**APPENDIX A**

In the

United States Court of Appeals

For the Seventh Circuit

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No. 18-3236

GEFT OUTDOORS, LLC,

*Plaintiff-Appellant*,

*v.*

CITY OF WESTFIELD, Hamilton County, Indiana,

*Defendant-Appellee*.

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Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 17-cv-04063 – **Tanya Walton Pratt**, *Judge*.

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ARGUED APRIL 5, 2019 – DECIDED APRIL 25, 2019

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Before FLAUM, KANNE, and SCUDDER, *Circuit Judges*.

FLAUM, *Circuit Judge*. GEFT Outdoors, LLC began building a digital billboard on its property in the City of Westfield, Indiana without obtaining or applying for the requisite sign permit. GEFT believed Westfield's relevant sign standards ordinance contains unconstitutional content-based speech restrictions

and that this invalidity renders the ordinance non-existent. GEFT only stopped installing the billboard when a contract attorney for Westfield threatened to arrest GEFT's representatives if the installation work continued. After this confrontation, Westfield and GEFT filed dueling injunction motions. GEFT asked for an injunction preventing Westfield from violating its due process rights; Westfield asked the district court to enjoin GEFT from installing the billboard pending the outcome of this litigation. The district court denied GEFT's motion and granted Westfield's motion, and GEFT filed this interlocutory appeal. We affirm.

## I. Background

### A. GEFT's Billboard & Westfield's Sign Standards

Plaintiff-appellant GEFT buys and leases land upon which it builds, maintains, and operates signs. It holds a valid lease-hold interest in property located in Westfield (the "Esler Property"), and it initiated this lawsuit because it sought to build a digital billboard (the "Billboard") on this leased property. To do so, it needed a permit from both the State of Indiana and the City of Westfield. *See* Ind. Dep't of Transp., Outdoor Advertising Control Manual 46 (2014), https://www.in.gov/indot/files/Permits_OutdoorAdvertisingControlManual_2014.pdf (Indiana permitting requirements "are in addition to any permit or licensing requirements of local governing bodies").

Defendant-appellee Westfield adopted the Westfield-Washington Township Unified Development Ordinance in 2014. *See generally* Westfield-Washington Township, Ind. Ordinance ("UDO"). The UDO regulates a broad range of development activities in Westfield, including the design, placement, and maintenance of signs within the city. *Id.* art. 6.17 (the "Sign Standards").

The Sign Standards require a permit for most signs, but thirteen categories are exempt from that requirement (the "Permit Exceptions"). *Id.* art. 6.17(C)–(D).[1] The Sign Standards also prohibit twelve types of signs entirely, two of which the parties discuss here. *See id.* art. 6.17(E). "Off-premise Signs" are not allowed in Westfield, "except as otherwise permitted by" the UDO (the "Off-Premises Ban"). *Id.* art. 6.17(E)(5). An off-premises sign is "[a] Sign directing attention to a specific business, product, service, entertainment, or any other activity offered, sold, or conducted elsewhere than upon the lot where the Sign is displayed." *Id.* art. 12.1. Westfield also bars "Pole Signs." *Id.* art. 6.17(E)(4). A pole sign is "[a] Sign which is supported by one or more poles, posts, or braces upon the ground, in excess of six (6) feet in height, not attached to or supported by any building." *Id.* art. 12.1.

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[1] Westfield amended these categories in April 2018. Any amendments are irrelevant for purposes of appeal, however, and so we cite only to the version of the UDO in force during the relevant events in late 2017. This version is available in the record on appeal, at page 32 of the Appendix.

The UDO treats signs erected in violation of its provisions (including signs erected without permits) as common nuisances. *Id.* art. 11.2. To remedy such a nuisance, Westfield "may issue a stop work order and shall advise the Property Owner of the sign . . . in writing of a violation of this Chapter and specify a date for compliance. The written notice shall describe the violation, appeal process, and enforcement provisions including penalties that may be assessed." *Id.* art. 11.5(A). The city may also obtain an injunction in state court to restrain UDO violations. *Id.* art. 11.5(B).

GEFT obtained the requisite sign permit from Indiana in October 2017. However, it never obtained (or even applied for) a sign permit from Westfield.

### B. GEFT's Billboard & Federal Lawsuit

Notwithstanding its lack of permit, GEFT began to erect the Billboard on the Esler Property on November 2, 2017. Specifically, GEFT installed a steel pole in the ground to serve as the Billboard's foundation and built a forty-square-foot "No Trespassing" sign nearby. The next day, GEFT sued Westfield in the Southern District of Indiana, challenging two portions of the Sign Standards—the Permit Exceptions and the Off-Premises Ban—as unconstitutional content-based speech restrictions. GEFT specifically alleged the Permit Exceptions and the Off-Premises Ban violated the First Amendment to the United States Constitution and Article I, § 9 of the Indiana Constitution, and that the Sign Standards did not comply with Indiana Home

Rule requirements. GEFT sought as relief a declaratory judgment that the UDO's Sign Standards chapter was unconstitutional on its face and as applied, an order enjoining Westfield from enforcing the chapter, and damages pursuant to 42 U.S.C. § 1983.

On November 7, Westfield posted a "Stop Work Notice" on the steel pole on the Esler Property. The notice listed two UDO violations: "Installation of an accessory structure with-out a permit" and "Installation of a sign without a permit." GEFT responded to this development by letter on November 21, informing Westfield that it "intend[ed] to move forward with the erection of the Billboard" within the next thirty days. GEFT also informed the city that in its view, the Sign Standards simply did not apply to this planned work:

> The City's Sign Standards purport to preclude the erection of the Billboard. However, the Sign Standards are unconstitutional under applicable law, as they restrict GEFT's right to free speech under the First Amendment. Because they are unconstitutional, it is as if the Sign Standards do not exist. . . . Because the Sign Standards are void due to their unconstitutionality . . . there are no local sign regulations governing GEFT's erection of the Billboard.

In turn, Westfield sent another letter on November 22, elaborating on the UDO violations identified on its

earlier Stop Work Notice.[2] First, Westfield stated that the steel pole constituted an "Accessory Building" under the UDO, and GEFT should have obtained an improvement location permit (separate from and in addition to a sign permit) before installing it.[3] Second, Westfield informed GEFT that if the steel pole was intended to be part of a sign, there were two further issues: GEFT should have applied for a sign permit before commencing installation, and in any event, the UDO bans all pole signs. Finally, Westfield informed GEFT that "[t]his letter is being provided as a warning to notify you of these violations . . . Please remedy this violation within thirty (30) days from the issuance of this letter (December 22nd) in order to avoid further enforcement action." Westfield then posted two more Stop Work Notices (identical to the first) on the steel pole, on November 27 and December 8.

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[2] The letter referenced a third violation—"[t]he installation of a nonconforming pole sign"—that is unrelated to the instant lawsuit because it involves another sign on the Esler Property.

[3] All improvements made to real property within Westfield require improvement location permits. UDO art. 2.5(D). An "improvement" includes "[a]ny building, structure, parking facility, fence, gate, wall, work of art, underground utility service, Land Disturbing Activity, or other object constituting Development, a physical alteration of real property, or any part of such alteration." *Id.* art. 12.1. An "accessory building" is "[a] subordinate building or structure, the use of which is incidental to and customary in connection with the Principal Building or use and which is located on the same Lot with such Principal Building or use and is under the same ownership." *Id*. A structure, in turn, is "[a]nything constructed or erected which requires location on the ground or attachment of something having location on the ground." *Id*.

Despite these notices, GEFT mobilized a construction team on December 16 to finish erecting the Billboard by placing an "advertising head" on the steel pole. At approximately 8:15 AM, GEFT's contractors began their work by offloading steel components at the site, on the ground near the pole. GEFT's founder and owner Jeffrey Lee was onsite that morning, along with GEFT representative John Kisiel, two contractors hired to perform sign erector work on the sign head installation (Marshall Heath Brock and Phillip Finn), a crane operator, and others. At around 10:15 AM, Westfield City Inspector Matthew Skelton arrived at the Esler Property along with two Westfield police officers. They demanded that all work stop, and one of the police officers told Lee that if construction continued, GEFT would be "asking for trouble."

While the City Inspector and the officers were still onsite, counsel for Westfield e-mailed GEFT's counsel, informing them that "GEFT or its agents . . . appear to be attempting to continue to build a structure without a permit in violation of the Westfield UDO and the Stop Work Order. Law enforcement has been called and the City will use its police powers as necessary to enforce the stop work order." Counsel for GEFT responded that Westfield had no legal basis to cease activity at the Esler Property; Westfield's counsel in turn cited the UDO and noted that the city "has the authority to abate a common nuisance by using its police powers."

Back at the Esler Property, Skelton spoke with each of GEFT's onsite contractors, including Brock and Finn, informing them that they would be fined if they

continued to do any work on the Billboard in violation of the Stop Work Orders. The crane operator demobilized the crane and the contractors stopped all their work. But approximately five minutes after Skelton and the police officers left the site, the contractors resumed installation of the Billboard.

About twenty minutes later, Brian Zaiger (a partner at a private law firm representing the city) arrived at the site. Zaiger identified himself as a "City Attorney" and advised Lee that "the police were on their way." Zaiger then pointed at Lee and Kisiel and said that if work was not stopped immediately, he would have them arrested along with GEFT's onsite contractors. When Lee said that this was a civil matter rather than a criminal one, Zaiger responded that Lee was in violation of the Stop Work Orders, any continued work was a nuisance, and the only way to abate the nuisance was to "throw you two in jail and then figure it out from there." Dur ing his exchange with Zaiger, Lee called GEFT's attorney and offered the phone to Zaiger; Zaiger, however, said he "wasn't interested" in speaking with him. According to Zaiger, he did not know it was counsel for GEFT that was on the call, as Lee had "just said he had a lawyer on the phone."

Zaiger also approached the crane operator and three other contractors to tell them that they would be arrested if they continued to do work at the site. The crane operator demobilized the crane and the contractors stopped performing any work. Lee also instructed GEFT's contractors to cease further work on putting the advertising head onto the Billboard. Lee observed

Zaiger tell a police officer who had returned to the site that, because work had stopped on the sign, there was no need to arrest anyone.

Westfield posted another Stop Work Notice on GEFT's pole on December 18, and it posted more comprehensive Stop Work Orders on the pole on January 19 and January 26, 2018. According to Lee, though, GEFT stopped work on the Bill board only because of Zaiger's December 16 arrest threats, not because of the city's Stop Work Notices or Orders.

### C. Preliminary Injunction & Restraining Order Motions

Three days after this confrontation at the Esler Property, Westfield filed a motion for a restraining order compelling GEFT to immediately stop work on the installation of its sign pending the outcome of its federal lawsuit. According to the city, this was necessary to maintain the status quo during the litigation, and it was warranted because GEFT had demonstrated its refusal to adhere to the UDO's permit requirements and pole-sign ban.

GEFT then filed an amended complaint and its own preliminary injunction motion. GEFT's First Amended Com plaint, which is the operative version for purposes of appeal,[4] included the three causes of action in the original complaint:

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[4] Since filing this appeal, GEFT has moved to file a second amended complaint and a supplemental complaint.

(1) the Permit Exceptions violate the First Amendment and Article I, § 9 of the Indiana Constitution; (2) the Off-Premises Ban violates the same provisions; and (3) the Sign Standards are void for not fulfilling the requirements of Indiana's Home Rule. GEFT also added two new causes of action to its com plaint based on the events of December 16: (4) a due process claim pursuant to 42 U.S.C. § 1983; and (5) a claim for abuse of process. In its contemporaneous preliminary injunction motion, GEFT requested that the court enjoin Westfield from (a) "Taking any further actions to enforce the Stop Work No tice;" (b) "Taking any further actions to prevent GEFT from enjoying the use of its property without due process of law;" and (c) "Threatening GEFT and/or its representatives with imprisonment, or imprisoning them, for violation of the UDO and/or the Stop Work Notice (or any similar order) when GEFT finishes construction of the . . . Billboard."

After a hearing on both motions, the court denied GEFT's motion and granted Westfield's motion on September 28, 2018. It ordered GEFT "to not continue any work on its pole and digital sign in Westfield until after resolution of this case on the merits." This interlocutory appeal followed.

## II. Discussion

When reviewing a district court's grant or denial of a pre liminary injunction, "legal conclusions are reviewed de novo, findings of historical or evidentiary fact for clear error, and the balancing of the injunction

factors for an abuse of discretion." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006). To obtain a preliminary injunction, a plaintiff "must establish that it has some likelihood of success on the merits; that it has no adequate remedy at law; that without relief it will suffer irreparable harm." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 816 (7th Cir. 2018). If the plaintiff fails to meet any of these threshold requirements, the court "must deny the injunction." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). However, if the plaintiff passes that threshold, "the court must weigh the harm that the plaintiff will suffer absent an injunction against the harm to the defendant from an injunction, and consider whether an injunction is in the public interest." *Planned Parenthood*, 896 F.3d at 816. This Circuit "employs a sliding scale approach" for this balancing: if a plaintiff is more likely to win, the balance of harms can weigh less heavily in its favor, but the less likely a plaintiff is to win the more that balance would need to weigh in its favor. *Id.*

Like the district court, we begin our analysis with GEFT's preliminary injunction motion before turning to Westfield's motion. We note that our analysis of these motions need not involve any discussion of GEFT's First Amendment challenges to specific Sign Standards provisions. While GEFT has indisputably challenged the constitutionality of the Sign Standards in its complaint, its preliminary injunction motion focuses solely on its due process claim and does not

request a ruling on the Sign Standards' compliance with the First Amendment. In fact, GEFT informed the district court that "[r]esolution of these [First Amendment] constitutional issues is not necessary for resolution of GEFT's preliminary injunction." Westfield's motion also did not ask the district court to definitively rule on the Sign Standards' constitutionality. The district court thus did not address the merits of GEFT's First Amendment challenge to the Sign Standards, and we will not reach them here in the first instance. *See Old Republic Ins. Co. Fed. Crop Ins. Corp.*, 947 F.2d 269, 276 (7th Cir. 1991) ("It is fundamental that on appeal to this court a litigant is restricted to those arguments which already have been raised at the district court level.").

### A. GEFT's Preliminary Injunction Motion

The district court denied GEFT's preliminary injunction motion for two reasons. It first held that GEFT had not shown it was reasonably likely to succeed on the merits of its due process claim. The district court also concluded that a preliminary injunction in GEFT's favor was unwarranted "based upon the timing and procedural history of GEFT's and West field's legal steps taken." More specifically, "GEFT's actions of knowingly violating the UDO, then later seeking this [c]ourt's intervention, and then again undertaking work in violation of the UDO, undermines the propriety of equitable relief before the case can be fully adjudicated." We consider each of these rationales in turn.

*1. GEFT's Due Process Claims*

The Fourteenth Amendment's Due Process Clause pro vides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. This due process guarantee includes procedural and substantive components. *See County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). GEFT claims violations of both.

a. Procedural Due Process

GEFT first argues Westfield violated its procedural due process rights when it stopped GEFT from finishing construction on the Billboard. To determine whether such a violation occurred, we first ask whether GEFT has been deprived of a protected liberty or property interest; and second, we ask whether that deprivation occurred without due process.

*See Black Earth Meat Mkt., LLC v. Village of Black Earth*, 834 F.3d 841, 848 (7th Cir. 2016).

To assess whether GEFT has a property interest protected by due process, we look to an independent source, such as state law, rather than the U.S. Constitution itself. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). GEFT's leasehold in the Esler Property is a protected interest that can support a procedural due process claim. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994).[5]

[5] GEFT also asserts that its state-issued Billboard permit is a vested, protected property right under Indiana law that can

The next part of this inquiry asks whether GEFT has been deprived of this property right without due process of law. *See Hudson v. City of Chicago*, 374 F.3d 554, 559 (7th Cir. 2004). GEFT asserts two different theories of how it suffered a deprivation because of Westfield's actions. First, GEFT claims that the city deprived it of its property right in its lease by enforcing an "invalid" stop work notice against it without no tice or a hearing. According to GEFT, the UDO requires that certain information be included in a "Stop Work Order" from Westfield—a description of the violation and the appeals process, the applicable enforcement provisions of the UDO including penalties that may be assessed, and a date for compliance. UDO art. 11.5(A). But the November 7 Stop Work Notice did not contain all this information, nor did Westfield's November 22 letter. Thus, GEFT says, the Stop Work Notice was not

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support its claim. This is unclear. While a state-granted building permit might be a vested property right, *see Metro. Dev. Comm'n of Marion Cty. v. Pinnacle Media, LLC*, 836 N.E.2d 422, 427–28 (Ind. 2005), Indiana's Department of Transportation provides in its regulations that all state permitting requirements are in addition to local requirements. Thus, GEFT only held its state Billboard permit subject to Westfield's own permitting scheme. That could mean GEFT's property right in the permit never vested; alternatively, that could mean Westfield did not deprive GEFT of any property right when it enforced the Sign Standards against it, as GEFT always held the Indiana permit subject to the Sign Standards. We do not need to decide the issue, as GEFT does have a protected property right in its Esler Property leasehold that could form the basis of a due process claim. And our analysis of the process that GEFT received from Westfield would be the same assuming it did have a protected property right in this permit and had been deprived of that right.

enforceable and provided no basis to order GEFT to stop putting up its Billboard.

This theory cannot support a procedural due process claim. As an initial matter, GEFT's own evidence submitted in support of its motion demonstrates that it stopped con structing the Billboard only because of Zaiger's arrest threats, not because of notices it received from Westfield. Lee states in his affidavit that "GEFT contractors stopped working because of the threat of incarceration, not because of a stop work or der" and that "[b]ut for the threats of arrest noted above, the work on the . . . Billboard that was planned for December 16, 2017 . . . would have been completed." Kisiel agreed with Lee's recitation of the facts of what happened on December 16. And both Brock and Finn, the two contractors onsite that day, said in affidavits that "[w]ere it not for the threats of arrest . . . we would have been able to complete the work that was planned for December 16, 2017 to erect the sign head for the . . . Billboard." The Stop Work Notices therefore could not have deprived GEFT of its property.

Even if the Stop Work Notices themselves halted further work on the Billboard, and assuming this work stoppage "deprived" GEFT of its leasehold interest, GEFT's only complaint about these notices is that they did not comply with the UDO's requirements. But there is no constitutional procedural due process right to state-mandated procedures. *See Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.*, 741 F.3d 769, 773 (7th Cir. 2013); *River Park*, 23 F.3d at 166–67 (plaintiff "may not have received the process [the state] directs its

municipalities to provide, but the Constitution does not require state and local governments to adhere to their procedural promises"). The fact that the Stop Work Notices did not comply with the UDO's procedures cannot support a procedural due process claim, and GEFT does not raise any other issue with the process it received via the Stop Work Notices beyond their noncompliance with the UDO. Thus, it has not shown any likelihood of success on the merits of its procedural due process claim as it relates to these notices.[6]

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[6] Moreover, the process that GEFT was entitled to was what was "due under the circumstances." *Charleston*, 741 F.3d at 772; *see also Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))). The traditional hallmarks of procedural due process are "notice and an opportunity to be heard." *Dietchweiler ex rel. Dietchweiler v. Lucas*, 827 F.3d 622, 628 (7th Cir. 2016). Westfield provided both before GEFT stopped erecting the Bill board. The November 7 Stop Work Notice informed GEFT of how the steel pole installation allegedly violated the UDO; Westfield's November 22 letter provided even more details about those violations, gave a proposed date for compliance, and warned that "further enforcement action" could follow if GEFT did not comply with Westfield's ordinances. And "[a]ny decision . . . in enforcement or application of [the UDO] may be appealed to the [Board of Zoning Appeals] by any person claiming to be adversely affected by such decision." UDO art. 3.2(B)(1). GEFT could have taken advantage of that process before or after December 16 and received the opportunity to be heard regarding Westfield's contentions that its Billboard violated the Sign Standards. *See River Park*, 23 F.3d at 167 (procedural due process requirements for property owner's loss were satisfied where owner had "ample means to contest the runaround it was receiving at the hands of" the defendant through state law processes). We also note that GEFT could have applied

GEFT also says that Westfield "violated its leasehold interest in the [Esler] Property by threatening GEFT's representatives with arrest and imprisonment." But GEFT cannot support its claim based on this theory either. When a plaintiff alleges a deprivation based on conduct that is "random and un authorized, the state satisfies procedural due process requirements so long as it provides a meaningful post-deprivation remedy." *Leavell v. Ill. Dep't of Nat. Res.*, 600 F.3d 798, 805 (7th Cir. 2010) (alterations and citation omitted); *see Armstrong v. Daily*, 786 F.3d 529, 544 (7th Cir. 2015) (conduct is random and unauthorized when "the state could not predict the conduct causing the deprivation, could not provide a pre-deprivation hearing as a practical matter, and did not enable the deprivation through established state procedures and a broad delegation of power").

GEFT presented evidence that on December 16, Zaiger came onto the Esler Property, identified himself as the West field city attorney, and told Lee and the others on the site that they would be arrested if work was not stopped immediately. According to GEFT, it

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for a permit before it began erecting the Bill board. While GEFT can bring a pre-enforcement First Amendment challenge to the Sign Standards without subjecting itself to that process, *see ACLU v. Alvarez*, 679 F.3d 583, 590–91 (7th Cir. 2012), the permitting process remained available as a way for GEFT to engage with Westfield's Sign Standards and receive both notice and an opportunity to be heard before being denied the right to install its sign. GEFT does not take issue with the procedural adequacies of any of these processes available to it to challenge Westfield's decision preventing continued work on the Billboard.

was only because of these threats that it stopped constructing the Billboard, and it was these threats that therefore deprived it of its leasehold interest.[7] But both GEFT and Westfield agree that neither local nor state law authorizes the arrest of anyone violating a municipal ordinance. Even if Zaiger is considered an employee of Westfield (which is an open question as Zaiger worked for a private law firm representing the city), GEFT has not identified any evidence Westfield authorized Zaiger's threats or even could have predicted he would make them that day. *See Leavell*, 600 F.3d at 806. As Westfield points out, the Indiana Tort Claims Act pro vides a remedy for any abuse of process that Zaiger's actions represent. *See* Ind. Code § 34-13-3 *et seq*. GEFT has not made any attempt to show that it took advantage of this process or that this remedy would be insufficient to compensate it for what was lost by Zaiger's threats. *See Veterans Legal Defense Fund v. Schwartz*, 330 F.3d 937, 941 (7th Cir. 2003) ("Given the availability of state remedies that have not been shown to be inadequate, plaintiffs have no procedural due process claim."). Because it has not made this showing, GEFT has not demonstrated it is likely to

[7] We note that is not clear GEFT was even deprived of anything: its leasehold interest in the Esler Property is subject to state and local regulations, such as the UDO. *See River Park*, 23 F.3d at 167 ("State and local governments may regulate and even take property; they must *pay* for what they take but are free to use the land as they please."). But Westfield makes no argument to the contrary in its brief, and so we will assume that a deprivation occurred here.

succeed on the merits of its procedural due process claim.

And since GEFT has no likelihood of success on the merits of this claim, there was no need for the district court to con duct further analysis of the "threshold phase" for preliminary injunctive relief, or to move to the "balancing phase." *See Valencia v. City of Springfield*, 883 F.3d 959, 966 (7th Cir. 2018) ("If it is plain that the party seeking the preliminary injunction has no case on the merits, the injunction should be refused regard less of the balance of harms." (citation omitted)). GEFT is not entitled to its requested preliminary injunction based on its procedural due process claim.

b. Substantive Due Process

GEFT also seeks a preliminary injunction based on an alleged violation of its substantive due process rights. It argues that Westfield used Zaiger's "unlawful threat" of imprisonment "to coerce GEFT into not exercising its constitutional right to enjoy the use of its [p]roperty." According to GEFT, Zaiger's conduct in this regard "is so utterly arbitrary and irrational that it shocks the conscience."

The substantive component of the Due Process Clause "bars certain arbitrary, wrongful government actions 'regard less of the fairness of the procedures used to implement them.'" *Porter v. DiBlasio*, 93 F.3d 301, 310 (7th Cir. 1996) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). The scope of a substantive due process claim is limited. *See Platt v. Brown*, 872

F.3d 848, 852 (7th Cir. 2017). When a plaintiff brings such a claim challenging "harmful, arbitrary acts by public officials," this claim "must meet a high standard, even when the alleged conduct was abhorrent, to avoid constitutionalizing every tort committed by a public employee." *Geinosky v. City of Chicago*, 675 F.3d 743, 750 (7th Cir. 2012). More specifically, "the cognizable level of executive abuse of power [is] that which shocks the conscience." *Lewis*, 523 U.S. at 846. "[O]nly the most egregious official conduct" can meet this standard. *Id.*

GEFT is not likely to succeed on the merits of this claim. Although Zaiger's threats of arrest were certainly inappropriate insofar as Indiana law does not provide a basis to arrest someone for violating a municipal ordinance, his threats are a far cry from the type of conduct recognized as conscience shocking (especially considering that he did not follow through and have anyone arrested). *See*, *e.g.*, *Rochin v. California*, 342 U.S. 165, 172–73 (1952) (forcibly pumping criminal suspect's stomach shocked the conscience).[8]

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[8] GEFT also claims that Zaiger may have violated a rule of professional conduct by speaking to Lee directly and refusing to speak to GEFT's lawyer. *See* Ind. Rules of Prof. Conduct 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter."). Even assuming such a violation did occur (which is not clear from the record), that would not change this analysis. A violation of this rule may be unprofessional, but that does not mean it shocks the con science. *See Tun v. Whitticker*, 398 F.3d 899, 903 (7th Cir. 2005) (even

In its reply brief, GEFT says that since Westfield violated its property interest in its lease, Westfield violated its substantive due process rights even if Zaiger's conduct did not shock the conscience. However, "[s]ubstantive due process is not 'a blanket protection against unjustifiable interferences with property.'" *Gen. Auto Serv. Station v. City of Chicago*, 526 F.3d 991, 1000 (7th Cir. 2008) (quoting *Lee v. City of Chicago*, 330 F.3d 456, 461 (7th Cir. 2003)). If GEFT wishes to challenge Westfield's interference with its property interests as a type of land-use decision that rises to the level of a substantive due process violation, it "must first establish either an independent constitutional violation or the inadequacy of state remedies to redress the deprivation." *Id.* at 1001. GEFT has done neither. Therefore, GEFT cannot succeed on its substantive due process claim under this theory.[9]

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"abhorrent" behavior by officials does not necessarily shock the conscience).

[9] Even if Zaiger's actions did rise to the level of conscience-shocking conduct or otherwise constitute a substantive due process violation, GEFT has not properly alleged that Westfield could be held liable under § 1983 for his actions. GEFT brings its substantive due process claim under § 1983 against Westfield only; however, there is no respondeat superior liability for municipalities under this statute. *See Belcher v. Norton*, 497 F.3d 742, 754 (7th Cir. 2007). The City could be liable if Zaiger was a "final policymaker." *See id.* (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986)). GEFT argues Zaiger's actions "can fairly be said to represent official policy," but the mere fact that he worked for Westfield does not show that, pursuant to state law, Zaiger possessed such authority. *See Pembaur*, 475 U.S. at 480. This is another reason why GEFT has not shown it is likely to succeed on the merits of its substantive due process claim.

As with the procedural due process claim, GEFT's substantive due process claim has no likelihood of success on the merits. Thus, the district court did not err in declining to enter a preliminary injunction in GEFT's favor, and there is no need to continue with the preliminary injunction analysis. *See Girl Scouts*, 549 F.3d at 1086.

*2. GEFT's Unclean Hands*

In addition to its decision that GEFT was unlikely to succeed on the merits of its due process claims, the district court also denied injunctive relief because GEFT's actions in "knowingly violating the UDO, then later seeking this [c]ourt's intervention, and then again undertaking work in violation of the UDO, undermine[d] the propriety of equitable relief" in its favor. This is so because "ordinances adopted by a city are presumptively valid until a court has determined them to be otherwise," and "GEFT cannot unilaterally decide that an ordinance is invalid and then disobey it."

GEFT challenges this "unclean hands" aspect of the district court's decision as well. We review the district court's exercise of its "equitable judgment and discretion" in this regard for abuse of discretion. *King v. Kramer*, 763 F.3d 635, 642 (7th Cir. 2014).

The purpose of the unclean-hands doctrine "is to discourage unlawful activity." *Original Great Am. Chocolate Chip Cookie Co. v River Valley Cookies, Ltd.*, 970 F.2d 273, 281 (7th Cir. 1992); *see Shondel v.*

*McDermott*, 775 F.2d 859, 868 (7th Cir. 1985) ("'[U]nclean hands' really just means that in equity as in law the plaintiff's fault, like the defendant's, may be relevant to the question of what if any remedy the plaintiff is entitled to."). According to GEFT, it could not be at fault for refusing to apply for or obtain a permit before it started construction on the Billboard. GEFT argues that because the Sign Standards are, in its view, unconstitutional, it is as if they never existed, and GEFT "cannot have unclean hands for not complying with a non-existent law."

GEFT's argument is premised on a misunderstanding about who has the authority to declare a law void; GEFT itself does not have that power. After a court holds that a statute or ordinance is unconstitutional, that legislation is void. *See GEFT Outdoor LLC v. Consol. City of Indianapolis & County of Marion*, 187 F. Supp. 3d 1002, 1012 (S.D. Ind. 2016) (noting that because the court had ruled the ordinance at issue was unconstitutional, the plaintiff could derive no rights from it). But the court's ruling that the law is invalid is the crucial trigger for voiding it. Parties who believe that a statute or ordinance is unconstitutional must wait for that to happen before treating the challenged law as nonexistent. They do not have free rein to invoke a court's jurisdiction over a challenge to an ordinance, but to then act like the law does not exist before the court reaches the merits of its challenge.

The constitutionality of the Permit Exceptions and the Off-Premises Ban in the Sign Standards is one of the main issues raised in GEFT's complaint against

Westfield. We express no opinion on the merits of these First Amendment claims; it may be that GEFT eventually prevails and the district court will declare these portions of the Sign Standards unconstitutional and void. The court might also conclude that these portions are not severable from the rest of the Sign Standards, as GEFT argues, and that entire chapter of the UDO must be declared void. But the district court has not considered or accepted any of these arguments yet, so various outcomes of GEFT's challenge are still possible. The Sign Standards are still in force until that happens. This is the basic principle the district court applied in its decision to assess the equity of GEFT's actions in the context of this lawsuit—until a court declares that the Sign Standards are unconstitutional, GEFT must presume that this chapter of the UDO is a valid enactment of the city's legislature that applies to its conduct.

GEFT argues this is the wrong way to approach its own challenge, though. It says that the Sign Standards are content based, and courts must presume that a content-based law is unconstitutional. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). But GEFT confuses the issue: the presumption from *Reed* applies when a court actually reviews a law for its compliance with the First Amendment. That is not what either party asked the court to do in the context of these injunction motions. Instead, GEFT sought an injunction because of alleged due process violations, and Westfield sought one to maintain the status quo pending the ultimate resolution of the case. Neither GEFT

nor Westfield asked the district court to rule on the Sign Standards' constitutionality, so *Reed*'s presumption did not apply.

The district court, faced with a situation where GEFT had invoked the court's power over its dispute with Westfield, but then unilaterally acted in violation of a still-valid ordinance, did not abuse its discretion in determining that these actions supported denying GEFT's motion for equitable relief. Once GEFT filed its lawsuit seeking a judicial determination on the Sign Standards' validity, it needed to let that process unfold before treating them as nonexistent.[10]

### B. Westfield's Motion for a Restraining Order

After denying GEFT its requested injunctive relief, the district court stated that "[i]n light of" its ruling on that motion, it would grant Westfield's motion

[10] Ordinarily, the unclean-hands doctrine "only applies when there is a direct nexus between the bad conduct and the activities sought to be enjoined.'" *Shondel*, 775 F.2d at 869 (quoting *Int'l Union, Allied Indus. Workers v. Local Union No. 589*, 693 F.2d 666, 672 (7th Cir. 1982)). GEFT argues there is no nexus here between its conduct and the activities it sought to enjoin because "GEFT has not taken any action inconsistent with its re quest to exercise its First Amendment rights." But again, GEFT misconstrues the scope of its preliminary injunction motion. GEFT did not ask for First Amendment-related injunctive relief; it asked the court for an order allowing it to continue constructing the Billboard without interference from Westfield, despite its failure to comply with the still-valid Sign Standards. A sufficient nexus exists between GEFT's requested relief from this ordinance and its actions in ignoring the ordinance to invoke this doctrine.

for a restraining order "to the extent that it requests an order prohibiting GEFT from continuing any work on its pole and digital sign until after the [c]ourt rules on the constitutionality of the UDO and resolves this litigation on the merits."

The district court did not conduct a separate analysis on Westfield's motion, but such an analysis was unnecessary considering its denial of GEFT's motion.[11] GEFT had asked the district court for an order enjoining Westfield from taking any further actions to enforce the Sign Standards against them, via the Stop Work Notices or otherwise. The court determined that GEFT was not entitled to this relief both because it had no likelihood of success on the merits of its due process claim, and because GEFT could not ignore the Sign Standards just because it thought they were unconstitutional. Considering that ruling, Westfield's motion for an order re quiring that GEFT stop work on the Billboard pending the outcome of the litigation on the merits sought no more from the district court than the logical consequence of its first decision—preventing further actions by GEFT in contravention of the Sign Standards. It was not an abuse of discretion for the district court to prevent GEFT from continuing any construction until the court ruled on whether it would have needed a sign permit under the Sign Standards

[11] Although Westfield's motion is captioned as one for a "restraining order," the district court treated it as one for a preliminary injunction. As GEFT received notice of it, this was proper, and the motion can be re- viewed using the same preliminary injunction standard set out above. *See Levas & Levas v. Village of Antioch*, 684 F.2d 446, 448 (7th Cir. 1982).

to erect its Billboard. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) ("[T]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." (internal quotation marks omitted)).

## III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

## APPENDIX B

## UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF INDIANA
## INDIANAPOLIS DIVISION

GEFT OUTDOOR, L.L.C.,

Plaintiff,

v. No. 1:17-cv-04063

CITY OF WESTFIELD,
HAMILTON COUNTY,

Defendant.

**ENTRY ON DEFENDANT'S MOTION FOR RESTRAINING ORDER AND PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

**WALTON-PRATT, J. SEPTEMBER 28, 2018**

This matter is before the Court on a Motion for Restraining Order (Filing No. 17) filed by Defendant City of Westfield ("Westfield") and a Motion for Preliminary Injunction (Filing No. 18) filed by Plaintiff GEFT Outdoor, LLC ("GEFT"). GEFT began construction of a digital billboard in Westfield on the west side of U.S. Highway 31 just south of Indiana State Road 32. Westfield determined that GEFT's actions violated its local ordinances and threatened imprisonment if GEFT continued erection of its sign. GEFT halted its activities and initiated this lawsuit, seeking declaratory and injunctive relief pursuant to the First and Fourteenth Amendments. Westfield filed a Motion for Restraining Order, asking the Court to order GEFT to cease all

work on its sign until this litigation has been resolved. GEFT filed a Motion for Preliminary Injunction, asking the Court to enjoin Westfield from preventing GEFT's construction of the sign and threatening imprisonment if GEFT continued its work on the sign. For the following reasons, the Court **grants** the Motion for Restraining Order and **denies** the Motion for Preliminary Injunction.

## BACKGROUND

GEFT is a company that buys and leases land to then build, maintain, and operate signs on that land. It disseminates commercial and noncommercial speech on its billboards. Esler Properties, LLC ("Esler") owns land located at 16708 Dean Road, Westfield, Indiana, immediately adjacent to U.S. 31/Meridian Street (the "Esler property"). Esler leased a portion of its property to GEFT. Because they hold a leasehold interest in the property, GEFT applied for and received a permit from the State of Indiana to erect a digital billboard on the Esler property. The state permit was issued on October 5, 2017. GEFT intends to display both commercial and noncommercial speech on the digital billboard, and it had advertisers' contracts lined up for the digital billboard to begin in January 2018. GEFT also possesses similar leasehold interests in portions of eight other properties located throughout Westfield, and it plans to put up digital billboards on those properties also (Filing No. 21 at 3, 6–7; Filing No. 19-1 at 2–3).

GEFT erected a ten-foot by four-foot "no trespassing" sign at the Esler property within its leasehold interest and also installed a large steel pole into the ground to serve as the foundation and structural support for its digital billboard. This steel pole was installed in either October or early November 2017 (Filing No. 21 at 6; Filing No. 19-1 at 2–3).

Then on November 3, 2017, GEFT initiated this lawsuit, challenging the constitutionality of Westfield's local ordinances regarding sign restrictions and exemptions (Filing No. 1). Westfield's Unified Development Ordinance ("UDO") includes a chapter on "sign standards". The UDO provides that a "sign permit shall be required for all signs . . . unless otherwise exempted herein." (Filing No. 19-4 at 2.) The UDO then provides a list of signs that are exempted from the permit requirement. *Id.* at 2–3. GEFT alleges that the exemptions, which apply to some commercial and some noncommercial speech, apply solely based on the topic or content of the speech on the sign; thus, the permit requirement and the exemptions are a content-based speech restriction.

The UDO also prohibits certain types of signs, including "off-premise signs," which direct "attention to a specific business, product, service, entertainment, or any other activity offered, sold, or conducted elsewhere than upon the lot where the Sign is displayed." (Filing No. 21 at 6; Filing No. 19-4 at 3–4.) An on-premise sign is permitted and conveys information about things offered at that property, whereas an off-premise sign is prohibited and conveys information about things

offered at a different property. GEFT alleges that the off-premise ban is an impermissible content-based speech restriction.

In its original complaint, GEFT asserted three claims. First, it asserted that the sign permit exemptions violate the free speech clause of the federal and state constitutions. Second, it asserted that the ban on off-premise signs violates the free speech clause of the federal and state constitutions. Third, it asserted that Westfield's sign standards are void under Indiana's statutory "home rule" because the UDO was not enacted consistent with the requirements of the home rule (Filing No. 1).

Four days after GEFT initiated this lawsuit, on November 7, 2017, Westfield posted a "stop work notice" on the steel pole that GEFT had erected on the Esler property. The notice noted violations of "installation of an accessory structure without a permit," and "installation of a sign without a permit." (Filing No. 21 at 8; Filing No. 19-1 at 3, 9.)

Two weeks later, on November 21, 2017, GEFT notified Westfield that it believed the sign ordinances were unconstitutional, and it intended to complete the work on erecting the digital billboard within the next thirty days (Filing No. 37-1 at 2–4). On November 22, 2017, Westfield responded to GEFT's letter, notifying GEFT and Esler (the property owner) that they were violating the UDO regarding signs and an accessory structure. Westfield's letter instructed GEFT and Esler

to remedy the violation within thirty days to avoid an enforcement action (Filing No. 37-2 at 2–7).

On December 16, 2017, GEFT mobilized a construction team to put an "advertising head" on the steel pole and to then place the digital billboard. After they had been on site for a couple of hours, GEFT and its contractors were confronted by a Westfield inspector and a Westfield police officer and sergeant. They demanded that work at the site cease. When GEFT representatives asked what would happen if they continued working, they were told that they would be asking for trouble. The Westfield inspector then went to each of the contractors and told them that they would be issued a fine if they continued working on the site (Filing No. 19-1 at 3–4).

The police officers and city inspector left the site, and approximately twenty minutes later, Brian Zaiger ("Zaiger") arrived at the site and introduced himself as the city attorney. Zaiger threatened the GEFT representatives and contractors that they would be arrested if they continued working at the site because it was a "common nuisance." GEFT called its attorney and asked him to talk with Zaiger, but Zaiger refused to talk with GEFT's attorney. Because they did not want to risk arrest, GEFT and its contractors stopped all work at the site. *Id.* at 5–6.

Three days after the confrontation at the work site, on December 19, 2017, Westfield filed its Motion for Restraining Order. Westfield asked the Court to prohibit GEFT from continuing any work on the steel

pole and digital sign at the Esler property until this litigation has reached a conclusion (Filing No. 17).

The following day, on December 20, 2017, GEFT filed its Motion for Preliminary Injunction, asking the Court to prohibit Westfield from taking actions to enforce the stop work notice and from threatening to imprison GEFT's representatives and contractors when it finishes construction of its digital billboard. GEFT also asked for a preliminary injunction prohibiting Westfield from taking actions that prevent GEFT from enjoying the use of its property without due process of law (Filing No. 18). Also on December 20, 2017, GEFT filed an Amended Complaint. (Filing No. 21). The amended and operative complaint asserts the three claims alleged in the original complaint, and adds two new claims: a Section 1983 claim for violation of due process rights, and an abuse of process claim. *Id*. at 20-22.

## LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* (citation and quotation marks omitted). Granting a preliminary injunction is "an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Roland Mach. Co. v.*

*Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984) (citation and quotation marks omitted).

When a district court considers whether to issue a preliminary injunction, the party seeking the injunctive relief must demonstrate that "it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that issuing an injunction is in the public interest." *Grace Schs. v. Burwell*, 801 F.3d 788, 795 (7th Cir. 2015). The greater the likelihood of success, the less harm the moving party needs to show to obtain an injunction, and vice versa. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008).

## DISCUSSION

Westfield filed its Motion for Restraining Order first, asking the Court to order GEFT to cease all work on its steel pole and digital sign in violation of the UDO until this litigation has concluded. One day later, GEFT filed its Motion for Preliminary Injunction, asking the Court to enjoin Westfield from preventing GEFT's construction of the sign and threatening imprisonment if GEFT continues its work on the sign. The Court will first address GEFT's Motion for Preliminary Injunction.

The Court initially notes that, while GEFT's Amended Complaint asserts First Amendment free speech claims, GEFT explains that "resolution of these

constitutional issues is not necessary for resolution of GEFT's preliminary injunction." (Filing No. 19 at 3, n.2.)

GEFT argues that it can use its property however it chooses, subject only to legally enacted laws and subject to due process. It asserts that it has a property right in the leased land and in erecting the digital billboard based on the state sign permit and the lease with Esler. GEFT argues that Westfield has deprived it of its property rights through an invalid stop work notice and an improper threat of imprisonment, and has deprived GEFT of its constitutionally protected right to due process.

GEFT asserts that it is likely to succeed on the merits of its claim that Westfield deprived it of its substantive and procedural due process rights. It argues that Westfield did not provide notice and an opportunity to be heard before Westfield deprived it of property rights in the leased property and to build its digital billboard. By virtue of the lease agreement and the state building permit, GEFT asserts that it had a valid, cognizable property interest.[1] GEFT argues it is entitled to a pre-deprivation hearing, and such was not provided by Westfield. Instead, Westfield threatened imprisonment if GEFT did not immediately stop work

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[1] *See Metro. Dev. Comm'n v. Pinnacle Media, LLC*, 836 N.E.2d 422, 427–28 (Ind. 2005) (building permit lawfully issued can constitute a vested property right); *River Park v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) (interest in land is constitutionally protected property right subject to due process protection).

on December 16, 2017. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (right to notice and an opportunity to be heard "at a meaningful time and in a meaningful manner"); *Boddie v. Connecticut*, 401 U.S. 371, 378–79 (1971) ("That the hearing required by due process is subject to waiver, and if not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."). GEFT further argues that Westfield's stop work notice did not provide sufficient information—it was even lacking information required by its own UDO—to give GEFT any reasonable notice, thereby depriving GEFT of due process. The stop work notice did not specify a date for compliance, describe the appeals process, describe the enforcement provisions, or describe any penalties that may be assessed for violating the stop work notice. GEFT argues that the stop work notice is invalid and therefore cannot be used to stop GEFT's work at the site.

Regarding a substantive due process violation, GEFT asserts that the steel pole, the digital billboard, and any alleged violation of the local sign ordinance are not a criminal nuisance and cannot serve as the basis for imprisonment. Thus, Westfield's reliance on these facts to threaten imprisonment violates GEFT's substantive due process rights to liberty. GEFT points out that the Indiana Code authorizes local municipalities to issue penalties for violation of local ordinances,

but the Indiana Code expressly does not give municipalities the power to imprison for an ordinance violation. Ind. Code § 36-1-3-8(a)(9). Because Westfield threatened imprisonment for an alleged violation of a local ordinance, and it expressly does not have such authority, GEFT argues that Westfield's conduct shocks the conscience and violates its substantive due process rights.

Additionally, freedom from bodily restraint is a core fundamental liberty interest, and Westfield's action infringing on this right violated substantive due process. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

GEFT asserts that the due process violation is compounded by the fact that the threat of imprisonment came from Westfield's attorney who was obligated to follow the Indiana Rules of Professional Conduct. This includes the prohibition against communicating about a case with a party who the lawyer knows is represented by another lawyer. Westfield's attorney, Zaiger, communicated directly with GEFT without GEFT's attorney's consent, and he threatened imprisonment over the actions directly involved in this litigation.

GEFT alleges that there is no adequate remedy at law and it will suffer irreparable harm if a preliminary injunction does not issue. GEFT argues that it is well

established that when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary, citing *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, 258 F. Supp. 3d 929, 954–55 (S.D. Ind. 2017). GEFT asserts that this case is about more than just money; it also involves the deprivation of free speech rights guaranteed by the First Amendment. GEFT argues that Westfield has deprived it of the ability to express itself via the digital billboard, so GEFT has shown an irreparable harm. GEFT also argues that there is no adequate remedy at law and it will suffer irreparable harm if Westfield continues to threaten imprisonment.

Finally, GEFT asserts that the harm it suffered outweighs any harm to Westfield because Westfield simply will be enjoined from taking actions against GEFT that it is not authorized under Indiana law to take against GEFT, whereas, without an injunction, GEFT will suffer deprivation of its constitutional rights. It notes that there is a strong public interest in protecting due process rights as well as in attorneys following the rules of professional conduct.

Responding in opposition to a preliminary injunction (and in support of its Motion for Restraining Order), Westfield argues that this case can and should be resolved on the UDO's blanket prohibition against "pole signs," which is content and location neutral, and thus does not give rise to a constitutional issue. Westfield explains, regardless of how the Court eventually decides the constitutional questions about the

off-premise ban and the exemptions to the permit requirement, the pole sign ban will still prohibit GEFT's digital billboard because it is a pole sign. Thus, Westfield argues, the Court should avoid the constitutional questions altogether, deny GEFT's preliminary injunction, and decide in Westfield's favor.

Westfield also asserts that ordinances adopted by a city are presumptively valid until a court has determined them to be otherwise, citing *Hobble By and Through Hobble v. Basham*, 575 N.E.2d 693, 696–97 (Ind. Ct. App 1991). As such, at this point without a court order stating otherwise, Westfield's sign ordinances are valid. GEFT cannot unilaterally decide that the ordinances are invalid and unconstitutional and unilaterally decide to act in contravention of the ordinances without consequence. But GEFT did so and comes before the Court with unclean hands and therefore is not entitled to injunctive relief.

Westfield explains that GEFT's permit from the State of Indiana to erect a billboard is immaterial because the State's authority over outdoor advertising along highways does not displace local laws and ordinances regulating placement of billboards. The state regulations explicitly recognize that state permitting is in addition to local permitting and licensing requirements, and thus, GEFT's state permit does not displace Westfield's local ordinances or grant GEFT property rights contrary to local ordinances.[2] Because the

[2] "The permit requirements contained herein are in addition to any permit or licensing requirements of local governing bodies,

Indiana Department of Transportation's ("INDOT") regulations expressly state its permit must be obtained in addition to any permit required by local ordinances, and because GEFT did not seek a sign permit from Westfield, GEFT does not have a vested

* * *

Westfield asserts that GEFT unilaterally (and without authority) decided that Westfield's UDO was unconstitutional, so it ignored the ordinances and began erecting its pole sign without first seeking a permit from Westfield. GEFT was aware of the ordinances prohibiting its actions but still proceeded to move forward with its work. GEFT has unclean hands and cannot now seek equitable relief in the form of a preliminary injunction. *See Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808, 822 (7th Cir. 2010) ("unclean hands" doctrine provides that "equitable relief will be refused if it would give the plaintiff a wrongful gain," and further, the "plaintiff who acts unfairly, deceitfully, or in bad faith may not through equity seek to gain from that transgression").

A preliminary injunction is an extraordinary remedy never awarded as a matter of right, and not to be granted unless the movant, by a clear showing, carries

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or other state agencies." Ind. Dept. of Trans. Outdoor Advertising Control Manual, Feb. 6, 2014, at 46, https://www.in.gov/indot/files/Permits_OutdoorAdvertisingControlManual_2014.pdf (last visited Sept. 28, 2018). property right to erect its sign and GEFT does not have an interest that rises to the level of a constitutionally protected property right. *Swartz v Scruton*, 964 F.2d 607, 609–11 (7th Cir. 1992).

the burden of persuasion. *Planned Parenthood*, 194 F. Supp. 3d at 823. Westfield argues that GEFT cannot demonstrate a reasonable likelihood of success on the merits because GEFT ignores facts concerning the due process afforded to it. Westfield posted the stop work notice on November 7, 2017, indicating that GEFT was in violation of ordinances and should stop working on the sign. This notice was followed up with the November 22, 2017 letter from Westfield, explaining the ordinance violations and providing a date for compliance. Westfield argues that the stop work notice, the follow up letter, and the publication of the local ordinances on Westfield's website provided sufficient notice and due process to GEFT. Importantly, because GEFT did not obtain the necessary sign permit from Westfield, GEFT did not have a vested property right to erect the steel pole or a digital sign, and thus, it did not have an interest that rises to the level of a constitutionally protected property right.

Westfield also argues that, while no constitutional deprivation has occurred, even if a deprivation has occurred, GEFT still has available to it adequate post-deprivation procedures, thereby providing due process.[3] Westfield points out that the Indiana Tort Claims

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[3] *See Leavell v. Ill. Dep't of Nat. Res.*, 600 F.3d 798, 805 (7th Cir. 2010) ("When the state conduct in question is random and unauthorized, the state satisfies procedural due process requirements so long as it provides a meaningful post-deprivation remedy. Thus, we have stated that, for a plaintiff alleging a procedural due process claim based on 'random and unauthorized' conduct of a state actor, the plaintiff must either avail herself of state post-deprivation remedies or demonstrate that the available remedies are inadequate.").

Act provides an adequate procedure for GEFT to seek redress for any alleged wrongs committed by Westfield. If Westfield randomly committed an abuse of process by threatening imprisonment without the authority to do so, then GEFT can pursue an Indiana tort claim against Westfield. Westfield further asserts that GEFT actually was required to pursue such a remedy first. Because GEFT failed to pursue such procedures, GEFT has prematurely pursued a federal due process claim. *Leavell*, 600 F.3d at 805–06 (a failure to give adequate notice is random and unauthorized, and thus post-deprivation procedures must be evaluated; however, a "state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them").

Westfield asserts that in light of the facts of this case, there is nothing that shocks the conscience regarding Westfield's conduct to support a substantive due process claim. The parties had been disputing GEFT's ability to erect the pole sign, and GEFT had unilaterally decided that Westfield's sign ordinances were unconstitutional. GEFT knew that Westfield did not allow its pole sign and still proceeded to perform its unauthorized work. Westfield's representatives simply were enforcing the valid sign ordinances when they confronted GEFT's employees and contractors and demanded that they stop working at the site. They continued their work until Westfield's attorney threatened arrest. Westfield argues that nothing in its conduct shocks the conscience, and there is no substantive due process violation.

Westfield further argues that, even if its threat of arrest was mistakenly unauthorized, the threat was reasonably justified to serve legitimate governmental interests in safeguarding the public's health and safety by stopping the construction of a structure that had not been subjected to any building or electrical safety inspections, protecting the community's aesthetic value, and minimizing risk to traffic safety. Again, Westfield's conduct is far from shocking the conscience in a constitutional sense.

Concerning adequate remedies at law and irreparable harm, Westfield asserts that this case is strictly about money, and GEFT has plainly requested money damages for its alleged injury. Therefore, GEFT has an adequate remedy, and it has not been and will not be irreparably harmed without a preliminary injunction. Westfield asserts it has a valid interest in guiding the growth and development of the community, and its local ordinances have as their purpose to protect the residents of Westfield and to promote the public health, safety, convenience, and general welfare of the community. Allowing GEFT to construct a pole sign in contravention of local ordinances would cause harm to the community as a whole, which outweighs any potential harm GEFT may claim while it allows the Court to address the allegations of the Amended Complaint on the merits. In GEFT's reply, concerning balancing the parties' interests and harms, GEFT argues that Westfield's public safety and traffic safety argument is belied by the fact that Westfield High School maintains two digital signs on its football stadium approximately

two miles north of GEFT's sign, facing the same road (U.S. 31/Meridian Street). Those signs advertise for commercial businesses and violate Westfield's UDO because they are off-premise signs and because the messages on the billboards change more than once an hour. The signs also violate INDOT's regulations by changing messages more than once every eight seconds. However, GEFT knows of no enforcement action against Westfield High School. GEFT asserts that the implication of this lack of action against Westfield High School is that there is no risk to traffic safety posed by digital billboards.

GEFT asserts that Westfield's actions have prevented work on the digital billboard, thereby preventing GEFT from exercising its right to commercial speech and denying GEFT revenue from that speech. It has incurred extra, unnecessary construction costs for mobilizing and remobilizing. GEFT argues a party can seek monetary and injunctive relief simultaneously, and a constitutional violation is presumed irreparable without an adequate remedy at law.

GEFT also argues that Westfield's Indiana Tort Claims Act argument is now moot because GEFT served a tort claim notice on January 25, 2018—one day before filing its reply brief in this litigation and more than two months after initiating this lawsuit. Regarding its abuse of process claim, GEFT acknowledges in a footnote that "its state tort claims could be subject to a 90-day waiting period set forth in the Indiana Tort Claims Act. If necessary, GEFT will dismiss

the state tort claims without prejudice and re-file later." (Filing No. 40 at 11, n.4.)

After reviewing the parties' arguments and evidence as well as the supporting case law, the Court determines that the issuance of a preliminary injunction is not warranted. While a leasehold interest in land is (as GEFT phrased it) a property interest "worthy of constitutional protection," GEFT also acknowledged at the beginning of its argument in its opening brief that GEFT's use of its property is subject to "legally enacted restrictive government laws." (Filing No. 19 at 10.) And as Westfield correctly pointed out, ordinances adopted by a city are presumptively valid until a court has determined them to be otherwise. *Hobble*, 575 N.E.2d at 696–97. GEFT cannot unilaterally decide that an ordinance is invalid and then disobey it. Westfield's UDO places certain restrictions on GEFT's use of its property. The UDO requires a property owner to obtain a permit to erect certain signs, and it also prohibits some signs. Although GEFT obtained an INDOT permit to erect its sign, INDOT's regulations explicitly note that local ordinances also apply. Thus, GEFT was required to comply with Westfield's UDO and obtain a local sign permit to erect its sign.

Without first obtaining a Westfield sign permit, GEFT put up a "no trespassing" sign and installed the large steel pole into the ground in October or early November 2017. Then on November 3, 2017, GEFT initiated this lawsuit, challenging the constitutionality of Westfield's UDO. Four days after GEFT initiated this lawsuit, Westfield posted its "stop work notice" on the

pole. Despite the "notice," GEFT responded to Westfield, stating that it believed the UDO was unconstitutional, and it intended to complete the work on the digital billboard within the next thirty days. The next day, Westfield responded to GEFT to explain that it was violating the UDO and directed it to remedy the violation within thirty days to avoid an enforcement action. Even though it already had initiated this lawsuit to seek the Court's intervention, and without waiting for any orders from the Court, GEFT unilaterally decided the UDO was unconstitutional and mobilized a construction team to finish its work on the digital billboard on December 16, 2017.

Given the facts adduced at this stage of the case regarding GEFT's unilateral determinations and wrongful actions as well as Westfield's responses to GEFT's persistent wrongful actions, the Court cannot conclude at this point that GEFT is reasonably likely to succeed on the merits of its due process claims. GEFT may or may not ultimately prevail on the merits, but having failed to meet this element, a preliminary injunction is not warranted. This determination also is based upon the timing and procedural history of GEFT's and Westfield's legal steps taken. GEFT's actions of knowingly violating the UDO, then later seeking this Court's intervention, and then again undertaking work in violation of the UDO, undermines the propriety of equitable relief before the case can be fully adjudicated.

In light of the Court's ruling on the Motion for Preliminary Injunction, the Court **grants** Westfield's

Motion for Restraining Order to the extent that it requests an order prohibiting GEFT from continuing any work on its pole and digital sign until after the Court rules on the constitutionality of the UDO and resolves this litigation on the merits.

## CONCLUSION

For the foregoing reasons, Westfield's Motion for Restraining Order (Filing No. 17) is **GRANTED**, and GEFT's Motion for Preliminary Injunction (Filing No. 18) is **DENIED**. There are a number of other pending motions in this case that relate to the Motion for Restraining Order and the Motion for Preliminary Injunction. These other pending motions request leave to file additional materials in connection with the Motions or request that a ruling be made by a certain date. These other pending motions are **DENIED as moot**: Motion to Strike Portions of the City's Post-Hearing Brief (Filing No. 60), Motion for Leave to Submit Supplemental Evidence (Filing No. 61), Objection to GEFT's Motion for Leave to Submit Supplemental Evidence (Filing No. 63), Motion for Temporary Restraining Order (Filing No. 65), and Motion for Ruling Before September 29, 2018 (Filing No. 74).

It is the Court's intent that the status quo be maintained until further order from this Court. GEFT is **ORDERED** to not continue any work on its pole and digital sign in Westfield until after resolution of this case on the merits.

**SO ORDERED.**

Date: 9/28/2018 /s/ Tanya Walton Pratt
TANYA WALTON PRATT,
JUDGE
United States District Court
Southern District of Indiana

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## APPENDIX C

**United States Court of Appeals**
**For the Seventh Circuit**
**Chicago, Illinois 60604**

May 23, 2019

JOEL M. FLAUM, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*
MICHAEL Y. SCUDDER, *Circuit Judge*

GEFT OUTDOORS, LLC,
*Plaintiff-Appellant,*

*v.*

CITY OF WESTFIELD, Hamilton
County, Indiana,
*Defendant-Appellee.*

Appeal from the United States District Court For The Southern District of Indiana

No. 1:17-cv-04063

**WALTON-PRATT, J.**

### ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by the plaintiff-appellant in the above case on May 8, 2019, no judge in active service has requested a vote thereon and all judges on the original panel have voted to deny the petition. The petition is therefore DENIED.