKALB COUNTY, GEORGIA; AND ANDREW BAKER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF PLANNING AND SUSTAINABILITY OF DEKALB COUNTY, GEORGIA,

Respondents.

Civil Action File No. 17CV3976-8

MANDAMUS ABSOLUTE

This matter comes before the Court on Petitioner's *Application for Mandamus*. Having reviewed the pleadings of record and the evidence presented at the Mandamus Nisi hearing, this Court finds as follows:

Petitioner filed the above-styled action pursuant to O.C.G.A. § 9-6-21, seeking a writ of mandamus, based on Respondents' failure to perform ministerial duties regarding the approval of certain sign permits. Petitioner claims that pursuant to the DeKalb County Code of Ordinances (the "Code"), a sign permit application shall be processed within forty-five (45) days of receipt and that the director shall give notice of the decision via hand delivery or certified mail to the address on the permit, return receipt requested. Petitioner also maintains that the Code requires that if the director fails to act within the forty-five (45) day period, the permit shall be deemed granted.

The evidence before the Court demonstrates that Petitioner submitted two (2) sign permits, which are at issue in this action. On November 23, 2015, Petitioner submitted a sign

permit for certain real property located at and commonly referred to as 1435 Montreal Road, Decatur, DeKalb County, Georgia 30033 (the "Montreal Application"). On September 2, 2016, Petitioner submitted a sign permit for certain real property located at and commonly referred to as 3384 E. Ponce de Leon Avenue, Scottdale, DeKalb County, Georgia 30079 (the "Ponce Application").

In response to the Montreal Application and Ponce Application, Betsy Stark, Senior Planner emailed Petitioner on September 9, 2016 advising that the requested permits were denied (the "Emails"). In response to the Emails, Petitioner objected that such communications satisfied the Code's notice requirements and as a result, the Montreal Application and Ponce Application were deemed to be granted. Ms. Stark and Respondents have refused to issue the requested permits. Consequently, Petitioner initiated this action, requesting an order of Mandamus from this Court to compel Respondents to issue the sign permits.

As is relevant to this action, Section 21-5 of the Code provides that:

> The director **shall process all sign permit applications within forty-five (45) business days** of the director's actual receipt of a completed application and a sign permit fee. The director **shall give notice to the applicant of his/her decision by hand delivery or by mailing a notice, by certified mail, return receipt requested**, to the address on the permit application on or before the forty-fifth business day after the director's receipt of the completed application. If mailed, notice shall be deemed to have been given upon the date of mailing in conformity with this section. **If the director fails to act within the forty-five-day period, the permit shall be deemed to have been granted.**

Georgia law is clear that "the writ of mandamus is an extraordinary remedy that is available only when the petitioner has a clear legal right to the relief sought and there is no other adequate legal remedy." Byrd v. city of Atlanta, 266 Ga. 800, 800 (1996). Here, the plain language of the Code prescribes two (2) methods of delivery when a sign permit has been denied; the two (2) proscribed methods of delivery are qualified by the word shall. As such,

Respondents were required to notify Petitioner of the decisions via hand delivery, or certified mail at the address shown on the applications. It is undisputed at the Emails failed to satisfy the requirements of the Code. Furthermore, the Code also prescribes the remedy when the director fails to provide proper notice as required; the Code specifically states that where the director fails to act within the forty-five (45) day period, the permit shall be deemed granted.

THIS COURT HEREBY FINDS that pursuant to the plain language of the Code, Respondents failed to properly notify Petitioner of its decision on the Montreal Application and the Ponce Application, and as result, the requested sign permits stand granted. The plain language of the Code provides Petitioner with a clear legal right to the relief requested.

Moreover, while the Code provides guidance on how an aggrieved party may seek relief where a sign permit is properly denied, there is no remedy in the Code to cover situations where the permits were never formally denied, and thus deemed granted pursuant to the expiration of the forty-five (45) days, but Respondents refuse to issue the permits. As such, THIS COURT HEREBY FINDS that should the requested relief by way of mandamus be denied, Petitioner would have no other adequate legal remedy to address its claims of relief.

Having found that Petitioner has a clear claim for relief and that there is no other adequate legal remedy available, THIS COURT ENTERS THIS MANDAMUS ABSOLUTE AND IT IS HEREBY ORDERED THAT Respondents issue the requested sign permits sought in the Montreal Application and the Ponce Application, along with all required, customary, and ancillary approvals and documentation within thirty (30) days of this ORDER. This Court shall retain jurisdiction over this action to enforce Respondents' obligations as set forth in this ORDER and upon Respondents performance of the same, this ORDER shall constitute the FINAL ORDER AND JUDGMENT in this action.

SO ORDERED this the 23rd day of Aug, 2017.

JUDGE LINDA WARREN HUNTER
SUPERIOR COURT OF DEKALB COUNTY

Prepared by:

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Counsel for Railroad Outdoor, LLC

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

RAILROAD OUTDOOR, LLC, Plaintiff, v. DEKALB COUNTY, GEORGIA and ANDREW BAKER in his official capacity as Director of Planning & Sustainability, Defendants.	)	CIVIL ACTION FILE NO.: 17CV3976-8

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served all parties in the foregoing matter with a copy of this:

MANDAMUS ABSOLUTE

by depositing same in the United States Mail in an envelope with adequate postage thereon and addressed as follows:

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Decatur, Georgia 30030
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This 23 day August, 2017.

Ms. Jay Lumpkin
Calendar Clerk to the
Honorable Judge Linda Warren Hunter

Exhibit “B”

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

THE LAMAR COMPANY, LLC,	*	
	*	
Plaintiff,	*	
	*	CIVIL ACTION
v.	*	File No. 2013cv225619
	*	
CITY OF COLLEGE PARK, GEORGIA,	*	
	*	
Defendant.	*	

ORDER

Before the Court is a motion for partial summary judgment filed by Plaintiff The Lamar Company, LLC and a cross-motion for summary judgment filed by Defendant City of College Park. After hearing oral argument on January 23, 2015, and considering all matters of record, the Court hereby GRANTS Plaintiff's motion and DENIES Defendant's motion.

Facts

The material facts are undisputed. In 2006, the General Assembly enacted legislation allowing electronic or LED (light emitting diode) multiple message faces on billboards. See O.C.G.A. § 32-6-70 *et seq.* In 2008, Defendant adopted its own regulations allowing LED billboards. See Sign Ordinance, § 5(9)(e), (f).

Lamar owns an existing billboard in the City at 4979 Old National Highway ("the Old National Sign") which fronts Interstate 85/285. On June 10, 2010, Lamar applied to the City for permission to convert the Old National Sign from a traditional static billboard to an LED multiple message billboard. The application was complete and the proposed conversion was compliant with the code. Sign Ordinance, §§ 5(9)(e), (f). The Sign Ordinance provided that:

> All sign permit applications shall be issued or denied within thirty (30) days of the submission date. Incomplete applications shall be rejected and a new application shall be submitted with all of the required information and assigned a new submission date. Should a decision on the application not be made prior to the

> expiration of a thirty-day period, the applicant shall be permitted to erect and maintain the sign under this statutory provision unless and until such time as the chief building inspector notifies the applicant of a denial of the application and states the reason(s) for the denial. No person erecting a sign under this provision shall acquire any vested rights to continued maintenance of such signs, and should the chief building inspector subsequently deny the application, the sign must be brought into compliance with this article.

Id. at § (3)(g)(3).

The City did not grant or deny Lamar's application within 30 days of June 10, 2010. The record shows that Lamar made multiple inquiries in 2010 as to the status of its application, but the City did not approve or deny the application. A meeting between the parties occurred in February 2011, after which the City Attorney indicated by email that City staff would process the application and respond "within the next week or so." This did not occur.

On January 8, 2013, after further prompts by Lamar were disregarded by the City, Lamar instituted this action. Among other things, Plaintiff alleged that the City's conduct violated Lamar's First Amendment rights and caused it to incur damages, which Lamar sought to recover pursuant to 42 U.S.C. § 1983. On March 19, 2014, some 45 months after the application was submitted, the City finally issued a permit to Lamar to convert the Old National Sign to LED technology. By that time, however, Lamar was precluded by State law from converting the sign, because a competitor's LED billboard had been approved by the Department of Transportation and was within 5,000 feet of the Old National Sign.

Had the City issued the Lamar permit at any time prior to April 2011, when Lamar held a State permit allowing the conversion, Lamar's conversion would have occurred and the Old National Sign would be operating as an LED.

Standard

In order to prevail on a motion for summary judgment, the moving party must make a showing that "there is no genuine issue of material fact, and that the undisputed facts, viewed in

the light most favorable to the nonmoving party, warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga. 491 (1991); also O.C.G.A. § 9-11-56(c). Summary judgment is the appropriate method for evaluating constitutional and other purely legal issues. Williams v. Trust Co. of Ga., 140 Ga. App. 49, 57 (1976).

Analysis

The First Amendment of the United States Constitution protects freedom of expression through speech. U.S. Const. amend. I; also, e.g., Statesboro Publ'g Co., Inc. v. City of Sylvania, 271 Ga. 92, 93 (1999). It has long been recognized that signs and billboards are an important medium of speech and thus are accorded First Amendment protection. E.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 524 (1981) ("billboards are a medium of communication warranting First Amendment protection"); Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, 266 Ga. 393, 396 (1996).

Lamar argues that the subject Sign Ordinance is inconsistent with the First Amendment because it lacks proper procedural safeguards on the application process.[1] The City counters by claiming that Section 3(g)(3) of its Ordinance imposes a 30-day time limit on the application process and that is all the First Amendment requires.

Both parties cite Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358 (11th Cir. 1999), as the controlling authority on this issue. There, the municipal licensing provision allowed an adult entertainment business to conditionally open if its application had not been

[1] The parties agree the relevant version of the Sign Ordinance is the version which was effective on June 10, 2010 – the date Lamar's application was submitted. Fulton County v. Action Outdoor Adver., JV, 289 Ga. 347, 348-49 (2011) ("The submission of a then-proper application for a permit gives an applicant a vested right to consideration of the application under the law in existence at the time the application is filed").

approved or denied within 45 days, subject to the revocation of such right if the application was eventually denied. Id. at 1363. The court held as follows:

> Does it matter that an applicant may begin operating while the [zoning] board is still considering its application? We think not. The ordinance only permits applicants to operate conditionally. Once the board denies an application for an exception, the applicant must close its doors. ***A conditional exception is no exception at all. A business can scarcely afford to operate in limbo, not knowing whether the City will shut it down the next day or not.***

Id. (emphasis added); also Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301, 1314 (11th Cir. 2003) (also holding that an ordinance which allowed an adult business to operate conditionally, subject to eventual revocation by the licensing authority, to be unconstitutional).

Pursuant to Lady J., because Section 3(g)(3) does not give the applicant an absolute right to operate if the time limit is not met, it is illusory and constitutionally insufficient. Indeed, Lamar, like the adult business in Lady J., "can scarcely afford to operate in limbo, not knowing whether the City will shut it down the next day or not." Id. at 1363. On the other hand, had the Sign Ordinance allowed Lamar to unconditionally operate when the City failed to respond to the application, Lamar could have converted its sign as early as July 2010. The Sign Ordinance's lack of such a safeguard is unconstitutional and a direct cause of the permitting delay.

Alternatively, even if it is presumed that the Sign Ordinance itself is constitutional, the City's conduct in "sitting on" the application for nearly four years has violated Lamar's First Amendment rights. E.g., Six Star Holdings, LLC v. City of Milwaukee, 932 F. Supp. 2d 941, 953-55 (E.D. Wisc. 2013) (granting partial summary judgment because city failed to offer any legitimate explanation for its failure to render a prompt decision); D'Ambra v. City of Providence, 21 F. Supp. 2d 106, 111-14 (D.R.I. 1998) (granting summary judgment on Section 1983 claim for failure to timely permit speech activity); H.D.V.-Greektown, LLC v. City of Detroit, 2008 WL 441487, *8-9 (E.D. Mich. Feb. 14, 2008) (holding city had not "provided the

Court with any rationale, explanation or justification for its inaction" and such multi-year permitting delay "has violated [applicant's] fundamental right to engage in free speech"), rev'd on other grounds, 568 F.3d 609 (6th Cir. 2009); Bench Billboard Co., Inc. v. Louisville-Jefferson County Metro Gov't, 2007 WL 2412899, *3 (W.D. Ky. 2007); Emerald Outdoor Adver., Inc. v. City of Portland, 1999 WL 1441942, *1-4 (D. Or. Nov. 1, 1999).

The justifications offered by the City for the lengthy permitting delay are not persuasive. First, there is no evidence in the record which supports the City's claim that the permitting delay is attributable to the rogue actions of City official Oscar Hudson, rather than the Sign Ordinance or other official City policies. Indeed, the uncontroverted evidence shows that many different City officials were aware of Lamar's application and that a decision on the application was "in the City Council's hands." Mr. Hudson, a current City employee, offers no contrary testimony.

Second, the July 2010 Moratorium on the acceptance of digital billboard applications is, as a matter of Georgia vested rights law, inapplicable to Lamar's previously submitted application E.g., Action Outdoor, 289 Ga. at 348-49; Recycle & Recover v. Georgia Bd. of Natural Resources, 266 Ga. 253, 254-55 (1996).

In sum, there is no lawful justification for the lengthy permitting delay and such delay has violated Lamar's First Amendment rights. Pursuant to 42 U.S.C. § 1983, Plaintiff is entitled to nominal damages as a matter of law and to prove up its actual and/or general damages at trial. E.g., Farrar v. Hobby, 506 U.S. 103, 112 (1992); SMD, LLP v. City of Roswell, 252 Ga. App. 438, 440 (2001).

WHEREFORE, IT IS HEREBY ORDERED that:

1. Defendant's Motion for Summary Judgment is DENIED;

2. Plaintiff's Motion for Partial Summary Judgment is GRANTED;

3. The issue of damages will be tried by jury on a date to be established by the Court.

SO ORDERED this 28 day of Jenvery, 2015.

Jerry W. Baxter

HONORABLE JERRY W. BAXTER
FULTON COUNTY SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

Exhibit “C”

IN THE SUPERIOR COURT OF CHEROKEE COUNTY
STATE OF GEORGIA

TINSLEY MEDIA, INC. and SOUTHERN MEDIA, INC., Plaintiffs/Petitioners, v. CITY OF WOODSTOCK, GEORGIA, Defendant/Respondent.	CIVIL ACTION FILE NO. 06-CV-2785

ORDER

This matter is before the Court on cross-motions for summary judgment filed by Plaintiffs Tinsley Media, Inc. ("Tinsley") and Southern Media, Inc. ("Southern") and Defendant City of Woodstock, Georgia ("City"). Having considered the parties' briefing and the arguments of counsel at the March 3, 2009 hearing, this Court hereby rules as follows:

Background

In May 2006, Tinsley submitted seven complete sign permit applications to the City and Southern submitted one complete application. Section 6.6.1(4) of the relevant City Sign Ordinance notes that:

> [w]ithin forty-five (45) days of the submission of a complete Application for a sign permit, the Building Official shall either:
>
> (a) . . . .
>
> (b) Reject the Sign Permit, if the sign(s) that is the subject of the Application fails in any way to conform to the requirements of this Ordinance. In case of a rejection, the Building Official shall specify in the rejection the Section(s) of the Ordinance or Applicable plan with which the sign(s) is inconsistent. If the Building Official fails to take action on or before the expiration of the forty-five (45) day period, the Sign Application is deemed accepted and the Sign Permit issued. [Ord. 010828]

It is undisputed that the City did not (i) send written notification of the denials to Plaintiffs within the 45-day time period or (ii) provide written citations to ~~cite~~ the sections of the Sign Ordinance that purportedly caused the applications to be denied.

Standard for Summary Judgment

In order to prevail on a motion for summary judgment, the moving party must make a showing that "there is no genuine issue of material fact, and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga. 491 (1991); also O.C.G.A. § 9-11-56(c).

Analysis

A. Interpretation of Section 6.6.1(4)(b).

This case turns on the interpretation and impact of Section 6.6.1(4)(b) of the Sign Ordinance. Plaintiffs argue that because the City failed to provide a proper notice of denial within the 45-day review period, the City must issue the requested sign permits. The City argues that disputed telephone calls to Plaintiffs' principals satisfied Section 6.6.1(4)(b)'s notice requirements and thus no permits are warranted.

Georgia courts adhere to the rule of law that property owners have an inalienable right to use their land in any lawful manner. E.g., Keenan v. Acker, 226 Ga. 896, 898 (1970); also Cherokee County v. Martin, 253 Ga. App. 395, 396 (2002). Because zoning ordinances restrict such property rights, they are in derogation of the common law and must be strictly construed in favor of the property owner and against the government seeking to enforce them. E.g., DeKalb County v. Post Apartment Homes, L.P., 234 Ga. App. 409, 410(1) (1998); Martin, 253 Ga. App. at 396; also City of Walnut Grove v. Questco, Ltd., 275 Ga. 266, 267 (2002) (holding that sign ordinances are construed as zoning regulations).

The plain language of Section 6.6.1(4)(b) requires (i) the City to communicate any rejection of a sign application within 45 days of the City's receipt of the application and (ii) to specify in the rejection "the Section(s) of the Ordinance or Applicable plan with which the sign(s) is inconsistent." Furthermore, although Section 6.6.1(4) is silent as to whether the City's denial must be in writing, a construction of the Ordinance as a whole establishes that this is indeed the case. E.g., Brown v. Liberty County, 271 Ga. 634, 635 (1999) (in interpreting a statute, courts must strive "to make all its parts harmonize and to give a sensible and intelligent effect to each part"). S&C, Inc. v City of Forest Park, 255 Ga. 339 (1986).

For example, an aggrieved sign applicant's short window to file an administrative appeal is tied to the date his or her application as denied. See Sign Ordinance, § 6.8.1. Without a formal written denial, there would always be a question of fact as to when the denial was issued. For this reason, courts have held that the date a denial is reduced to writing is the pivotal date for notification purposes. E.g., Chadwick v. Gwinnett County, 257 Ga. 59, 59-60 (1987); Taco Mac v. City of Atlanta Bd. of Zoning Adjustment, 255 Ga. 538, 538-39 (1987).

Because the City failed to timely issue a written denial of the applications, Section 6.6.1(4)(b) mandates that permits for the proposed signs be issued.

WHEREFORE, IT IS HEREBY ORDERED that:

1. Defendant's Motion for Summary Judgment is DENIED;
2. Plaintiffs' Motion for Partial Summary Judgment is GRANTED;
3. Plaintiffs are entitled to City permits for the eight signs proposed in their May 2006 applications;

4. Defendant shall issue City permits to Plaintiffs to post and operate the foregoing eight signs, as well as complete the City's portion of any necessary state permit forms for the signs; and

5. If the parties are unable to resolve Plaintiffs' remaining claims (i.e., Counts II, III, IV, VI, and IX of the Complaint) within the next 60 days, they are to file a joint status report to include the following: an update regarding efforts to resolve the matter, the desirability of mediation, and the parties' position on all remaining scheduling and deadlines, to include a date by which the case will be ready for trial.

IT IS SO ORDERED, this 20 day of March, 2009.

N. JACKSON HARRIS, Judge
Cherokee County Superior Court

Blue Ridge Judicial Circuit

N. JACKSON HARRIS
JUDGE

SUPERIOR COURT OF
CHEROKEE COUNTY

March 20, 2009

E. Adam Webb, Esq.
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Re: *Tinsley Media, Inc., et al. v. City of Woodstock, Georgia*
Cherokee County Superior Court, Civil Action File No. 06CV2785JH

Dear Counsel:

Enclosed please find a copy of an Order on the cross-motions for summary judgment in the above-styled case. The order has been filed with the Clerk of Court on today's date and you should receive a stamped filed copy from the Clerk.

Sincerely,

Rena Morris

Rena Morris CPS/CAP

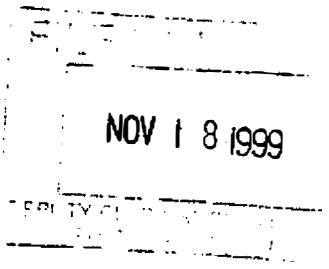
RM:wp

Cc: Clerk of Court

Exhibit “D”

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA



SMD, L.L.P. and LIABILITY LIMITED, INC.,	:	
Plaintiffs,	:	CIV. ACTION FILE NO. E-65358
v.	:	
CITY OF ROSWELL, GEORGIA M.L. MABRY as an individual and in his capacity as MAYOR OF THE CITY OF ROSWELL, EDWIN TATE, TERRY JOYNER, STEVE DORVEE, CATHERINE HIBBARD, JERRY ORLANS and SALLY WHITE as individuals and in their capacities as MEMBERS OF THE CITY COUNCIL, KRISTEN RILEY in her capacity as a MEMBER OF THE CITY COUNCIL OF THE CITY OF ROSWELL and ALAN GOINGS in his capacity as BUILDING INSPECTOR FOR CITY OF ROSWELL,	:	
Defendants.	:	

ORDER

The above-styled case is before the Court on Plaintiffs' motion for summary judgment and Defendants' cross motion for summary judgment. After hearing oral argument and reviewing all matters of record, the Court hereby GRANTS, in part, Plaintiff's motion for summary judgment and GRANTS Defendants' cross motion as it pertains to qualified immunity.

Plaintiff SMD, L.L.P., and Plaintiff Limited Liability lease land and build billboards to display commercial and noncommercial speech. In the spring and summer of

1997, Plaintiffs contracted with a number of people within the city of Roswell to erect billboards on certain properties. Billboard usage in the City of Roswell is controlled by the city's sign ordinance.

As required by the ordinance, Plaintiffs submitted applications to the office of the administrative inspector. The applications were summarily denied and Plaintiffs appealed the denial to the City Design Review Board and the City Historic Preservation Commission, respectively. In August 1997, the two groups heard and denied the applications for the sign permits. Plaintiffs appealed those decisions to the mayor and the city council. A hearing was scheduled for November, but was rescheduled to comply with public notice requirements. In October 1997, the Roswell city council, without public notice, amended the sign ordinance. The mayor and city council denied Plaintiffs' appeals on December 1, 1997. Plaintiffs then filed their Complaint requesting this Court invalidate the sign ordinance as unconstitutional.

Georgia courts have long held that summary judgment is the appropriate method for evaluating constitutional issues. Williams v. Trust Co. of Georgia, 140 Ga. App. 49 (1976). In order to prevail on a motion for summary judgment, the moving party must make a showing that "there is no genuine issue of material fact, and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." Lau's Corp. v. Haskins, 261 Ga. 491 (1991).

Plaintiffs complain the sign ordinance as a whole and specific sections of the ordinance in particular, violate Plaintiffs' First Amendment rights to the dissemination of constitutionally protected commercial and noncommercial speech. Defendants respond that even though sections of the ordinance may be unconstitutional, the ordinance, as a whole, is not.

Furthermore, Defendants contend the sections of the ordinance which may have been unconstitutional have been amended, thereby curing any defect in the statute.

Plaintiffs argue the controlling ordinance is the pre-amendment ordinance because as an actual applicant seeking to alter the use of their land they possessed a vested right to consideration of the application under the statutory law then in existence. Recycle & Recover, Inc. v. Georgia Board of Natural Resources, 266 Ga. 253 (1996). The pre-amendment ordinance allowed for the possibility of variances related to the size of the sign and the city may have been required to grant plaintiffs a variance from the restrictions of the ordinance. See Village Centers, Inc. v. Dekalb County, et al., 248 Ga. 177, 178 (1981). Before the final review of the applications, the city changed the ordinance to prevent any size related variances. Plaintiffs have a vested right in proceeding under the pre-amendment ordinance. Recycle & Recover, Inc, 266 Ga. at 254.

Furthermore, the amendments are not relevant to Plaintiffs' applications because the city failed to comply with O.C.G.A. § 36-33-4 and provide the public notice of any hearing where the city intended to amend the ordinance. McClure, et. al, v. Davidson, et. al, 258 Ga. 706, 709 (1988). The sign ordinance clearly falls within the definition of a "zoning" ordinance because the sign ordinance regulates uses within various zones of the city. O.C.G.A. § 36-66-3 (3). The city failed to comply with the hearing requirements of the statute in passing the amendments. As such, the amendments to the sign ordinance are a nullity and the pre-amendment ordinance is applicable to Plaintiffs' applications. McClure, 258 Ga. at 710. See also Grove, et. al, v. Sugar Hill Investment Associates, et. al., 219 Ga. App. 781 (1995).

It is well established the state can regulate the dissemination of commercial and non-commercial speech. Metromedia Inc, et. al. v. City of San Diego, et. al., 453 U.S. 490 (1981). That regulation, however, must be tempered by First Amendment constitutional concerns. Id.

A restriction of commercial speech is invalid unless it seeks to implement a substantial governmental interest, directly advances that interest, and reaches no further than necessary to accomplish the given objective. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). The burden rests on Defendants to show the validity of the ordinance. Edenfield v. Fane, 507 U.S. 761 (1993).

The Central Hudson case requires state actors to make some showing of what interests the state sought to protect or implement when passing the restrictive legislation. Adams Outdoor Advertising, et. al. v. Fulton Co., 738 F. Supp. 1431, 1433 (1990). This showing can be made either through a purpose clause, findings of fact, or some extrinsic evidence to show the intent of the city council at the time of passage. Id.

Defendants argue the sign ordinance does have a purpose clause, but the clause was simply omitted when the ordinance was codified and published. The purpose clause, Defendants contend, is to be found within the preambles to the 1977 sign ordinance and the 1982 amendment to that ordinance. The 1988 version, Defendants urge, is a mere codification of prior ordinances in which the city sought to advance the substantial state interests of public safety and aesthetics. The Court finds the argument to be unsupported by the record. The 1988 version is different from the 1977 version in many respects, both in the number of restrictions,

kinds of restrictions and method of review for denial of permits. It is clear the 1988 version is substantially more restrictive then the ordinance it replaced.

As such, there is nothing before the Court to show what interests the city sought to implement when passing a more restrictive ordinance in 1988. Defendants are asking the Court to assume what the interests are, without presenting any evidence to support their argument. Adams Outdoor Advertising of Atlanta, Inc., 738 F. Supp. at 1433. The Court must conclude the ordinance fails the Central Hudson commercial speech test and is therefore an unconstitutional restriction on the dissemination of protected speech. Dills v. City of Marietta, 674 F.2d 1377 (11th Cir. 1982), cert. denied, 461 U.S. 905 (1983). Compare State of Georgia v. Café Erotica, 270 Ga. 97 (1998).

Because Defendants have failed to satisfy the Central Hudson test, the Court does not need to reach any additional conclusions. The Court finds, however, assuming arguendo the 1977 preamble applies to the 1988 ordinance, Defendants have failed to show why the governmental interests claimed were not served by the less restrictive ordinance already in place. Central Hudson, 447 U.S. at 570.

In addition to impermissibly restricting commercial speech, the ordinance also restricts noncommercial speech. Restrictions on noncommercial speech, whether content based or content neutral, are subject to a more stringent standard then regulations on commercial speech. See Chambers v. Peach County, 266 Ga. 318, 319 (1996); Perry Educ. Ass'n v. Perry Local Educ.'s Ass'n., 460 U.S. 37, 45 (1983). As discussed above, Defendants have presented no evidence of any governmental interest being served by the restrictions in the 1988 sign

ordinance. The sign ordinance is an unconstitutional restriction on noncommercial speech. See Chambers, 266 Ga. at 319. The ordinance must be stricken in its entirety.

Alternatively, assuming Defendants have shown proper purposes, Plaintiffs contend several specific sections of the ordinance which go directly to the core of the contended purposes are unconstitutional and not severable thereby rendering the entire ordinance unconstitutional.

The sign ordinance prohibits all "off premises signs" except for three exceptions and is similar to language found to be unconstitutional by the Georgia Supreme Court. Union City Board of Zoning Appeals et al. v. Justice Outdoor Displays, Inc., 266 Ga. 393 (1996). Also, as in Justice Outdoor Displays, the Roswell ordinance effectively bans non-election ideological signs and is unconstitutional. Id. at 399, 401. These sections violate the constitutions of Georgia and of the United States, however, the Georgia Supreme Court has found similar sections to be severable and the entire ordinance need not necessarily be stricken because of these violations. Id.

However, the ordinance must be stricken in its entirety because certain sections work in conjunction to ban personal expression signs within residential zones of the city. Section 2 ½ – 35 expressly prohibits signs unless specifically permitted by the ordinance. Section 2 ½ - 36(1) lists the types of signs permitted in residential zones in the city. The list does not include signs containing noncommercial content. As such, the sections violate the constitutions of Georgia and of the United States and must be stricken because they exclude noncommercial ideological signs from residential zones while permitting similar size commercial signs. Justice Outdoor Displays, 266 Ga. at 396.

With § 36 (1) stricken, the rest of the ordinance must fall for two reasons. First, if the Court were to simply sever the section, the remaining ordinance would be more restrictive of speech then was intended by the city. See Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994). Second, in addition to favoring commercial speech over noncommercial speech, § 36 (1) is a time, place, manner regulation. Without the section, the ordinance does not regulate signs within the residential zones at all, a conclusion clearly not within the council's intent when passing the legislation. Compare Justice Outdoor Displays, 266 Ga. at 404.

The ordinance also must be stricken in its entirety because the "amortization schedule" in the ordinance amounts to a taking of property without compensation and is unconstitutional. Lamar Advertising v City of Albany, 260 Ga. 46 (1990). In Lamar Advertising, the Georgia Supreme Court held that the provision for the amortization of signs was "at the core of the ordinance's general purpose" and the entire ordinance had to be stricken. Id. at 47. There, the general purpose of the ordinance was found to be preventing the proliferation of signs within the city and eliminating those that, under the prior ordinances, were lawful. Id. Given the assumed purposes, as stated in the 1977 ordinance, along with the inclusion of the provision to remove the nonconforming signs, Roswell had the same general purpose in mind. The entire scheme must be stricken as unconstitutional. Id.

The ordinance must also be stricken in its entirety because city officials have an unspecified amount of time to make permit decisions. Bo Fancy Productions, Inc. v. Rabun County Bd. of Comm's., 267 Ga. 341 (1966). The ordinance provides that once a permit is denied by the administrative inspector and the denial is appealed, the subject review board has a specific time in which to hear the review and issue a ruling. There is nothing in the ordinance

which provides for a period in which the administrative inspector must make the initial decision to issue or deny the permit and is therefore an unconstitutional prior restraint. Id. For this reason, where one of the assumed purposes of the ordinance is to promote fair guidelines for the placement of signs, the ordinance must be stricken in its entirety. See Lamar Advertising, supra.

Finally, assuming the 1977 ordinance general purposes applied to Plaintiffs, the ordinance must be stricken in its entirety because several sections of the sign ordinance unconstitutionally favor noncommercial speech of select religious and community organizations. See National Advertising Co. v. Town of Babylon, 703 F. Supp. 228 (E.D.N.Y 1989); Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994). The ordinance allows for church bulletins in residential zones of the city when the ordinance excludes other forms of noncommercial speech such as the personal ideological views of residents.

The preference for religious based speech over other forms of ideological speech cannot stand without the state showing a substantial governmental interest in preferring religious speech. See Desert Outdoor Advertising Co. v. City Moreno Valley, 103 F.3d 814 (9th Cir. 1996).

Even if the Court were to find the preference subject to equal protection analysis because a church is permitted to express an opinion where an individual cannot express the same opinion, the preference cannot stand. See Justice Outdoors, 266 Ga. at 400. The classification does not bear a rational relationship to any legitimate government purpose either expressed in the assumed purposes of the ordinance or which the Court can fathom. See Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973). The preference is unconstitutional and the ordinance must be stricken in its entirety. Rappa v. New Castle County, supra.

Plaintiffs allege many of the Defendants are individually liable for not granting the permits. Public officials are entitled to qualified immunity unless the plaintiffs prove that a reasonable public official could not have believed that his or her actions were lawful in light of clearly established law. Board of Commissioners of Effingham County v. Farmer, 228 Ga. App. 819 (1997).

It appears the central issue surrounding the denial of the applications was not the content of the signs, but rather the size of the signs. In that regard, it cannot be said that it is well established that the size limitations could not be severed from the rest of the ordinance. See e.g., Justice Outdoors, *supra*. Summary judgment is granted to Defendants on the issue of qualified immunity.

As a separate matter, Plaintiffs complain the "historical guidelines" used by the Roswell Historical Preservation Commission to issue certificates of appropriateness before any change in external environmental features may be made within the boundaries of the Roswell historic district is unconstitutional. Plaintiffs argue the determination of appropriateness is unconstitutional where the applicant must state the type and purpose of the sign as required by the ordinance. The Court disagrees with Plaintiffs interpretation of the statute.

The requirement of listing the type and purpose of the sign on an application does not provide city officials with unconstitutional discretion. Seav v. Cleveland, 228 Ga. App. 836 (1998). Section 765.11 of the Historic Ordinance regulates the size and style of structures within a designated "historic district." The Court finds the restrictions to be part of a reasonable landmark preservation law. See Outdoor Systems v. City of Atlanta, 885 F. Supp.

1572, 1580 (N.D. Ga. 1995). Summary judgment is granted to Defendants regarding the issue of the constitutionality of the certificate of appropriateness.

IT IS HEREBY ORDERED judgment is entered in favor of Defendants on the issue of qualified immunity and the constitutionality of the Historic Preservation Commission's certificate of appropriateness and judgment is entered in favor of Plaintiffs on the issue of the constitutionality of the sign ordinance.

IT IS HEREBY ORDERED that Defendants are permanently enjoined from enforcing the existing Roswell sign ordinance as it pertains to Plaintiffs and shall permit Plaintiffs to construct and operate each and every sign outside the Roswell Historic District for which they have brought this action.

IT IS FURTHER ORDERED that Plaintiffs are entitled to attorney's fees pursuant to 42 U.S.C. § 1988 and a hearing will be conducted consistent with the procedures outlined in Hensley v. Eckerhart, 461 U.S. 424 (1983).

SO ORDERED AND ADJUDGED this 18th day of November, 1999.

MELVIN K. WESTMORELAND, JUDGE
FULTON COUNTY SUPERIOR COURT