**In the**
**United States Court of Appeals**
**For the Seventh Circuit**

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NO. 16-3055

LEIBUNDGUTH STORAGE & VAN SERVICE, INC.,
*Plaintiff-Appellant,*

*v.*

VILLAGE OF DOWNERS GROVE, ILLINOIS,
*Defendant-Appellee.*

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 14 C 9851 – **Edmond E. Chang**, *Judge*.

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ARGUED MARCH 27, 2017 – DECIDED SEPTEMBER 24, 2019

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Before BAUER and EASTERBROOK, *Circuit Judges*, and DEGUILIO, *District Judge*.*

EASTERBROOK, *Circuit Judge*. An ordinance in Downers Grove, Illinois, limits the size and location of signs. Leibundguth Storage & Van Service contends that this ordinance violates the First Amendment to the Constitution (applied to the states by the Fourteenth) because it is riddled with exceptions and therefore is a form of content discrimination that the Village has not justified. See *Reed v. Gilbert*, 135 S. Ct. 2218

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* Of the Northern District of Indiana, sitting by designation.

(2015). But because the principal topic of the ordinance is commercial speech, the district court concluded that *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), rather than *Reed* supplies the rule of decision, and it found the ordinance valid. *Peterson v. Village of Downers Grove*, 150 F. Supp. 3d 910 (N.D. Ill. 2015). We conclude that, whether or not *Reed* applies, this does not do Leibundguth any good because it is not affected by the problematic exceptions.

Downers Grove has a comprehensive ordinance regulating signs. Section 9.020 sets out rules for all signs, including a rule prohibiting "any sign painted directly on a wall" (§ 9.020.P). Section 9.050.A sets a size limit: for buildings such as Leibundguth's, which are closer than 300 feet to a street, the maximum is 1.5 square feet per linear foot of frontage—which implies a limit of 159 square feet for Leibundguth's building. Section 9.050.C.1 provides that each business may have only one sign, though an amendment in 2015 allows businesses that face both a street and a railroad an extra sign on the railroad side. Section 9.030 creates exceptions: the ordinance does not require permits for holiday decorations (§ 9.030.D), temporary signs for personal events such as birthdays (§ 9.030.E), "[n]oncommercial flags" (§ 9.030.G) (flags can be used to send political messages), political and noncommercial signs that do not exceed 12 square feet (§ 9.030.I), "[m]emorial signs and tablets" (§ 9.030.K), and about a dozen more. These exclusions set up Leibundguth's argument

that the ordinance represents content discrimination prohibited by *Reed*.

The Village insists that the ordinance regulates commercial speech only. We need not decide which decision—*Reed* or *Central Hudson*—must give way when a commercial-sign law includes content discrimination. (One circuit recently held that *Reed* supersedes *Central Hudson*. See *Thomas v. Bright*, 2019 U.S. App. LEXIS 27364 (6th Cir. Sept. 11, 2019).) *This* ordinance is comprehensive. Section 9.010.B tells us so: "The regulations of this article apply to all signs in the village, unless otherwise expressly stated." And if that were not clear enough, the exceptions are revealing. Why exclude modestly sized political signs (§ 9.030.I) from the permit requirement unless they are included for other purposes?

Suppose we were to hold that commercial signs must be treated the same as flags and political signs. Leibundguth's problems come from the ordinance's size and surface limits, not from any content distinctions. One of Leibundguth's signs is painted on a wall; another is too large; a third wall has two signs (as the Village counts them); and the size of these signs, conceded to exceed 500 square feet, vastly exceeds the limit of 159 square feet for Leibundguth's building (and the limit of 12 square feet for political signs).

Let us start with the largest of Leibundguth's signs, which faces the railroad tracks—and which Leibundguth tells us leads to as much as 20% of its

revenue, by appealing to commuters who see the sign when going to and from work.


This sign is 40 feet long and 10 feet high, or 400 square feet. It is painted on a brick wall. The ordinance's size limit and no-paint-on-walls rules independently forbid this sign. It would fare no better if it were a flag or carried a political message. It exceeds 12 square feet, so it would not be saved by § 9.030.I. And the exemptions for flags (§ 9.030.G) and political signs pertain only to the permit requirement; they do not exempt flags or political signs from § 9.020.P, which bars signs painted on walls. Likewise with the exception for temporary signs (§ 9.030.E)—not that "temporary" is a form of content discrimination in the first place. Anyway, Leibundguth does not want to use temporary signs.

Leibundguth insists that the exclusions in § 9.030 remove the size and no-paint-on-walls rules for flags and other listed subjects. But that's not what § 9.030 itself says. It begins by stating that the excluded signs do not require permits; it does *not* say that rules for all signs stated elsewhere in the ordinance drop out.

Section 9.010.B says that all of the ordinance's rules apply to all signs unless they are "expressly" excluded; § 9.030 does not expressly remove any signs from the size and no-paint-on-walls rules. Leibundguth's argument rests on a report prepared by a Village official suggesting that the ordinance does not prohibit purely decorative murals and flags. But the Village itself disclaims this non-textual reading. The Village's understanding of its own ordinance carries the day, see *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992), in the absence of some indication that it has enforced the ordinance in a way that permits large political signs or flags painted on walls. See *Construction & General Laborers' Union v. Grand Chute*, 915 F.3d 1120 (7th Cir. 2019). And Leibundguth has not offered any evidence that the Village has enforced the ordinance as Leibundguth reads it, rather than as how the Village tells us the ordinance works.

A limit on the size and presentation of signs is a standard time, place, and manner rule, a form of aesthetic zoning. The Supreme Court has told us that aesthetic limits on signs are compatible with the First Amendment. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810–12 (1984). Like other time, place, and manner restrictions, an aesthetic rule must serve its ends; it cannot be arbitrary. The rule must be justified without reference to the content or viewpoint of speech, must serve a significant government interest, and must leave open ample channels for communication. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

As the district court explained, 150 F. Supp. 3d at 922–24, the Village gathered evidence that signs painted on walls tend to deteriorate faster than other signs (Leibundguth's own sign is full of chipped paint and flaking bricks) and, when revised or painted over, can become downright ugly. Old paint may show through; efforts to remove paint may leave a ghost image or bleach the brick so that the building becomes mottled. Leibundguth tells us that those effects are too slight to justify legislation, but *de gustibus non disputandum est*. ("There's no accounting for taste.") People's aesthetic reactions are what they are; if a large number of people find paint-on-brick ugly, and paint-over-paint-on-brick worse, this is a raw fact that a governmental body may consider. It need not try to prove that aesthetic judgments are right.

Likewise with size. Many people view signs as a necessary evil and believe that smaller = less evil. Unless the government has engaged in content or viewpoint discrimination, that aesthetic judgment supports legislation. The Village's ordinance contains content discrimination, but as we have explained that discrimination does not aggrieve Leibundguth. And the parties agree that enforcement of the sign ordinance leaves open plenty of ways to communicate. Advertising does not depend on applying paint to brick—and although 159 square feet of signage on Leibundguth's building is less than it prefers to use, 159 square feet is still a large sign. Leibundguth also is free to advertise in print or over the Internet.

The parties dispute how the Village's ordinance applies to the signs on two other faces of Leibundguth's building, but none of the possibilities poses a constitutional issue distinct from the ones we have already addressed. What we have said is enough to show that the ordinance, as applied to Leibundguth, does not violate the First Amendment.

AFFIRMED

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

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| ROBERT PETERSON and LEIBUNDGUTH STORAGE & VAN SERVICE, INC., | ) | |
| Plaintiffs, | ) | No. 14 C 09851 |
| v. | ) | Judge Edmond E. Chang |
| VILLAGE OF DOWNERS GROVE, | ) | |
| Defendant. | ) | |

**MEMORANDUM OPINION AND ORDER**

(Filed Dec. 14, 2015)

Plaintiffs Robert Peterson and Leibundguth Storage & Van Service, Inc. sued the Village of Downers Grove to challenge the constitutionality of the Village's Sign Ordinance. R. 1, Compl.[1] Plaintiffs contend that several sections of the Village's revised Ordinance, which was originally adopted in 2005 but later amended, violate the First and Fourteenth Amendments, as well as Article I, Section 4 of the Illinois Constitution.[2] Plaintiffs focus their challenge on the following restrictions

[1] Citations to the record are "R." followed by the docket number then the page or paragraph number.

[2] This Court has subject-matter jurisdiction over the federal issue under 28 U.S.C. § 331, and supplemental jurisdiction over the state-law claim under 28 U.S.C. § 1367(a).

in the Sign Ordinance: its restriction on painted wall signs, on signs that do not face a roadway or drivable right-of-way, and on the total sign area and number of wall signs permitted on a single lot. *Id.* Earlier in the case, the Court dismissed Peterson as named plaintiff (because really his corporation is the sole proper plaintiff), R. 29 at 10-12 (April 2015 Opinion), leaving Leibundguth Storage & Van Service, Inc. as the only remaining plaintiff. Both parties have now moved for summary judgment. R. 35, Def.'s Mot. for Summ. Judgment; R. 39, Pl.'s Mot. for Summ. Judgment. For the reasons set forth below, the Court grants the Village's motion, and denies Leibundguth's.

## I. Background

The nature of Leibundguth's claims are set forth in detail in the April 2015 opinion [R. 29] that denied the Village's motion to dismiss. *Peterson et al v. Village of Downers Grove*, 2015 WL 1929737, at *1-3 (N.D. Ill. April 27, 2015). The relevant facts are largely undisputed.

### A. Leibundguth's Signs

Robert Peterson is a resident of Downers Grove, Illinois. R. 38-4, Exh. 5, Peterson Depo. at 15. He has owned Leibundguth Storage & Van Service, Inc., which provides moving and storage services, since the mid-1980s. *Id.* at 24. Leibundguth operates out of a building located between Warren Avenue and the Metra

commuter-railway tracks in the Village of Downers Grove. R. 40, PSOF ¶ 5.[3]

On the building's north and south facing walls, signs can be found advertising Leibundguth's business. On the south wall, a sign has been painted directly onto the brick, which reads "Leibundguth Storage and Van Service / Wheaton World Wide Movers." PSOF ¶ 7; R. 10, Am. Compl. ¶ 16; Peterson Depo., Exh. B at 10. The company's phone number is also listed. Am. Compl. ¶ 16. The sign looks like this:

[3] Citations to the parties' Local Rule 56.1 Statements of Fact are "DSOF" (for the Village's Statement of Facts) [R. 37; R. 38]; "PSOF" (for Leibundguth's Statement of Facts) [R. 40]; "Pl.'s Resp. DSOF" (for Leibundguth's Response to the Village's Statement of Facts) [R. 40]; and "Def.'s Resp. PSOF" (for the Village's Response to Leibundguth's Statement of Facts) [R. 46]. In several instances, the parties submitted their Statement of Facts and their responses/replies to the opposing party's Statement of Facts in a single document. As a point of clarification, the paragraph numbers referenced in the Court's citations to these Statements refer to that portion of the document being referenced. For example, PSOF ¶ 1 refers to paragraph 1 of Leibundguth's Statement of Facts, which begins on page 16 of R. 40. Finally, where a fact is admitted, only the asserting party's statement of facts is cited; where an assertion is otherwise challenged, it is so noted.


*Id.* ¶ 1. The sign is 40 feet long, 10 feet high, and is directly visible to commuters riding by on Metra trains into and out of Chicago. *Id.* ¶ 16; PSOF ¶ 7. The sign does not face a roadway and is not visible to drivers. Am. Compl. ¶ 17; PSOF ¶ 5. According to Leibundguth, this sign brings in around 12 to 15 potential new customers each month, and generates between $40,000 and $60,000 in revenue per year, or about 15 to 20 percent of the company's annual revenue. Am. Compl. ¶ 18; PSOF ¶ 16.

On the front of the building, which faces north, Leibundguth has several signs. Leibundguth has another painted wall sign, which lists the company's name and phone number. Am. Compl ¶ 19; PSOF, ¶ 9. This sign is 40 feet long and 2 feet high, and is visible to drivers. Am. Compl. ¶ 19. It looks like this:


*Id.*

Leibundguth also has a separate sign (also on the front of the building) which spells out the company's name, "Leibundguth Storage & Van Service," in red and white (primarily white) hand-painted block letters. PSOF ¶ 11; Am. Compl. ¶ 21. Directly beneath those words is a rectangular sign, which advertises Leibundguth's relationship with "Wheaton World Wide Moving," a long-distance mover. PSOF ¶ 12. Neither of these signs is painted directly onto the building's exterior, but both face a roadway and can be seen by drivers. Am. Compl. ¶ 22. The portion of the sign spelling out the company's name is 19 feet long by two feet high, and the portion referencing Wheaton World Wide Moving is seven feet long by four feet high. Am. Compl. ¶¶ 20-21. These signs look like this:


*Id.* ¶ 21. The parties dispute whether the pictured sign(s) are one sign or two. Leibundguth argues two; the Village, one. PSOF ¶ 6; R. 46, Def.'s Resp. to PSOF ¶¶ 6, 11-12. In total, Leibundguth's signs cover more than 500 square feet of the building. Am. Compl. ¶ 42 (Leibundguth suggests they cover about 550 sq. ft.); R. 12, Ans. to Am. Compl ¶¶ 16, 19-20 (the Village asserts they cover about 665 sq. ft.).

### B. The Village's Sign Ordinance

In May 2005, the Village of Downers Grove amended its sign ordinance, reducing the amount of signage permitted and prohibiting certain types of signs altogether. DSOF ¶ 15. (The Village's sign ordinance is contained in Article 9 of the Village's municipal code; for convenience's sake, this Opinion will refer to Article 9 as the "Sign Ordinance.") The Sign Ordinance's stated purpose is "to create a comprehensive but balanced system of sign regulations to promote effective communication and to prevent placement of signs that are potentially harmful to motorized and

non-motorized traffic safety, property values, business opportunities and community appearance." R. 38-1, Exh. 2, Sign Ord. § 9.010(A).

Three of the Sign Ordinance's restrictions directly apply to Leibundguth's signs by banning *painted* wall signs; setting a cap on *total square footage* of signage; and setting a cap on the total *number* of wall signs. More specifically, the Ordinance prohibits "any sign painted directly on a wall, roof, or fence." *Id.* § 9.020(P). It limits the "maximum allowable sign area" for each property to 1.5 square feet per linear foot of frontage (two square feet per linear foot if the building is set back more than 300 feet from the street), in no case to "exceed 300 square feet in total sign surface area." *Id.* § 9.050(A). And finally, it limits the number of wall signs a lot may display to "one wall sign per tenant frontage along a public roadway or drivable right-of-way." *Id.* § 9.050(C)(1). As originally enacted, this last provision prevented a property owner from displaying a sign facing the BNSF railroad, because such a sign would not be facing a roadway or drivable right-of-way. After Leibundguth filed this lawsuit, however, the Village amended this portion of the ordinance to allow "lots with frontage along the BNSF railroad" to display "one additional wall sign" facing the railroad, but limited the sign area to 1.5 square feet per linear foot of frontage along the BNSF railroad right-of-way. Def.'s Br., Exh. B, Am. Sign Ord. § 9.050(C)(5).

Leibundguth also points to § 9.030 of the Village's Sign Ordinance to show that the restrictions that apply to it are content-based. Pl.'s Br. at 16-20. Section

9.030 of the Sign Ordinance exempts certain signs—not Leibundguth's—from needing to obtain a sign permit and subjects those signs, which it identifies based on the type of sign being displayed, to different size restrictions. Sign Ord. § 9.030. For example, it exempts (among other signs) Governmental Signs, Railroad and Utility Signs, Street Address Signs, Noncommercial Flags, Real Estate Signs, Decorations displayed in connection with a Village-sponsored event, "No Trespassing" Notices, "Political and noncommercial signs," and "Memorial signs and tablets" from needing to obtain a permit. *Id.* Some of the listed exemptions remain subject to size restrictions, such as "Political and noncommercial signs," which "may not exceed a maximum area of 12 square feet per lot," *id.* § 9.030(I), while others are not subject to any size restrictions at all, such as Governmental Signs and Noncommercial Flags, *id.* § 9.030(A), (G). None of the listed exemptions, however, are subject to the one wall-sign restriction in § 9.050(C) that Leibundguth is. The Village says that all signs (whether exempted under § 9.030 or not) remain subject to the prohibitions laid out in § 9.020, including the restriction on painted wall signs found in § 9.020(P) (but the square-footage and number-of-signs restrictions are not in § 9.020, so those restrictions do not apply to the exempted signs). DSOF ¶ 6.

Leibundguth's signs violate the Sign Ordinance in a number of ways. The Ordinance's ban on signs painted directly onto walls makes Leibundguth's Metra-facing advertisement and its similar, smaller sign on the front of the building unlawful. PSOF ¶¶ 8-9. The Ordinance

also only allows the company 159 square feet for all of its signs (calculated at 1.5 square feet per linear foot of frontage, because Leibundguth's building is not set back more than 300 feet from the street), far less than the more than 500 square feet of advertising the company currently displays. PSOF ¶¶ 8-9, 13; Am. Compl. ¶ 41. And, according to Leibundguth, the Ordinance also prohibits its combined block-letter wall sign and Wheaton World Wide Moving sign, because only one wall sign can be displayed on a given wall and these signs constitute two signs. PSOF ¶¶ 11-13. The Village, of course, disputes this last point, whether Leibundguth's block-letter wall sign and Wheaton World Wide Moving sign constitute one or two signs. Def.'s Resp. PSOF ¶¶ 11-12.

When enacted, the Sign Ordinance established a grace period, giving property owners and businesses until May 2014 to bring any non-conforming signs into compliance. DSOF ¶¶ 15-16; R. 37-4, Exh. 1D at 349, 352[4]. During that time, Leibundguth applied with the Downers Grove Zoning Board of Appeals for a variance that would allow the company to have a Metra-facing sign, painted wall signs, and total signage area that exceeded the maximum allowed under the ordinance. PSOF ¶ 18; R. 40-5, Exh. D at 2. The Zoning Board denied Leibundguth's request, and instead gave Leibundguth a four-month window (until April 2014) in which to paint over its painted wall signs with a solid color. PSOF ¶¶ 18-19; R. 40-2, Exh. A at 2-9. With the

[4] The page numbers associated with Exhibit 1D refer to the pagination in the PDF.

compliance period long over, and with Leibundguth's signs still not in compliance, Leibundguth could face fines of up to $750 per violation per day. Am. Compl. ¶ 63; R. 10-5, Exh. E, Village Muni. Code § 1.15(a). The Village has, however, agreed not to enforce the Sign Ordinance against Leibundguth and not to assess any fines during the pendency of these summary judgment motions. R. 11, Minute Entry dated Jan. 30, 2015.

### C. The Lawsuit

Leibundguth (and at the time, Peterson too) sued the Village in December 2014. R. 1, Compl. In Count One of Leibundguth's amended complaint, Leibundguth challenges the "sign ordinance's content-based restrictions." Pointing to § 9.030 explicitly and § 9.050 implicitly, Leibundguth alleges that the size and number restrictions included in the Village's Sign Ordinance are impermissible content-based restrictions that violate the First Amendment. R. 10, Am. Compl. ¶¶ 65-74. In Counts Two, Three and Four, Leibundguth challenges the Sign Ordinance's ban on painted wall signs; its ban on signs that do not face a roadway or drivable right-of-way (this provision has since been amended); and its limit on total signage area and on the number of permitted wall signs. *Id.* ¶¶ 75-95. According to Leibundguth, these restrictions violate the First Amendment because the Village lacks "a compelling, important, or even rational justification" for them, because they are not narrowly tailored to advance the Village's purported interests in traffic safety and aesthetics, and because they are more extensive than

necessary to advance the Village's interests. *Id.* ¶¶ 77-80, 84-87, 91-94. Leibundguth seeks a declaratory judgment that the Sign Ordinance violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section 4 of the Illinois Constitution; a permanent injunction against enforcing the Sign Ordinance; one dollar in nominal damages; and costs and attorneys' fees. *Id.* ¶¶ A-G.

## II. Legal Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating summary judgment motions, courts must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court may not weigh conflicting evidence or make credibility determinations, *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011), and must consider only evidence that can "be presented in a form that would be admissible in evidence" at trial, Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment has the initial burden of showing that there is no genuine dispute and that they are entitled to judgment as a matter of law. *Carmichael v. Village of Palatine*, 605 F.3d 451, 460 (7th Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S.

317, 323 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). If this burden is met, the adverse party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. On cross motions for summary judgment, the Court assesses whether each movant has satisfied the requirements of Rule 56. *See Cont'l Cas. Co. v. Nw. Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005); *see also Laskin v. Siegel*, 728 F.3d 731, 734 (7th Cir. 2013).

## III. Analysis

Leibundguth challenges the following restrictions in the Village's Sign Ordinance, which impact Leibundguth's signs: its restriction on painted wall signs, *see* Sign Ord. § 9.020(P); its requirement that wall signs face a roadway or drivable right-of-way, *id.* § 9.050(C); and its restriction on the maximum total sign area permitted on a given lot and on the number of wall signs that may displayed on a building, *id.* § 9.050(A) and (C). Leibundguth argues in the alternative that, in the event the Court finds that these restrictions do not violate the First Amendment as applied to Leibundguth, they nonetheless constitute facially impermissible content-based restrictions on speech. Pl.'s Br. at 16.

### A. Painted Wall Signs

Leibundguth's first challenge is to the Sign Ordinance's restriction on painted wall signs. Sign Ord. § 9.020(P). This section prohibits "any sign painted directly on a wall, roof, or fence." *Id.* According to

Leibundguth, this section violates the First Amendment because it does not advance "a compelling, important, or even rational" government interest, and it is not narrowly tailored to serve the Village's purported interests in traffic safety and aesthetics. Pl.'s Br. at 2.

Neither party disputes whether signs are a form of expression protected by the First Amendment, and for good reason. *See City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (noting that "signs are a form of expression protected by the Free Speech Clause" of the First Amendment). The Supreme Court has explained, however, that signs "pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *Id.* Thus, municipalities, like the Village, generally may "regulate the physical characteristics of signs," within reasonable bounds. *Id.*

Both parties agree that the Sign Ordinance's ban on painted wall signs constitutes a time, place, and manner restriction. Pl.'s Br. at 2; Def.'s Br. at 7. The Village may enforce a time, place, and manner restriction without violating the First Amendment if the restriction is: (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leaves open ample alternative channels of communication. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *DiMa Corp. v. Town of Hallie*, 185 F.3d

823, 828 (7th Cir. 1999). The Village bears the burden of proving that its restriction on painted wall signs meets these requirements. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000).

As to the first element, the Village has satisfied its burden: its ban on painted wall signs, § 9.020(P), is content-neutral. To be content-neutral, a regulation must not restrict speech "because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015). If a regulation "appl[ies] to particular speech because of the topic discussed or idea or message expressed," then that regulation is content-based. *Id.* at 2227. Likewise, if the government adopts a regulation of speech "because of disagreement with the message [the speech] conveys," then that regulation is similarly content-based. *Ward*, 491 U.S. at 791.

In this case, the Village's restriction on painted wall signs "is wholly indifferent to any specific message or viewpoint," *Weinberg*, 210 F.3d at 1037; it applies to *all* signs, regardless of their message or content. The first step to understanding this is to recognize that the Village's Municipal Code broadly defines a "sign" as:

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

R. 40-6, Exh. E, Village Muni. Code § 15.220. This expansive definition does not on its face refer to the content of speech, either by singling out a *viewpoint* or a particular *topic* of speech. Next, the Village regulates signs in Article 9 of the Municipal Code (this Opinion has been calling Article 9 the "Sign Ordinance" for convenience). After setting forth the Sign Ordinance's general purpose, *see* Sign Ord. § 9.010, the Ordinance then bans certain types of signs, again without reference to the viewpoint or topic of the sign's message. Entitled "Prohibited Signs and Sign Characteristics," Section 9.020 sets out 21 categories of banned signs, including "any sign painted directly on a wall, roof, or fence." § 9.020(P) (as amended).[5] There is no exception in Section 9.020: all painted wall signs are banned, regardless of a sign's content.

It is true that the next section of the Sign Ordinance, § 9.030, exempts certain types of signs from being subject to the Village's permit application and fee requirements—and the exemptions do, in some instances, refer to the content of the signs. To back-up for a moment, the Sign Ordinance does generally require that persons who want to display a sign apply for a permit to do so. Sign Ord. § 9.080(A). Unless the Sign Ordinance "expressly" says otherwise, "all signs require a permit." § 9.080. The permit-application process includes a "plat of survey" and a permit fee. § 9.080(A), (B). A copy of the application, which apparently is used

[5] In July 2015, the Village amended this section to remove a previous exception for certain business districts in the Village. R. 36-2, Exh. B, Am. Sign Ord.

for a wide variety of Village-required permits and thus is not specific to signs, is attached to this Opinion, as is the schedule of user fees. There is nothing more specific in the Sign Ordinance about the requirements for issuance of a permit, but in the same section, the Sign Ordinance does require that signs (a) conform with the National Electrical Code (if the sign has electrical wiring and connections); (b) be designed and constructed to withstand wind pressure of at least 40 pounds per square foot and to receive "dead loads" as required in the Village's building code; and (c) for signs that extend over, or could fall on, a public right-of-way, the applicant must agree to indemnify the Village and to obtain certain insurance coverage. § 9.080(C), (D), (E). So the Sign Ordinance does require a permit-application process for signs, absent an express exemption.

Returning to Section 9.030, that particular section does exempt certain types of signs from the permit-application process. And, as noted earlier, some of the exemptions do refer to the content of the signs. *E.g.*, § 9.030(B) (public-safety signs), § 9.030(E) (temporary signs at a residence commemorating a "personal" event, such as a birthday), § 9.030(G) ("Noncommercial flags" of a government), § 9.030(I) ("Political signs and noncommercial signs," within certain size limits). But that does not mean that the ban on painted wall signs—contained in § 9.020 of the Sign Ordinance—is content-based. The ban applies to *all* signs, even those that are not subject to the permit-application requirement. Nothing in the text of § 9.020 suggests that the prohibited signs in that section are anything but

completely banned, even if the sign is one of the types exempted in § 9.030. In other words, the only thing that § 9.030 does in categorizing certain types of signs is to exempt those signs from the permit-application process. For example, if someone wanted to display a political or noncommercial sign, the sign would be exempt from the permit-application process (assuming it met the other requirements detailed in § 9.030), but § 9.020 would still ban the sign from being painted directly on a wall. Nor is there anything in the text of either § 9.030 or § 9.080 that purports to override the complete ban of § 9.020. So the painted-wall ban does not single out a certain message for different treatment, nor does it require consideration of the content of the speech in order to apply it.[6] There is also no

[6] In resisting the content-neutral text of the Sign Ordinance's ban against painted wall signs, Leibundguth points to a Staff Report authored by the Village's Planning Manager, Stanley Popovich. According to Leibundguth, the report shows that flags and murals are allowed to be painted directly on walls. Pl.'s Br. at 3; R. 47, Pl.'s Reply Br. at 6. The report was submitted as a recommendation on the proposed 2015 amendments to the Sign Ordinance. *See* R. 36-2, Exh. B, 2015 Staff Report. In the report, Popovich does say that purely "decorative" flags and murals are not subject to the ban. 2015 Staff Report at 3 ("There are instances of flags and murals painted on buildings and these are permitted by the code on the basis that they are decorative, and do not convey constitutionally protected commercial or non-commercial speech."). But the report simply states that conclusion without any discussion of the Sign Ordinance's text. *See id.* As discussed above, the actual text of the pertinent provisions of the Sign Ordinance contains no exception to the ban on painted wall signs. Indeed, the Village concedes that flags and murals that meet the definition of a "sign" *are* subject to the painted wall sign restriction. R. 45, Def.'s Reply and Resp. Br. at 1. In light of municipal code's broad definition of a "sign," *see* R. 40-6, Exh. E,

evidence to suggest that the Village adopted this restriction because of disagreement with the messages conveyed in painted wall signs. Accordingly, because the Village's restriction on painted wall signs applies to all signs, regardless of their content, the restriction is content-neutral.

The Court must next consider whether the Ordinance's restriction on painted wall signs is narrowly tailored to achieve a significant government interest. It is this prong that the parties most contentiously dispute. The Village generally asserts that two governmental interests underlie the restrictions in its Sign Ordinance: traffic safety and aesthetics. *See* Def.'s Br. at 8-9. The Village then specifies, in a footnote, that "[f]or purposes of Section 9.020.P" the relevant governmental interest is "solely . . . aesthetics." *Id.* at 8 n.4.[7] Based on that concession, the Court will focus its analysis on aesthetics only. It is well settled that a town's interest in aesthetics is a significant governmental interest. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805-06

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Village Muni. Code § 15.220, it is difficult to conceive of a flag or mural that would not be considered a "sign," despite the note in the Staff Report.

[7] The Village's concession on this point is oddly worded; it says that the "focus of this pleading" (its brief) is "solely on aesthetics." Def.'s Br. at 8 n.4. Regardless of what is meant by that, even if the Village *did* want to rely on traffic safety as a purported justification for the painted wall sign ban, the Village develops no argument and points to no record evidence that *painted* wall signs pose some special traffic-safety problem that differs from non-painted signs.

(1984) ("it is well settled that the state may legitimately exercise its police powers to advance esthetic values . . . [and] municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression."); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (describing both "traffic safety" and "the appearance of the city" as "substantial government goals"). So the *significance* of the government interest is satisfied—the only question is whether the Village's ban on painted wall signs is narrowly tailored to further that aesthetic interest.

"A regulation is narrowly tailored if it 'promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Weinberg*, 310 F.3d at 1040 (quoting *Ward*, 491 U.S. at 799). "[A]n ordinance need not be the least restrictive method for achieving the government's goal" in order to satisfy the narrowly tailored prong. *Id.* Although the Village cannot "blindly invoke" its concerns without more, *Weinberg*, 310 F.3d at 1038, the burden to put forth evidence supporting a content-neutral speech restriction of this kind is "not overwhelming," *DiMa Corp.*, 185 F.3d at 829. For example, "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* (internal quotation marks omitted). *See*

*also City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1554 (7th Cir. 1986).

Leibundguth's primary challenge is to the sufficiency of the evidence offered by the Village to justify its need for its restriction on painted wall signs. The Village does "ha[v]e the burden of showing there is evidence supporting its proffered justification," which in this case is aesthetics. *Weinberg*, 310 F.3d at 1038. And although the evidence does not need to be "overwhelming," the Village does need to show that it did more than "blindly invoke" aesthetic concerns to support its restriction on painted wall signs. *Id.* But in this case, the Village has satisfied its burden. Before the Village implemented its Sign Ordinance, it took hundreds of photographs of signs both around the village, as well as in nearby towns. R. 37-4, Exh. 1D at 160-348[8]. The Village documented the various sign styles and structures in use by the community and on several occasions made note of aesthetic preferences. *See*, *e.g.*, *id.* at 326. More to the point, in a Staff Report prepared for the Village's Plan Commission, the Village specifically discussed the aesthetic problems associated with *painted* wall signs. *See* R. 36-3, Exh. C, 2015 Staff Report. The Report explains that painted wall signs "present numerous issues, including permanence, on-going maintenance and water damage to the underlying structure;"[9] that the typical removal processes for

[8] The page numbers associated with this exhibit refer to the pagination in the PDF.

[9] The Report explains in detail why water damage is a special problem with paint on bricks: the paint traps moisture on the

painted wall signs "are very caustic and can cause significant damage to the brick," "[i]n many cases" leaving a "ghost sign" on the wall; and that "[t]ired, faded, chipped wall signs painted directly onto wood or masonry are perceived by many . . . as presenting a negative face to the commercial vitality of the community." *Id.* at 3-5. The Report also sets forth a photographic example of what the "ghost" sign problem looks like and what the water damage problem looks like (given the Village's ban, the exemplar photos are not actually from signs in the Village). *Id.* at 4, 5. Although this Report did not come out until the Sign Ordinance was amended in 2012, it nevertheless supports the Village's conclusion that painted wall signs pose specific aesthetic problems that justify the ban in § 9.020(P). On top of all this, the Village also offers photos of Leibundguth's railway-facing, painted wall sign, and those photos do show some of the fading and chipping aesthetic problems discussed by the Staff Report. R. 36-4, Exh. D at 7-9 (photos taken on July 22, 2015). All of this evidence together shows that the Village did not blindly invoke its aesthetic concerns, but rather that it carefully documented and considered the current appearance of signs around the community and the impact different types of signs, including painted wall signs, have on the town's general appearance. The Village has provided sufficient evidence to justify its need for a restriction on painted wall signs.

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brick's surface, and when the water freezes and expands, the ice shears the face of the brick. 2015 Staff Report at 4.

The Village's painted wall sign restriction is also narrowly tailored to serve the Village's interest in aesthetics. The Village spent more than a year in deliberation and dialogue with Village residents and businesses regarding the Sign Ordinance, as reflected in the Village's meeting minutes. *See*, *e.g.*, DSOF ¶¶ 13-14; R. 37-1, Exh. 1A at 49-104.[10] Recognizing the problems created by painted wall signs, the Village determined that the best way to eliminate the harm caused by painted wall signs was to ban them. This was probably the only effective way to address the aesthetics problem posed by painted wall signs. *See Taxpayers for Vincent*, 466 U.S. at 808 ("By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy. . . . It is not speculative to recognize that [posted signs] by their very nature, wherever located and however constructed, can be perceived as an esthetic harm." (internal quotation marks and citation omitted)). In arguing to the contrary, Leibundguth does not, except for one immaterial exception, actually attempt to explain how the Village could adopt some other, narrower restriction and still serve its concern over aesthetics. Pl.'s Br. at 4-5.[11] Really,

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[10] The page numbers associated with this exhibit refer to the pagination in the PDF.

[11] The immaterial exception is in response to the Village's unpersuasive argument that striking down the painted wall sign ban would prevent the Village from banning spray-painted signs. Pl.'s Br. at 3-4. Of course it would be narrower to ban only spray-painted signs, but luckily for the Village, the Village more broadly argues (persuasively) that the aesthetic problems posed by painted wall signs are not limited to *spray* paint. *See* 2015 Staff Report at 3-5.

Leibundguth just argues that the Village's concerns are not genuine concerns because (1) painted murals are allowed, Pl.'s Br. at 5, and (2) the Village does not ban painting on brick walls, it just bans painted wall signs, *id.* at 4. But on the first point, this Opinion earlier explained why there is no exemption for murals. *Supra* at 14-15, 15 n.6. And on the second point—which, again, is not really an argument on narrow tailoring, so much as it is an argument against the genuineness of the aesthetic concern—the Village reasonably could conclude that a sign, which is by definition a display that attracts attention (and indeed is designed to attract attention), poses a more serious aesthetic problem that [sic] just a painted wall. The Village's restriction on painted wall signs is narrowly tailored to advance its interest in aesthetics.

Moving on to the final element of the time-place-and-manner test, the parties do not dispute whether the Village's ban on painted wall signs leaves open ample alternative channels of communication, and for good reason. The Village's restriction on painted wall signs prohibits just *painted* wall signs; it does not prohibit other types of wall signs. In fact, the Sign Ordinance expressly permits residents and businesses to put up wall signs if they wish to do so, they just cannot directly paint the sign on the wall. Sign Ord. § 9.050(C). The Ordinance also allows businesses to use a variety of other types of signs, such as window signs, awning signs, and under-canopy signs. *Id.* § 9.050(F)-(H). The Village has left open ample alternative channels through which commercial entities, like Leibundguth,

can advertise their businesses. This element is satisfied.

Because the Village has satisfied its burden—at least as to its interest in aesthetics—under the First Amendment, the Village's ban on painted wall signs is constitutional. The Village's motion for summary judgment is granted as to Leibundguth's claim that the ban on painted wall signs violates the First Amendment.[12]

### B. Restriction on Wall Signs Facing a Roadway or Drivable Right-of-Way

Leibundguth's next challenge is to the Ordinance's requirement that wall signs face a roadway or drivable right-of-way. *See* Sign Ord. § 9.050(C)(1). When originally adopted, this requirement precluded those lots adjacent to the Metra railroad (like Leibundguth's)

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[12] The Village suggests that in the event this Court determines that the Ordinance's restriction on painted wall signs is valid, the remainder of Leibundguth's complaint becomes moot because Leibundguth—after removing its painted wall signs—will only have one remaining sign, which meets the Ordinance's restrictions. Def.'s Br. at 14. This, however, does not moot the remainder of the complaint, because Leibundguth still currently has *all* three signs on its building. Until Leibundguth removes the painted wall signs, the company remains in violation of the restrictions in § 9.020(P) as well as the restrictions in § 9.050. What's more, Leibundguth is entitled to appeal this Court's holding that the ban on painted wall signs is valid, so even if Leibundguth removes the painted wall signs, the company can present a live, non-moot dispute because the company would want to paint the signs back onto the walls (and, in any event, perhaps Leibundguth will win a stay of the decision pending appeal). The remainder of the complaint is not moot.

from displaying wall signs that faced the railroad but did not face a roadway or drivable right-of-way. After Leibundguth filed suit, however, the Village amended § 9.050(C). In July 2015, the Village added a provision allowing "lots with frontage along the BNSF railroad right-of-way"—like Leibundguth's—to display "one additional wall sign" facing the railroad, provided that the sign does "not exceed 1.5 square feet per linear foot of tenant frontage along the BNSF railroad right-of-way." Am. Sign Ord. § 9.050(C)(5). Due to this amendment, the Village argues, Leibundguth's claim here—that the Sign Ordinance's ban on signs facing the Metra violates the First Amendment—is moot. Def.'s Br. at 15.

The Village is correct. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). For claims seeking only prospective relief, the repeal of a challenged ordinance ordinarily renders that case moot "unless there is evidence creating a reasonable expectation that the City will reenact the ordinance or one substantially similar." *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003) (citing *Rembert v. Sheahan*, 62 F.3d 937, 940 (7th Cir. 1995), *Thomas v. Fiedler*, 884 F.2d 990, 995 (7th Cir. 1989)). *See also Zessar v. Keith*, 536 F.3d 788, 793 (7th Cir. 2008) ("[A]ny dispute over the constitutionality of a statute becomes moot if a new statute is enacted in its place during the pendency of the litigation, and the plaintiff seeks only prospective relief."). The

same holds true for when a municipality amends a statute, at least so long as the amended statute "clearly rectifies the statute's alleged defects." *Rembert v. Sheahan*, 62 F.3d 937, 940-41 (7th Cir. 1995).

In this case, the Village's amended provision, § 9.050(C)(5), rectified the Sign Ordinance's alleged defect on the railroad-facing ban. The Ordinance no longer bans wall signs facing only the Metra railway. Now, lots with railroad frontage *are* allowed to display a wall sign facing the railroad even if that sign does not also face a drivable right-of-way. Am. Sign Ord. § 9.050(C)(5). Thus, Leibundguth is no longer precluded from displaying a wall sign that faces only the Metra tracks, as he complains. There is also no evidence in the record to show that the Village is likely to repeal its amended provision; in fact, Leibundguth does not even argue that the Village is likely to reenact its ban. And while the Village did amend the ordinance to moot this claim after Leibundguth filed suit, courts have held that the altering of an ordinance in response to litigation "does not alone show the city's intent to later reenact the challenged ordinance." *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir. 2007). *See also Fed'n of Adver. Indus. Representatives, Inc.*, 326 F.3d at 929 (ruling that where a municipality appears to be voluntarily amending a statutory provision in order to fashion an ordinance that passes constitutional scrutiny, it is proper to presume that the municipality does not intend to reenact the same or a substantially similar unconstitutional provision). Thus, without more, there is no reasonable basis to

believe that the Village will reenact its ban on wall signs facing the Metra railway. Leibundguth's claim is moot as to the declaratory and injunctive relief Leibundguth requests in its amended complaint. *Id.* ("If the plaintiff's only claims seek to require government officials to cease allegedly wrongful conduct, and those officials offer to cease that conduct, then the claims should be dismissed as moot, absent some evidence that the offer is disingenuous."). To the extent Leibundguth wishes to challenge the amended section of the Ordinance and to again request declaratory and injunctive relief on the revised Ordinance, Leibundguth must amend its complaint to do so (though there does not seem to be a practical reason to do so, at least not as to the revised Ordinance's authorization of a railroad-facing sign, as that is what Leibundguth wanted).

It is true that Leibundguth did not seek just declaratory and injunctive relief in its amended complaint. Leibundguth also sought one dollar in nominal damages in connection with "the violation of [its] constitutional rights," which presumably includes a violation resulting from the Village's ban on wall signs facing the Metra. *See* Am. Compl. ¶ D. A plaintiff who has been deprived of a constitutional right is entitled to nominal damages, as Leibundguth claims, even absent actual damages. *Hessel v. O'Hearn*, 977 F.2d 299, 302 (7th Cir. 1992). The problem for Leibundguth, however, is that the Village never did commit a constitutional violation of Leibundguth's rights because the Village never enforced its short-lived ban on signs facing only the Metra. The ban, when in effect, could have

impacted only Leibundguth's painted wall sign on the back of its building; the sign facing the Metra. But that sign was in place before the ordinance was enacted, remained in place after the enactment, and still remains in place today. Leibundguth was not required to change it; Leibundguth was never precluded from speaking through that sign; and importantly, Leibundguth was never fined for having a non-conforming sign when the ban was in effect. Rather, the Village agreed not to fine Leibundguth during this case's pendency. R. 10. So long as the Village will not fine Leibundguth for having a Metra-facing sign during the time the ban was in effect, Leibundguth's request for nominal damages is likewise moot. *See Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1029-33 (E.D. Wis. 2008). *See also Carey v. Piphus*, 435 U.S. 247, 266 (1978) (explaining that nominal damages are available to "vindicate[] deprivations of certain 'absolute' rights that are not shown to have caused injury"). Accordingly, the Court dismisses this claim as moot.

### C. Restriction on Total Sign Area and the Number of Permitted Wall Signs

Leibundguth's next challenge is to the ordinance's restriction on the total signage area allowed under § 9.050(A), and on the number of wall signs permitted under § 9.050(C). Section 9.050(A) limits the maximum allowable signage area per lot to "1.5 square feet per linear foot of tenant frontage" for buildings which are set back 300 feet or less "from the abutting street right-of-way," and "2 square feet per linear foot of

tenant frontage" for buildings set back more than 300 feet. *See* Sign. Ord. § 9.050(A). Section 9.050(C), which applies just to *wall* signs, limits the number of wall signs a "business or property owner" may display to "one wall sign per tenant frontage along a public roadway or drivable right-of-way." *Id.* § 9.050(C)(1). According to Leibundguth, these size and number restrictions violate the First Amendment because they do not serve even a rational government interest, are not narrowly tailored, and are not the least extensive means necessary to achieve the Village's interests. Am. Compl. ¶¶ 91-94. Leibundguth challenges these restrictions both on their face and as applied. The Court will address Leibundguth's as applied challenge first, and its facial overbreadth challenge second.

As a threshold matter, the Court must determine the proper framework to use in analyzing these restrictions. As the Court explained in its April 2015 order addressing the Village's motion to dismiss, the appropriate level of scrutiny here is intermediate scrutiny. R. 29, April 2015 Order, at 17-19; *see also Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n*, 447 U.S. 557, 562 (1980). Both parties agree that as far as the restrictions in § 9.050 are concerned, they restrict only commercial speech. The Village adopted this position in its motion to dismiss briefing, *see* R. 25 at 4 (explaining that "only three specific commercial sign regulations prohibit [Leibundguth's] commercial signs"); and neither party disputes it now, *see* Def's Br. at 15; Pl's Br. at 5. Commercial speech, although of course worthy of First Amendment protection, is entitled only

to intermediate scrutiny, *see Central Hudson*, 447 U.S. at 562; therefore, the restrictions in § 9.050 need only satisfy the requirements of the Supreme Court's *Central Hudson* test in order to be valid under the First Amendment, *see id.*

Before addressing the merits of the Village's restrictions under *Central Hudson*, however, it is worth discussing a recent Supreme Court decision that was issued after this Court's opinion on the dismissal motion. In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Supreme Court held that a town's sign code was unconstitutionally content-based because it applied different restrictions to signs depending on the sign's content. 135 S. Ct. at 2231-32. In *Reed*, a majority of the Supreme Court explained that a speech regulation would be considered content-based in one of two ways: first, if the regulation, on its face, "applies to particular speech because of the topic discussed or the idea or message expressed," then that regulation is content-based. *Id.* at 2227. This is so "even if the regulation does not discriminate among viewpoints within that subject matter." *Id.* at 2230. Second, if a regulation is facially neutral, but cannot be "justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message the speech conveys," then that regulation is likewise content-based. *Id.* at 2227 (internal quotations omitted). Applying these principles to the town's sign code in *Reed*, the Supreme Court concluded that the distinctions the code drew between different types of signs—for example, Ideological Signs, Political

Signs, and Temporary Directional Signs—were content-based because they "depend[ed] entirely on the communicative content of the sign," *id.* at 2227, and that because the code favored certain kinds of speech (*e.g.*, ideological signs) over other kinds of speech (*e.g.*, temporary directional signs), its restrictions had to be subject to strict scrutiny, *id.* at 2227-31.

Given how recently *Reed* was decided, its reach is not yet clear. Although *Reed* broadly states that content-based restrictions must be subject to strict scrutiny, *see id.* at 2231, even if there is no viewpoint discrimination and even if the speech regulation differentiates just as to particular *topics*, it remains to be seen whether strict scrutiny applies to *all* content-based distinctions. As pertinent here, the question would be whether strict scrutiny applies to *commercial*-based distinctions like those at issue in § 9.050(A) and (C). There are certain broad statements in *Reed* that could be read that way, *see id.* at 2226 ("Content-based laws [are] unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."), but other statements tug the other way, *id.* at 2232 ("Not all distinctions are subject to strict scrutiny, only content-based ones are."). Yet the concurring opinions warn that the majority's test for how to tell what is content-based and what is not could result in commercial-speech regulation being deemed content-based. *See id.* at 2235 (Breyer, J., concurring in judgment) ("Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable . . . regulations by

relying on this Court's many subcategories of exceptions to the rule," such as, "for example, . . . commercial speech."); *id.* at 2236 (Kagan, J., concurring in judgment) ("Says the majority: When laws single out specific subject matter, they are facially content based; and when they are facially content based, they are automatically subject to strict scrutiny."). But the majority never specifically addressed commercial speech in *Reed*, which is not surprising, because the Supreme Court did not need to address that issue: all of the restrictions at issue in *Reed* applied only to *non*-commercial speech. What is important for this case is that, absent an express overruling of *Central Hudson*, which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny—which are directly applicable to the commercial-based distinctions at issue in this case—binding. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of th[e] [Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court . . . should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions."). Accordingly, notwithstanding any broad statements in *Reed*, the restrictions in § 9.050(A) and (C) still only need to survive *Central Hudson's* intermediate scrutiny test.

With the proper test identified, it is time to apply it. *Central Hudson* lays out a four-step analysis for determining whether restrictions on commercial speech are valid under the First Amendment. *Central Hudson*,

447 U.S. at 566. First, for commercial speech to even be entitled to First Amendment protection, *Central Hudson* instructs that the speech must not itself comprise unlawful activity (such as being fraudulent) and must not be misleading. *Id.* If the speech satisfies this requirement, then the burden falls on the government to show (1) that its asserted interest in regulating the speech is "substantial," (2) that its regulation "directly advances" the government's asserted interest, and (3) that its regulation is "not more extensive than is necessary to serve that interest." *Id.*

As to the threshold element, Leibundguth's commercial speech—its signs advertising its business—are entitled to First Amendment protection. Leibundguth's signs concern a lawful activity: moving and storage; and they are not false or misleading. Before conducting discovery, the parties did not dispute whether Leibundguth's signs were truthful. Now, however, the Village asserts that one of Leibundguth's signs is false and misleading—the sign on the back of Leibundguth's building facing the Metra—because it misidentifies the name of Leibundguth's partner company, Wheaton World Wide Moving. *See* Def.'s Br. at 16. The Village points out that the sign announces the partner-company name as Wheaton World Wide *Movers*, when in fact the company's name is Wheaton World Wide *Moving*. *Id.*; DSOF ¶ 25. Maybe a very discerning grammarian would wonder whether the noun "Movers" is equivalent to the gerund "Moving" (or is "Moving" a present participle in the sign?) But to every other observer, this slight difference is not false or misleading,

at least not in the commercial-speech sense. The requirement that commercial speech not be false or misleading is designed to protect consumers from deceit or misinformation. *See Central Hudson*, 447 U.S. at 563. The Village does not dispute that there is no registered company under the name Wheaton World Wide Movers, *see* Pl.'s Br. at 6, so Leibundguth is not trying to feed on the reputation of another company. Nor has the Village otherwise submitted any evidence showing that anyone is likely to be misled by this error, or tricked into thinking Leibundguth has a relationship with one moving company when in reality it has a relationship with another. Because none of Leibundguth's signs are false or likely to deceive the public, they are all entitled to First Amendment protection. *Central Hudson*, 447 U.S. at 563 (explaining that there is no constitutional problem with banning "communication [that is] more likely to deceive the public than inform it"); *see also In re R.M.J.*, 455 U.S. 191, 203 (1982) (explaining that for *Central Hudson* purposes, "inherently misleading" advertising "may be prohibited entirely").

Moving on to the next element, the question is whether the interests the Village advances—traffic safety and aesthetics—are substantial. It is well settled that they are. *See Metromedia, Inc.*, 453 U.S. at 508 ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial government goals."); *see also Taxpayers for Vincent*, 466 U.S. at 806 (recognizing that towns may ban certain signs in furtherance of a "weighty" interest "in

proscribing intrusive and unpleasant formats for expression"). To be sure, Leibundguth disputes whether the record shows that those problems are actually posed by the size and number of signs targeted by the ordinance, and that dispute is discussed next, but this part of *Central Hudson* is satisfied because aesthetics and traffic safety qualify as substantial government interests.

The third element of *Central Hudson* asks whether the Village's restrictions in § 9.050(A) and (C) directly advance the Village's proffered interests in traffic safety and aesthetics. A regulation infringing commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Central Hudson*, 447 U.S. at 564). Put differently, this burden "is not satisfied by mere speculation or conjecture; rather the governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*; *see also Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999). It is here that the Village's restrictions falter, although only in part and not fatally. On the Village's purported interest in traffic safety, the Village has failed to provide sufficient evidence to prove that the signs of the targeted size and number pose a traffic-safety problem, or to show that the Village's restrictions advance its interest in traffic safety "in any direct [or] material way." *Edenfield*, 507 U.S. at 771. The Village has not

provided any studies, police reports, or even anecdotal stories to show that the traffic harms it recites are real. *See id.* (concluding that the regulations at issue were not narrowly tailored to serve the Board's purported interests where the Board presented no studies or anecdotal evidence to show that its interest was advanced by its restrictions, and where many states failed to impose a similar restriction). Nor has it produced any evidence demonstrating that restricting the size and number of commercial signs, but not other signs (*e.g.*, non-commercial flags, governmental signs, or decorations temporarily displayed in connection with a Village-sponsored event, *see* Sign Ord. § 9.030), will alleviate this alleged harm to a material degree. *See City of Cincinnati v. Discovery Network*, 507 U.S. 410, 424 (1993) (rejecting purported interest where distinction between commercial and noncommercial speech bore "no relationship whatsoever to the particular interests that the city has asserted"). Without any evidence showing that the targeted signs pose a traffic safety problem, the Village cannot show that its restrictions in § 9.050 directly advance that interest. *See Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998).

It is true that the Village attaches treatises and sign-industry publications to its brief, which it asserts shows that sign regulations—like those at issue in § 9.050—directly impact traffic safety. *See* R. 38-13, Exh. 14, Treatises. But the real problem with the Village's presentation is that it fails to develop any actual argument based on these treatises or to explain how these treatises support its contention that traffic

safety is a real problem for the Village. In one sentence—and one sentence only—the Village proffers that these treatises show that "limiting the size and number of signs *can* enhance traffic safety and aesthetics," Def.'s Br. at 17 (emphasis added), but the fact that such restrictions *can* improve traffic safety does not show that the traffic safety harms the Village recites are real or that the Village's restrictions in § 9.050 operate to alleviate those harms to a material degree. Without a developed argument, actually analyzing the underlying treatises and publications, the Court cannot accept "speculation or conjecture" as proof that the Ordinance's restrictions advance the Village's interest in traffic safety. *Edenfield*, 507 U.S. at 770-71. Accordingly, these treatises do not save the Village's traffic safety interest.

The Village also cites to several sign codes from surrounding towns, suggesting that because those towns imposed size and number restrictions in the name of traffic safety, the Village's interest in traffic safety must likewise be real. Def.'s Reply and Resp. Br. at 9. But the Village's argument again falls short. In order for these other sign codes to provide the support the Village needs here, those codes must do more than simply cite traffic safety as a governmental interest (which is exactly what the Village has done here), they must provide some sort of evidence showing that traffic safety is advanced by restrictions like the ones the Village has imposed here. To be sure, this evidence need not be extensive; it can be in the form of studies performed by those other locales or even by anecdotes

from those towns. *See Lorillard Tobacco v. Reilly*, 533 U.S. 525, 555 (2001) (noting that "litigants [can] justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, . . . [by] relying on history, consensus, and 'simple common sense' "). But simply noting that other locales cite to traffic safety in their sign codes is insufficient. The Village has failed to point the Court to anywhere in those sign codes showing the existence of a relationship between traffic safety and regulations limiting the size and number of signs. And again, absent some sort of evidence showing that the Village's restrictions in § 9.050(A) and (C) alleviate to at least some degree the Village's interest in traffic safety, the Village's restrictions in § 9.050(A) and (C) cannot be said to directly advance that interest.

The Village's interest in aesthetics, however, saves the Sign Ordinance. Unlike with its interest in traffic safety, the Village does have a sufficient basis for believing that its restrictions in § 9.050(A) and (C) help "enhance the physical appearance of the Village"—one of the alleged goals of the Village's Sign Ordinance. Sign Ord. § 9.010(A)(3). As noted earlier in the Opinion, before enacting the Ordinance, the Village took hundreds of pictures of commercial signs around the community, spoke with several village members regarding the different signage currently in use by town residents and businesses, and even took pictures of signs in surrounding communities for comparison purposes. R. 37-4, Exh. 1D at 160-348; DSOF ¶¶ 13-14. Because the Village spent time studying the appearance

of signs in its town (as well as in other towns), the Village knew how the town's commercial signs looked and how it wanted to change those signs to improve the town's overall aesthetic appeal. This shows that the aesthetic harms the Village cites are not just mere conjecture, but rather that they are real harms that can be alleviated by placing restrictions on the size and number of signs that may be placed on buildings in the village. *See Metromedia*, 453 U.S. at 510 ("It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'"); *Taxpayers for Vincent*, 466 U.S. at 807 (concluding that a complete ban on the posting of signs on public property directly advanced a town's interest in preventing visual clutter); *see also View Outdoor Advertising, LLC v. Town of Schererville Bd. of Zoning Appeals*, 86 F. Supp. 3d 891, 895 (N.D. Ind. 2015) (finding that a ban on commercial billboards directly advanced a town's interest in aesthetics). Accordingly, the Village's restrictions in § 9.050(A) and (C) directly advance its stated interest in improving the town's aesthetics.

The Village's restrictions in § 9.050(A) and (C) are also narrowly tailored to serve the Village's interest in aesthetics. This last part of the *Central Hudson* analysis asks whether the Village's restrictions are no more extensive than necessary to further the Village's purported interest. To satisfy this prong, the Village need not show that its restrictions are "the least restrictive means conceivable," or that they are a "perfect" fit. *Greater New Orleans Broadcasting Ass'n, Inc. v. United*

*States*, 527 U.S. 173, 188 (1999). Rather, all that the Village must show is that there is a "fit between the . . . ends and the means [that it] chose[] to accomplish those ends." *Am. Blast Fax, Inc.*, 323 F.3d at 658-59 (citing *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995). The Village has done this. Municipalities, like the Village, are generally given "considerable leeway . . . in determining the appropriate means to further a legitimate governmental interest, even when enactments incidentally limit commercial speech." *South-Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868, 897 (7th Cir. 1991) (citing *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 478-79)). In this case, the Village chose to limit the total sign area, § 9.050(A), and the number of commercial wall signs a building may display, § 9.050(C). The Village did not go so far as to completely ban wall signs (except painted ones) or commercial signs altogether; nor is there evidence in the record to suggest that the Village's restrictions in § 9.050 are likely to have a detrimental impact on a business' ability to effectively advertise to consumers. *Id.* In fact, the Village's Sign Ordinance still permits a business to advertise in a variety of ways, including not only through wall signs, but also through window signs, awning signs, vehicle signs, and sandwich board signs.[13] *See generally* Sign

[13] Leibundguth points to the Ordinance's allowance of other signs in unlimited numbers to suggest that the Ordinance's restrictions in § 9.050 are not narrowly tailored. *See* Pl.'s Br. at 12. But this point is not persuasive. As the Court noted above, this last element of the *Central Hudson* analysis merely requires a reasonable fit between the Village's goal—improving town

Ord. § 9.050. The Village's decision to limit the total sign area and number of wall signs a commercial business may display is thus narrowly tailored to serve the Village's interest in enhancing the town's overall appearance. A reasonable fit exists between the Village's ends—improving town aesthetics—and the means the Village chose to accomplish those ends—restricting the size and number of commercial signs.

Leibundguth argues that the Village's interest in community aesthetics cannot be considered narrowly tailored because the Village was willing to exempt one company, Art Van Furniture, from having to abide by § 9.050's restrictions. Pl.'s Br. at 8. According to Leibundguth, the Village's willingness to make such an exception demonstrates that the Village's restrictions in § 9.050(A) and (C) are impermissibly underinclusive. *Id.* It is true that a restriction on speech can be underinclusive, and therefore, invalid, when it has exceptions that undermine and counteract the interest the town claims its restrictions further. *See Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 742 (9th Cir. 2011); *see also View Outdoor Advertising, LLC*, 86 F. Supp. 3d at 896. But exceptions should also not be "viewed in isolation" or "parsed too finely." *Vanguard*

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aesthetics—and its chosen means—reducing total signage area and the number of wall signs permitted. It does *not* require that the restrictions implemented by the Village be a perfect fit or the least restrictive means possible. *See Members of the City Council of Los Angeles*, 466 U.S. at 815-16. It is sufficient that the Village's aesthetic goals are directly advanced by its restrictions in § 9.050 and that those restrictions are an "effective approach" to solving the problem before the Village. *Metromedia*, 453 U.S. at 508.

*Outdoor, LLC*, 648 F.3d at 742. In this case, the Village's decision to grant one company a variance to § 9.050's restrictions does not undermine the Village's overall interest in advancing its community appearance. The Village's restrictions in § 9.050(A) and (C) still effectively advance the Village's interest in aesthetics.

Because the Ordinance's restrictions in § 9.050(A) and (C) satisfy the requirements outlined in *Central Hudson*, the restrictions do not run afoul of the First Amendment. Accordingly, Leibundguth's as applied challenge fails. The Village's restrictions in § 9.050(A) and (C) may stand.

All that remains then is Leibundguth's final argument: its facial challenge. Leibundguth frames its challenge as an overbreadth attack. Pl.'s Br. at 16. It contends that even if the Village's restrictions in § 9.050(A) and (C) "might be constitutionally applied to Leibundguth" (that is, might pass muster as restrictions on commercial speech), the restrictions may nonetheless "conceivably be applied unconstitutionally to others," (that is, to noncommercial speakers) and thus, must be deemed "invalid" in "all [their] applications." *Id.* In making this argument, Leibundguth relies not only on § 9.050, but also on § 9.030 of the Village's Ordinance. Section 9.030 is what Leibundguth identifies as the "noncommercial" counterpart to § 9.050's restrictions on commercial signs. R. 47, Pl.'s Reply Br. at 17. As discussed previously, Section 9.030 exempts certain signs, depending on their content, from needing to obtain a permit and then subjects those exempted signs to a variety of size and number

restrictions, which are different than the size and number restrictions found in § 9.050 for commercial signs. Sign Ord. § 9.030. For example, it exempts noncommercial and political signs from needing to obtain a permit, but then restricts those signs to a "maximum area of 12 square feet per lot" and requires that they not be in "the public right-of-way." *Id.* § 9.030(I). It likewise exempts governmental signs and noncommercial flags, but then does not impose any size or number restrictions on those signs. *Id.* § 9.030(A) and (G). Leibundguth contends that the content-based distinctions the Ordinance draws between different noncommercial signs in § 9.030, requires that *all* of the Ordinance's size and number restrictions (in both § 9.030 and § 9.050) be subject to strict scrutiny—a level of scrutiny, Leibundguth argues, the Village cannot meet. Pl.'s Br. at 18-20.

Leibundguth, however, is not entitled to invoke the overbreadth doctrine in this way, because the parties agree that § 9.050 applies *only* to commercial speech. The overbreadth doctrine is designed to give a litigant, who has been injured under one provision of an ordinance, standing to bring a facial challenge to vindicate the constitutional rights of another litigant not currently before the court who may also have been injured under *that* same provision. *Alexander v. United States*, 509 U.S. 544, 555 (1993); *see also CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1273-74 (11th Cir. 2006). In the case of a commercial litigant then, like Leibundguth, the First Amendment's overbreadth doctrine can be used by that commercial

litigant to challenge an ordinance that might be constitutionally applied to it, but unconstitutionally applied to a noncommercial litigant. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 481 (1989). The problem for Leibundguth, of course, is that because § 9.050 does *not* apply to noncommercial speakers, there is no overbreadth challenge to be had. A *non*-commercial litigant will never be subject to § 9.050's requirements, because those requirements apply only to *commercial* speakers; therefore, there are no non-party rights to assert here. And although Leibundguth can point to § 9.030 to *inform* whether § 9.050—the section that applies to Leibundguth—is content-neutral, Leibundguth cannot *challenge* under the overbreadth doctrine an entirely different section of the Ordinance—like § 9.030—which does not apply to it. *See CAMP Legal Defense Fund, Inc.*, 451 F.3d at 1273-74 ("The overbreadth doctrine allows CAMP to mount a facial challenge to provisions of the Festivals Ordinance that harm its ability to hold a festival . . . [But] [n]othing in the overbreadth doctrine allows CAMP to challenge provisions wholly unrelated to its activities."); *see also Brazos Valley Coal. for Life v. City of Bryan*, 421 F.3d 314 (5th Cir. 2005); *Lamar Adver. of Pa., LLC v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004). Accordingly, Leibundguth's facial challenge also fails.[14]

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[14] If Leibundguth's facial challenge survived, and strict scrutiny applied to both § 9.030 and § 9.050, then the Village's restrictions would in all likelihood fail to survive that level of scrutiny. To survive strict scrutiny, the Village would need to show that its restrictions in § 9.050, as well as its restrictions in § 9.030, further "a compelling state interest and [are] narrowly

## IV. Conclusion

The Court holds that the Village's restriction on painted wall signs in § 9.020(P) is a valid content-neutral time, place, and manner restriction. This restriction is valid under the First Amendment and may remain in place. The Village's restrictions in § 9.050(A) and (C) may likewise remain in place, as those restrictions, which apply only to commercial speech, satisfy the *Central Hudson* test. Accordingly, the Court grants the Village's motion for summary judgment, and denies Leibundguth's.

As mentioned earlier, the Village has agreed to not impose any fines against Leibundguth during the case's pendency. Because this Opinion brings the case to a close in the district court, it is conceivable that the Village now will seek to start the meter running in fines, even if Plaintiffs plan to appeal. But to give both

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drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *see also Reed*, 135 S. Ct. at 2231; *Billings v. Madison Metro. Sch. Dist.*, 259 F.3d 807, 815 (7th Cir. 2001). The Village—at least on this record—very likely has failed to make that showing. For example, it is questionable whether the Village's interests in traffic safety and aesthetics are sufficiently *compelling* to satisfy strict scrutiny. *See Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 738 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1543 (2012) (ruling that "a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held compelling"); *but see Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) (holding that while the city's "asserted interests in aesthetics and traffic safety" are not "compelling" in this instance, "[w]e do not foreclose the possibility that [they] may in some circumstances constitute a compelling government interest").

sides time to consider this Opinion and make deliberative decisions on whether to appeal and whether to agree to a continued stay of the imposition of fines if an appeal were to be filed (including a possible agreement by the parties to expedite (or at least move promptly) appellate briefing in exchange for not imposing fines during the appeal's pendency), the Court on its own motion enters a temporary stay of judgment so that the fines will not accumulate during the deliberative process. The temporary stay will expire on December 28, 2015, by which time hopefully the parties will have entered into an agreement concerning the pace of an appeal and the stay of fines during an appeal. If no agreement is reached, then Plaintiffs must file a motion to extend the stay during the appeal by December 28, 2015. If a stay motion is filed, then the stay will automatically be decided until after briefing and a decision on the stay motion.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: December 14, 2015

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

| | |
|---|---|
| Robert Peterson, et al,<br>Plaintiff(s),<br>v.<br>Downers Grove,<br>The Village of,<br>Defendant(s). | Case No. 14 CV 9851<br>Judge Edmond E. Chang |

**JUDGMENT IN A CIVIL CASE**

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $ ,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

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☒ in favor of defendant(s) Defendant-Counterclaimant Village of Downers Grove and against plaintiff(s) Plaintiff Leibundguth Storage and Van Service, Inc.

Defendant(s) shall recover costs from plaintiff(s).

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☐ other:

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This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Edmond E. Chang on a motion Rule 54(b) judgment entered on the federal-law claims and counterclaim. Section 9.020(P) and Section 9.050(A) and (C) are valid, and the federal claims of Plaintiff Leibundguth Storage & Van Service, Inc. against those sections are dismissed and judgment is entered in favor of Defendant-Counterclaimant as to those sections. A declaration is entered as to those sections' validity. The claim against former Section 9.050(C)(1) is dismissed as moot.

Date: 1/7/2016 Thomas G. Bruton, Clerk of Court
Marsha E. Glenn, Deputy

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

| | | |
|---|---|---|
| ROBERT PETERSON and LEIBUNDGUTH STORAGE & VAN SERVICE, INC., | ) | |
| Plaintiffs, | ) | No. 14 C 09851 |
| v. | ) | Judge Edmond E. Chang |
| VILLAGE OF DOWNERS GROVE, ILLINOIS, | ) | |
| Defendant. | ) | |

**MEMORANDUM OPINION AND ORDER**

(Filed Jun. 29, 2016)

On December 14, 2015, the Court issued an order granting the Village of Downers Grove, Illinois's motion for summary judgment and denying Leibundguth Storage & Van Service, Inc.'s cross motion for summary judgment.[1] R. 51, 12/14/15 Op.[2] The Court formally entered a Rule 54(b) judgment in the Village's favor on all of Leibundguth's claims on January 7, 2016. R. 52; R. 53. Currently before the Court is Leibundguth's motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). R. 63, Mot. to Amend J.; R. 64,

[1] This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331.

[2] Citations to the record are indicated as "R." followed by the docket number.

Pl.'s Amend J. Br. For the reasons discussed below, Leibundguth's motion is denied.

## I. Background

The factual background and procedural history of this case are set forth in detail in the opinion granting the Village's motion for summary judgment. 12/14/15 Op. (For convenience, the Court will refer to that opinion as the "December 2015 Opinion.") There is no need to repeat all of those details here, so this Opinion sets out only those facts relevant to deciding the current motion.

In December 2014, Leibundguth sued the Village of Downers Grove, alleging that several sections of the Village's Sign Ordinance violated the First Amendment. R. 1, Compl.; R. 10, Am. Compl. Leibundguth challenged the provision prohibiting painted signs, R. 10, Exh. A, Sign Ord. § 9.020(P), the provision prohibiting wall signs that face only the BNSF Railway and not a public roadway or drivable right-of-way, *id.* § 9.050(C), and the provisions limiting the size and number of wall signs that a business or property owner may display along a public roadway or drivable right-of-way, *id.* § 9.050(A) (maximum sign area); *id.* § 9.050(C)(1) (number of wall signs). The Village answered Leibundguth's complaint and filed a counterclaim. R. 12, Ans. and Countercl. In its counterclaim, the Village asked the Court to declare the challenged provisions of the Sign Ordinance constitutional, to order Leibundguth to bring all non-conforming signs into

compliance with the Ordinance, and to award the Village fines if Leibundguth failed to bring its signs into timely compliance. *Id.* at 32-36.

After discovery had closed, the Village filed a motion for summary judgment, in which it asked for summary judgment in its favor on all counts in Leibundguth's amended complaint. R. 35, Def.'s Mot. Summ. J.; R. 36, Def.'s Summ. J. Br. at 20. The Village did not ask for summary judgment on its counterclaim. Leibundguth then filed its own cross motion for summary judgment, in which it too asked for summary judgment in its favor on all counts in its complaint. R. 39, Pl.'s Mot. Summ. J. at 4-5. Again, the Village's counterclaim was not discussed.

On December 14, 2015, the Court granted the Village summary judgment on all counts in Leibundguth's amended complaint. 12/14/15 Op. In analyzing the various claims, the Court first held that the Sign Ordinance's prohibition on painted signs, R. 36, Exh. B, Am. Sign Ord. § 9.020(P), was content-neutral and constituted a valid time, place or manner restriction. 12/14/15 Op. at 11-21.

Second, the Court concluded that Leibundguth's challenge to the Ordinance's prohibition on wall signs that face only the commuter railway, and not a public roadway or drivable right-of-way, R. 36, Exh. A, Sign Ord. § 9.050(C)(1), was moot because the Village had amended that section of the Sign Ordinance. 12/14/15 Op. at 21-25. When originally enacted, the Sign Ordinance prohibited buildings next to the Metra railroad

(like Leibundguth's) from displaying a wall sign that faced the railroad but not a public roadway or drivable right-of-way. Sign Ord. § 9.050(C)(1). But in July 2015, after Leibundguth filed suit, the Village amended § 9.050(C) to include a new provision allowing "lots with frontage along the BNSF railroad" to display "one additional wall sign" facing the railroad, provided the sign did "not exceed 1.5 square feet per linear foot of tenant frontage along the BNSF railroad right-of-way." R. 36, Exh. B, Am. Sign Ord. § 9.050(C)(5). Because Leibundguth was no longer precluded from displaying a wall sign that faced only the railroad, which is all that Leibundguth had challenged in its amended complaint, the Court decided that this claim was moot. 12/14/15 Op. at 22-24.

Third, the Court held that the Sign Ordinance's restrictions on the size and number of wall signs that may be displayed on a given lot, R. 36, Exh. A, Sign Ord. § 9.050(A) (size provision) and § 9.050(C)(1) (number provision), applied only to commercial signs, and therefore, were subject to intermediate scrutiny under *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). 12/14/15 Op. at 25-26. In reaching this conclusion, the Court noted that the Village adopted this position—that these restrictions apply only to commercial speech—in its motion-to-dismiss briefing, *id.* at 26; R. 25, Def.'s Mot. to Dismiss Reply Br. at 4, and that the parties did not dispute this point in their summary-judgment-briefing, 12/14/15 Op. at 26; Def.'s Summ. J. Br. at 15; R. 41, Pl.'s Summ. J. Br. at 5. The Court also reviewed the

Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), but concluded that because the Supreme Court did not specifically overrule *Central Hudson* in *Reed, Central Hudson* still applied to restrictions targeting commercial speech. 12/14/15 Op. at 27-29. Applying the test articulated in *Central Hudson*, the Court found that the Ordinance's restrictions on the size and number of wall signs that may be displayed along a public roadway or drivable right-of-way were narrowly tailored to advance the Village's interest in aesthetics and constituted valid restrictions on commercial speech. *Id.* at 29-37.

Finally, the Court addressed Leibundguth's facial challenge to these same size and number restrictions in § 9.050(A) and (C)(1). Relying on the overbreadth doctrine, Leibundguth asserted that even if the restrictions could be constitutionally applied to it, the restrictions could conceivably be applied unconstitutionally to others, and thus, had to be found invalid in all applications. Pl.'s Summ. J. Br. at 16. The Court, however, rejected Leibundguth's overbreadth attack:because the parties agreed that the size and number restrictions in § 9.050(A) and (C) applied only to commercial speech, a non-commercial litigant could never be subject to these provisions, which meant there was no overbreadth challenge to be had. 12/14/15 Op. at 38-40.

Having reached these conclusions, the Court granted summary judgment in favor of the Village on all counts of Leibundguth's complaint. *Id.* at 40. The December 2015 Opinion did not, however, specifically

address the Village's counterclaim, and in particular, did not address the state-law issues raised in the counterclaim, which neither party had briefed. At the status hearing immediately following the Court's issuance of its December 2015 Opinion, the Court entered a Rule 54(b) judgment on Leibundguth's claims, all of which were federal claims, and on the federal portion of the Village's counterclaim (that is, the portion asking for a declaration of constitutionality). R. 52 (Jan. 7, 2016 Minute Entry). The Court then ordered the parties to file position papers addressing whether the Court should relinquish supplemental jurisdiction over the remaining issues in the Village's counterclaim, all of which were based on state law. *Id.*

The parties filed their initial position papers on January 21, 2016, R. 56; R. 57; they filed their responses a week later, R. 59; R. 60. Leibundguth urged the Court to relinquish supplemental jurisdiction over the state-law issues, R. 56; the Village urged the Court to retain jurisdiction, R. 57. On the same day the parties submitted their initial position papers, January 21, Leibundguth also filed a motion under Federal Rule of Civil Procedure 62, asking the Court to stay enforcement of the Sign Ordinance during any post-judgment motions and while on appeal. R. 54, Pl.'s Stay Mot.; R. 55, Pl.'s Stay Br. On February 3, 2016, a day before the Court issued its ruling on the jurisdiction issue and on Leibundguth's Rule 62 motion, but less than 28 days after the Court had entered judgment on the parties' motions for summary judgment, Leibundguth filed this Rule 59(e) motion to alter or amend the December

2015 Opinion. R. 63, Pl.'s Mot. to Amend J.; R. 64, Pl.'s Amend J. Br. The next day, the Court issued an order relinquishing supplemental jurisdiction over the Village's remaining counterclaims and denying Leibundguth's motion to stay enforcement of the Sign Ordinance. R. 67, 02/04/16 Op. So all that remains is Leibundguth's motion to alter or amend judgment.

## II. Legal Standard

Under Federal Rule of Civil Procedure 59(e), a party may, within 28 days of the entry of judgment, move to alter or amend that judgment. Fed. R. Civ. P. 59(e). The granting of a Rule 59(e) motion "is only proper when the movant presents newly discovered evidence that was not available at the time of trial" or when the movant "clearly establishes a manifest error of law or fact." *Burritt v. Ditlefsen*, 807 F.3d 239, 253 (7th Cir. 2015) (internal quotation marks and citation omitted); Fed. R. Civ. P. 59(e). The Seventh Circuit has made clear that Rule 59(e) is not to be used as a vehicle to "'advance arguments that could and should have been presented to the district court prior to the judgment,'" *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013) (quoting *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000)), or to "rehash" arguments previously made and rejected, *Vesely v. Armslist LLC*, 762 F.3d 661, 666 (7th Cir. 2014); *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). Rather, the Seventh Circuit has said that reconsideration is allowed only when a "significant change in [the] law has occurred," or "new facts have

been discovered," or when a court has "misunderstood a party," "made a decision outside the adversarial issues presented to the court by the parties," or "made an error of apprehension (not of reasoning)." *Broaddus v. Shields*, 665 F.3d 846, 860 (7th Cir. 2011), overruled on other grounds by *Hill v. Tangherlini*, 724 F.3d 965, 967 n.1 (7th Cir. 2013); *see also Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990).

Because judgments are presumed final, reconsideration under Rule 59(e) is granted only when the moving party has shown that there is a compelling reason to set the judgment aside. *Bank of Waunakee*, 906 F.2d at 1191; *Hecker v. Deere & Co.*, 556 F.3d 575, 591 (7th Cir. 2009); *Solis v. Current Dev. Corp.*, 557 F.3d 772, 780 (7th Cir. 2009). If a party seeks reconsideration based on a "manifest error," it must show a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto*, 224 F.3d at 606.

## III. Analysis

### A. Challenge to Sections 9.050(A) and (C)

Leibundguth first attacks the Court's decisions on the Sign Ordinance's restrictions that limit the size and number of wall signs permitted on a single lot, § 9.050(A) and (C)(1). Pl.'s Amend J. Br. at 2. Section 9.050(A) limits the total sign area to "1.5 square feet per linear foot of tenant frontage," and § 9.050(C)(1) limits "[e]ach business or property owner" to "one wall sign per tenant frontage along a public roadway or

drivable right-of-way." R. 36, Exh. A, Sign Ord. § 9.050(A) and § 9.050(C)(1). Leibundguth argues that the Court incorrectly held that these restrictions apply only to commercial signs, and therefore, only to commercial speech; according to Leibundguth, the restrictions apply to *all* signs and speech. *Id.* But in making this argument, Leibundguth disregards the fact that the Court's conclusion that § 9.050(A) and (C)(1) apply only to commercial signs was based on the parties' own arguments. Up until this point, both parties seemingly agreed that the restrictions in § 9.050 restrict only commercial speech. 12/14/15 Op. at 26. That is the position the Village took in its motion-to-dismiss briefing, *see id.*; R. 25, Def.'s Mot. to Dismiss Reply Br. at 4, and the position both parties took on summary judgment, Def.'s Summ. J. Br. at 15; Pl.'s Summ. J. Br. at 5.

Leibundguth now argues that "although [it] agrees that Section 9.050 applies to commercial speech, it has never claimed that Section 9.050 *only* applies to commercial signs." Pl.'s Amend J. Br. at 2 (emphasis in original). But a review of the record in this case refutes this. It is true, as Leibundguth points out, that nothing in § 9.050 specifically states that it is limited to commercial speech; it does not use the word "commercial" and it is entitled "Sign Regulations Generally." *Id.*; R. 36, Exh. A, Sign Ord. § 9.050. But on summary judgment, Leibundguth clearly asserted that the restrictions in § 9.050(A) and (C)(1) apply only to commercial speech—it was implied in Leibundguth's

responses to the Village's statement of facts, and it was explicit in Leibundguth's briefing.

Specifically, in the Village's Local Rule 56.1 Statement of Uncontested Material Facts, the Village stated:

> 7. Section 9.050 regulates commercial signs, (Ex. 2 § 9.050) and Section 9.050.A is a commercial sign size limitation. (Ex. 2, § 9.050.A). Section 9.050.A permits up to 1.5 sq. ft. of commercial signage per linear foot of tenant frontage, not to exceed collectively 300 sq. ft. per tenant. (Ex. 2, § 9.050.A).
>
> 8. Section 9.050.C is a limitation on the number of commercial wall signs permitted based upon the number of tenants having frontage along a public roadway or drivable right-of-way (Ex. 2, § 9.050.C.1).

R. 37, Def.'s Statement of Facts (DSOF) ¶¶ 7-8. Both of these statements show that the Village viewed the restrictions in § 9.050(A) and (C)(1) as restricting only commercial signs. Leibundguth, for its part, did *not* refute these statements. In both instances, Leibundguth responded that the statements were "Undisputed." R. 40, Pl.'s Resp. to DSOF ¶¶ 7-8. Leibundguth could have challenged the Village's position that § 9.050(A) and (C)(1) apply only to commercial signs; it did not. Instead, it took the same position as the Village: that the restrictions regulate commercial signs.

Leibundguth's summary judgment briefing is also crucial in making this point. Both Leibundguth

and the Village agreed on summary judgment that § 9.050's restrictions should be analyzed under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), which only applies when a regulation restricts *commercial* speech. Pl.'s Summ. J. Br. at 5-6; Def.'s Summ. J. Br. at 15. *See also* R. 47, Pl.'s Summ. J. Reply Br. at 11 ("The parties agree that the proper test in evaluating Leibundguth's First Amendment challenge to the size and number restrictions is the *Central Hudson* test[.]"). True, the Court held that *Central Hudson* applied to these restrictions at the motion-to-dismiss stage, R. 29, 04/27/15 Dismissal Op., a fact which the Village noted in its summary judgment briefing when addressing § 9.050, Def.'s Summ. J. Br. at 15. But remember, the Court reached that conclusion because the Village specifically asserted that the restrictions were commercial restrictions, *see* R. 25, Def.'s Mot. to Dismiss Reply Br. at 4 (stating that "only three specific commercial sign regulations prohibit [Leibundguth's] commercial signs"), and at that time, the Court was simply considering whether the complaint was sufficient to state a claim. If Leibundguth wished to challenge the applicability of *Central Hudson* to the restrictions in § 9.050 on summary judgment, it easily could have done so (or at a minimum, Leibundguth could have preserved the argument by making note of it in its briefing). But Leibundguth did no such thing. Instead, Leibundguth argued *only* that § 9.050(A) and (C)(1) failed under *Central Hudson*. Leibundguth never asserted that something other than *Central Hudson* applied or that

the restrictions applied to more than just commercial signs. At this stage, it is too late.

It is worth noting that Leibundguth did attack the restrictions in § 9.050(A) and (C)(1) on summary judgment under the overbreadth doctrine. Pl.'s Summ. J. Br. at 16. Leibundguth argued that even if the Village's restrictions in § 9.050(A) and (C)(1) "might be constitutionally applied to Leibundguth" (that is, might pass muster as restrictions on commercial speech), the restrictions may nonetheless "conceivably be applied unconstitutionally to others," (that is, to noncommercial speakers) and thus, must be deemed "invalid" in "all [their] applications." *Id.* Out of context, this argument could be viewed as supporting Leibundguth's contention that it never asserted that § 9.050 applies *only* to commercial signs. But when Leibundguth's argument is read in its entirety, it is clear that that is not the case. In making this argument, Leibundguth relied not only on § 9.050(A) and (C)(1), but also on an entirely different section of the Ordinance, § 9.030, which Leibundguth identified as the non-commercial counterpart to § 9.050's restrictions on commercial signs. Section 9.030 exempts certain signs from needing a permit (technically, all signs require a permit under the Ordinance unless exempted, Sign Ord. § 9.080) depending on the content of the sign and whether the sign meets the specific restrictions described in that section for those types of signs. Pl.'s Summ. J. Br. at 18-20; Pl.'s Summ. J. Reply Br. at 16-17; R. 36, Exh. A, Sign Ord. § 9.030. Relying on these two sections, Leibundguth argued that when the two sections are viewed

together—§ 9.030 and § 9.050—it is clear that the Ordinance's size and number restrictions violate the overbreadth doctrine because they impose restrictions on commercial speech (under § 9.050(A) and (C)(1)) that are more favorable than some of the restrictions they impose on non-commercial speech (under § 9.030), and because they treat certain non-commercial speech better than other non-commercial speech. Pl.'s Summ. J. Br. at 18-20; Pl.'s Summ. J. Reply Br. at 17. Although the Court need not rehash its discussion on this issue, the important point here is that even when making its overbreadth argument, Leibundguth did not once suggest that the restrictions in § 9.050(A) and (C)(1) applied to anything other than commercial signs.

What Leibundguth is attempting to do here is challenge, for the first time, the scope of § 9.050; and more specifically, the Village's contention that § 9.050(A) and (C)(1) apply strictly to commercial signs. A motion under Rule 59(e) is not the appropriate vehicle for a first-time challenge like this. *Cincinnati Life Ins. Co.*, 722 F.3d at 954 (Rule 59(e) cannot be used to "advance arguments that could and should have been presented to the district court prior to the judgment."). Leibundguth could have raised this argument on summary judgment. It could have challenged whether § 9.050(A) and (C) apply only to commercial signs (as opposed to all signs generally) in its response to the Village's Local Rule 56.1 Statement and in its briefing, or at the very least attempted to preserve the argument if it thought the Court had already ruled that *Central Hudson* applied. It did not. It cannot now, on a Rule 59(e) motion,

raise this argument for the first time. *Id.* Leibundguth has failed to show that reconsideration is warranted on this ground.

Leibundguth makes two additional arguments related to the restrictions in § 9.050(A) and (C)(1). First, Leibundguth argues that the Court incorrectly held that the Village provided sufficient evidence to show that its restrictions in § 9.050(A) and (C)(1) advance the Village's interest in "improving aesthetics." Pl.'s Amend J. Br. at 11-14. Leibundguth argues that "the Village's 'evidence' regarding aesthetics"—that is, the pictures the Village took of commercial signs in Downers Grove and nearby towns, and the conversations between the Village and residents regarding the Sign Ordinance—"consist[s] of nothing more than 'speculation or conjecture,' " and does nothing to show the "*specific* [aesthetic] end the Village is seeking to achieve." *Id.* at 11-12 (emphasis in original). Leibundguth further asserts that the Village has advanced "conflicting policies"; "it has argued that restricting the size and number of wall signs improves aesthetics, but [it] . . . has also asserted that granting Art Van Furniture significantly *more* and *larger* wall signs than the Ordinance allows would improve aesthetics." *Id.* at 12 (emphases in original).

Leibundguth's contention is problematic for a couple of reasons. The first is that Leibundguth raised these same points during summary judgment, and is now merely reemphasizing issues it thinks the Court got wrong. Pl.'s Summ. J. Br. at 12-14 (discussing how "mere speculation or conjecture" is insufficient, and

how the Village has provided evidence only of the process it undertook); *id.* at 12 (discussing exemptions given to Art Van Furniture); Pl.'s Summ. J. Reply Br. at 15-16 (same). *See* 12/14/15 Op. at 34-37 (rejecting these same arguments). It is well settled that Rule 59(e) cannot be used to rehash old arguments. *Vesely*, 762 F.3d at 666; *Oto*, 224 F.3d at 606.

The second problem for Leibundguth is that it is seeking to impose a more rigorous standard than is required under *Central Hudson*. Leibundguth asserts that the Village should have been required to identify the *specific* aesthetic interest it was seeking to advance through its restrictions. But a general interest in aesthetics is recognized as a significant governmental interest. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805-06 (1984) ("[M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression."). And Leibundguth fails to cite to anything that would indicate that a more specific breakdown of that aesthetic interest is required for it to pass muster under *Central Hudson*. Now, it is true that the Village must provide some evidence to support its asserted interest in aesthetics, and that the evidence must consist of something more than speculation or conjecture. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). But the evidence need not be overwhelming; it can consist of "history, consensus, and 'simple common sense.'" *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); *Lavey v.*

*City of Two Rivers*, 171 F.3d 1110, 1116 (7th Cir. 1999) (explaining that City did not have to produce a voluminous record when common-sense restrictions were involved). Despite Leibundguth's contention to the contrary, the Court remains convinced that the Village has met this burden in this case. The Village clearly studied the signs around town, as evidenced by the hundreds of pictures Village officials took of commercial signs in town. R. 37-4, Exh. 1D at 267-348; R. 37-1, Exh. 1A at 44 (Village Workshop Meeting Minutes 05/11/04: noting that the Plan Commission and Economic Development Commission have looked at signage within the context of "aesthetics"). Village staff members also met regularly to discuss the town's signage and policies, R. 37-1, Exh. 1A at 57 (Plan Commission Meeting Minutes 02/21/05: noting that "[t]he Sign Subcommittee met almost weekly for 17 weeks for 2-3 hour meetings"), and asked for resident input on all suggested amendments along the way, *e.g.*, R. 37-1, Exh. 1A at 55-91 (minutes from Plan Commission Meetings on 02/21/05 and 02/28/05 where all proposed amendments to the Sign Ordinance were discussed and public input was sought). *See also* 12/14/15 Op. at 34; DSOF ¶¶ 13-14. These actions show that the Village did not rely on mere speculation when deciding what restrictions to impose. What's more, just as with billboards, "[i]t is not speculative to recognize that [large wall signs] by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm,' " particularly when they are numerous. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981). This is common sense. The Village has provided

enough evidence to support its aesthetic interest. Leibundguth has failed to provide any new evidence or to cite to any case law that persuades the Court that anything more is required, or that the Court committed a manifest error. *Oto*, 224 F.3d at 606 (manifest error of law requires a showing of wholesale disregard or misapplication of the law, or failure to recognize controlling precedent).

Leibundguth's next and final argument on the restrictions in § 9.050 is that the Court wrongly held that the Village had established that its size and number restrictions are narrowly tailored to advance the Village's interest in aesthetics. Pl.'s Amend J. Br. at 14-15. In particular, Leibundguth argues that the restrictions are not narrowly tailored because "the Village has provided exemptions to the size and number restrictions to some businesses and the Ordinance allows other kind[s] of signs [such as window signs] without the same size and number restrictions." *Id.* at 14. But this assertion is once again a mere rehash of an argument previously made and rejected. Pl.'s Summ. J. Br. at 11-13, 8-9; 12/14/15 Op. at 35-36, 36 n.13. It too fails to meet the rigorous standard imposed under Rule 59(e) for reconsideration to be warranted. *Vesely*, 762 F.3d at 666; *Oto*, 224 F.3d at 606.

### B. Challenge to Section 9.020(P)

Next, Leibundguth attacks the Court's decision on the Ordinance's restriction on painted signs in § 9.020(P). R. 36, Exh. B, Am. Sign Ord. § 9.020(P)

(banning "any sign painted directly on a wall, roof, or fence"). Leibundguth asserts that the Court ignored the fact that § 9.020(P)'s ban on painted signs excludes flags and murals, making § 9.020(P) a content-based restriction that should have been subject to strict scrutiny. Pl.'s Amend J. Br. at 3-4. As support, Leibundguth points to a 2015 Village Staff Report that contains a statement to that effect.[3] *Id.* But contrary to Leibundguth's contention, the Court did *not* ignore the fact that a Village Staff Report, authored by the Village's Planning Manager, Stanley Popovich, stated that purely "decorative" flags and murals are not subject to the painted sign ban. 12/14/15 Op. at 15 n.6; R. 36, Exh. C, 2015 Staff Report at 3. Leibundguth brought this point up during summary judgment, Pl.'s Summ. J. Br. at 2-5, and the Court specifically addressed it in the December 2015 Opinion, 12/14/15 Op. at 15 n.6. The Court

[3] In its reply brief, Leibundguth also cites the Village's response to Leibundguth's Local Rule 56.1 Statement of Undisputed Material Facts, suggesting that there too the parties agreed that flags and murals are exempt from the painted sign ban. Pl.'s Amend. J. Reply Br. 8 (citing R. 46, Def.'s Resp. to Pl.'s Statement of Material Facts (PSOF) ¶ 33). But that paragraph merely refers to the same 2015 Staff Report Leibundguth otherwise cites: "33. The Village staff report accompanying [the Sign] Ordinance . . . states: 'There are instances of flags and murals painted on buildings and these are permitted by the code on the basis that they are decorative, and do not convey constitutionally protected commercial or non-commercial speech.' (Def. Exh. 4, Report of Plan Commission, July 6, 2015, at 3.)[.]" *Id.* In its response, the Village simply agreed that the Staff Report contains that statement: "Undisputed that this statement is included as part of the overall report referenced." *Id.* So, although it might appear that Leibundguth cites to more than just the Staff Report to support its argument here, Leibundguth does not.

was not then (and is still not) persuaded that Popovich's statement in the Staff Report turns the Sign Ordinance's ban on painted signs into a content-based restriction. As explained in detail in the prior Opinion, the actual text of the Sign Ordinance does not exempt any signs (decorative or otherwise) from the restriction, and the Village conceded on summary judgment that any flag or mural that meets the definition of a "sign" is subject to the painted sign restriction, despite Popovich's statement to the contrary. *Id.*; R. 45, Def.'s Summ. J. Reply and Resp. Br. at 1. Given the Village's concession and the broad definition of "sign" adopted by the Village in its Municipal Code, R. 40, Exh. E, Village Muni. Code § 15.220, the Court held that the restriction in § 9.020(P) was content-neutral. 12/14/15 Op. at 15 n.6. In its current motion, Leibundguth does not raise any new arguments or point to any new evidence that convinces the Court that it erred in reaching this conclusion.

Leibundguth does try to bolster its argument by attaching to its Rule 59(e) brief a photo of a restaurant in Downers Grove that has a painted American flag on the side of its building, as well as a picture of the restaurant that was located there previously, which had an Irish flag painted on the side of its building. R. 64, Exh. A. Leibundguth argues that these pictures similarly show that the Village exempts flags and murals from § 9.020(P)'s ban. Pl.'s Amend J .Br. at 3-4. These photographs, however, were not in the record at summary judgment, and Leibundguth fails to provide a valid explanation for why they could not have been

produced earlier. Both photographs are dated. R. 64, Exh. A. The photograph of the American restaurant appears to be from September 2015, and the photograph of the Irish restaurant from September 2012. *Id.* Leibundguth did not file its reply brief in support of its motion for summary judgment until October 2015. Pl.'s Summ. J. Reply Br. These pictures could easily have been included with that briefing. Leibundguth implies that it could not have attached these photographs at that time because the Staff Report was issued after discovery had closed, and therefore, Leibundguth was not able to take discovery on this point during summary judgment. Pl.'s Amend J. Br. at 4 n.1. But Leibundguth never objected to the introduction of the Staff Report, or to the Village's reliance on it, during summary judgment. If Leibundguth had a problem with the Staff Report it should have voiced its concern. The same holds true for any additional discovery; if Leibundguth wanted to take additional discovery after the Staff Report came to light, it should have asked the Court to do so. We are now at the motion to vacate stage; Leibundguth's decision to wait to raise its concerns until now comes too late. *Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 924 (7th Cir. 2007); *Witte v. Wis. Dep't of Corr.*, 434 F.3d 1031, 1038 (7th Cir. 2006) (recognizing that a party forfeits any argument it fails to raise in a brief opposing summary judgment). These photos do not present new evidence that can properly be considered under Rule 59(e), and they do not show that reconsideration is appropriate. *Cincinnati Life Ins. Co.*, 722 F.3d at 954 (Rule 59(e) is not to be used to "advance arguments that could and should have been

presented to the district court prior to the judgment[.]").

Leibundguth separately argues that the Court wrongly held that the Village satisfied is burden to show that the Ordinance's ban on painted signs is narrowly tailored to advance the Village's asserted interest in aesthetics. Pl.'s Amend J. Br. at 4-9. Specifically, Leibundguth argues that the Village has not provided enough evidence to support its aesthetic interest, and that it has not shown that its painted sign ban is narrowly tailored to achieve that interest. *Id.* But once again, Leibundguth has failed to present any new, compelling evidence or to show that the Court committed a manifest error. To support its aesthetic interest, the Village provided copies of hundreds of photographs its staff members took of signs around town before it passed the Sign Ordinance, R. 37-4, Exh. 1D at 267-348; it also included a copy of the 2015 Staff Report previously discussed, which describes in detail the Village's concerns with painted wall signs, R. 36, Exh. C, 2015 Staff Report at 3-5. Leibundguth takes issue with the fact that nothing connects the photographs with the Village's asserted interest in aesthetics, and with the fact that the 2015 Staff Report provides no support for its assertions that painted signs require on-going maintenance, are subject to water damage, and are hard to remove. *Id.* at 6-7.

But these arguments do not establish that reconsideration is warranted; they simply highlight Leibundguth's disagreement with the Court's conclusion. Mere disagreement is not sufficient to establish manifest

error or to entitle a party to reconsideration. *Seng-Tiong Ho v. Taflove*, 648 F.3d 489, 505 (7th Cir. 2011); *Oto*, 224 F.3d at 606; *see also King v. Cross*, 2014 WL 1304320, at *2 (N.D. Ill. Mar. 28, 2014). As the Court explained in the December 2015 Opinion, this evidence is enough to show that the Village did not "blindly invoke" its stated concern over aesthetics, which is all that the Village is required to show. *Weinberg v. City of Chi.*, 310 F.3d 1029, 1038 (7th Cir. 2002). The Village's photographs show that it took the time to study the signs that were in use in the Village before implementing any new sign regulations, which inherently includes consideration of the overall aesthetic appeal of those signs. And the 2015 Staff Report shows that the Village carefully considered the effects of painted signs before fully banning them. 12/14/15 Op. at 17-18. It is perfectly reasonable to believe that Mr. Popovich, the Village's Planning Manager, has sufficient expertise to draw the conclusions that he did in the Staff Report. What's more, Leibundguth's painted wall sign also provides additional proof that the Village's concerns are real; the photo of Leibundguth's painted wall sign on the back of its building, which the Village provided on summary judgment, shows the exact fading and chipping problems discussed by the Staff Report. R. 36, Exh. D at 7-9. Leibundguth responds that its painted sign looks the way it does because it has not "touched [it] up" because of this lawsuit. Pl.'s Amend J. Br. at 9. But that just goes to show that the Staff Report is correct in that painted signs require ongoing maintenance or are otherwise likely to deteriorate, and that they are prone to fading and chipping. R. 36, Exh. C, 2015 Staff

Report at 3-4. This evidence remains sufficient to meet the Village's burden to show that its painted sign ban advances its interest in town aesthetics. The Village need only show that it did not "blindly invoke" its aesthetic concerns; it has done that.[4] While Leibundguth may disagree with the Court's conclusion, as noted above, a Rule 59(e) motion is not the proper vehicle to air that difference of opinion. *Seng-Tiong Ho*, 648 F.3d at 505; *Oto*, 224 F.3d at 606.

Leibundguth's assertion that the painted sign ban is not narrowly tailored to advance the Village's aesthetic interest suffers from a similar problem. Leibundguth argues that the "deliberation and dialogue" between the Village and its residents that occurred before the original Sign Ordinance was passed does not support the conclusion that the painted sign ban is narrowly

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[4] Leibundguth again points out that discovery had closed in this case before the 2015 Staff Report came to light and before the Village decided to amend § 9.020(P) to ban painted signs in all of Downers Grove (previously, it had allowed painted signs in the Downtown Business, Downtown Transitional, and Fairview Districts). Pl.'s Amend. J. Br. at 5 n.3, 6. According to Leibundguth, without discovery, "there is no way to know whether the [2015 Staff] Report accurately reflects real concerns about painted signs." *Id.* at 6. But again, Leibundguth could have moved to reopen discovery on this issue as soon as it became aware of the Staff Report and the amendment, but it chose not to. *Id.* Leibundguth must live with that decision. As the Court has already explained both in this Opinion and in its prior opinions, this argument comes too late; it has been forfeited. Leibundguth also has yet to explain what discovery it would have taken related to the Staff Report. *See* 02/04/16 Op. at 11 (explaining when Leibundguth raised this same argument in its motion requesting a stay that Leibundguth should have identified what discovery it would have taken).

tailored for two reasons: because painted signs were never specifically discussed at that time, and because the discussions occurred in advance of the passing of the original Sign Ordinance, which still allowed painted signs in certain downtown business zones. Pl.'s Amend J. Br. at 7-8. Leibundguth points out that almost no deliberation or dialogue occurred before the passing of the amended (and the now current) ordinance, which completely bans painted signs. *Id.* at 8.

Although Leibundguth frames this argument as one attacking whether the painted sign ban is narrowly tailored, it really attacks (again) whether the Village's asserted aesthetic interest is genuine, as that is where the Court discussed the Village's "deliberation and dialogue." 12/14/15 Op. at 17. Leibundguth is correct in that the Village, once upon a time, did allow painted signs in certain districts, R. 36, Exh. A, Sign Ord. § 9.020(P), but that is no longer the case, R. 36, Exh. B, Am. Sign Ord. § 9.020(P), which makes any argument along these lines moot. Leibundguth also failed to raise this issue during summary judgment, something it certainly could have done. *Cincinnati Life Ins. Co.*, 722 F.3d at 954 (Rule 59(e) is not to be used to "advance arguments that could and should have been presented to the district court prior to the judgment."). In addition, that painted wall signs may not have been explicitly discussed between the Village and its residents does not change the fact that the Village took the time to study the town's signs prior to implementing any ban on painted signs (or any other restrictions for that matter), and that it gave residents a chance to

voice any concerns they may have had prior to the new restrictions taking effect, including the restriction on painted signs. This "deliberation and dialogue" was also just one piece of evidence (and not the primary piece) that the Court relied on in finding that the Village's asserted aesthetic interest was real and that its painted sign ban narrowly tailored. 12/14/15 Op. at 17. The other piece of evidence was the 2015 Staff Report, which the Court has already discussed and which addresses in detail the problems with painted signs. This argument is rejected.

Leibundguth also asserts that the painted sign ban is not narrowly tailored because it is underinclusive: it still allows flags and murals to be painted on walls. This is again an attempt by Leibundguth to rehash an argument previously made. Leibundguth made this same argument on summary judgment, Pl.'s Summ. J. Reply Br. at 8, and the Court specifically addressed it in its December 2015 Opinion, 12/14/15 Op. at 15 n.6. Leibundguth is not entitled to reconsideration simply because it does not like the result the Court reached.[5]

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[5] It is also worth emphasizing that "[t]he 'requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Graff v. City of Chi.*, 9 F.3d 1309, 1321 (7th Cir. 1993) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Here, the painted sign ban surely promotes the Village's aesthetic interest: it alleviates many of the concerns regarding maintenance and building wear-and-tear that the Village emphasized in its 2015 Staff Report. Absent a ban like the one imposed in § 9.020(P), these concerns would not be addressed

### C. Challenge to Amended Section 9.050(C)(5)

Finally, Leibundguth contends that the Court should not have held that Leibundguth's challenge to the Sign Ordinance's ban on signs facing only the BNSF railway (Count 3 of the Amended Complaint) was moot. Pl.'s Amend J. Br. at 10. According to Leibundguth, the December 2015 Opinion "did not address Leibundguth's challenge to Section 9.050(C)'s limits [to] the size of wall signs along the BNSF railroad, which were properly pleaded as well as raised in Leibundguth's motion for summary judgment."[6] Pl.'s Amend J. Reply Br. at 2. Leibundguth is correct on this point. Technically, if Leibundguth had prevailed on striking down the ban on painted wall signs in § 9.020(P), and also won on the size and number restrictions imposed in § 9.050(A) and (C)(1), then it is possible that Leibundguth could still be found in violation of the Ordinance under the revised § 9.050(C)(5). That section allows "lots with frontage along the BNSF railroad" to display "one additional wall sign" facing the railroad, provided the sign does "not exceed 1.5 square feet per linear foot of tenant frontage along the

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as effectively. The Court remains unpersuaded that its holding regarding the Sign Ordinance's painted sign ban was incorrect.

[6] Leibundguth did not specifically challenge the size restriction in § 9.050(C)(5) in its amended complaint, R. 10, Am. Compl., no doubt because the amendment came out after Leibundguth had already filed that complaint. But it would certainly have been better if Leibundguth had asked for leave to amend its complaint again after the Village revised its restriction on wall signs facing just the BNSF railroad. That would have given Leibundguth a chance to properly raise any relevant arguments in its complaint against this amendment.

BNSF railroad right-of-way." R. 36, Exh. B, Am. Sign Ord. § 9.050(C)(5). Neither party disputes that the size of Leibundguth's railway-facing sign exceeds § 9.050(C)(5)'s size limit. R. 46, Def.'s Resp. to Pl.'s Statement of Material Facts (PSOF) ¶ 8. So, Leibundguth is right in that for Article III purposes, this claim is not moot, because even if Leibundguth won summary judgment on the remainder of its claims, it could still be found in violation of § 9.050(C)(5). The Court will revise its judgment to reflect that Leibundguth's claim related to § 9.050(C)(5)'s size restriction is not moot.

That said, Leibundguth has still not shown that it is entitled to summary judgment on this claim. The size restriction imposed under § 9.050(C)(5) is exactly the same size restriction imposed under § 9.050(A) for wall signs that face a public roadway or drivable right-of-way. Both may not exceed 1.5 square feet per linear foot of tenant frontage.[7] R. 36, Exh. A, Sign Ord. § 9.050(A); R. 36, Exh. B, Am. Sign Ord. § 9.050(C)(5). So, for the same reasons that the size restriction in § 9.050(A) is constitutional, so too is the size restriction in § 9.050(C)(5). In challenging § 9.050(C)(5), Leibundguth does not raise any new arguments or present any new evidence. Instead, Leibundguth merely asserts that the Court should hold that the size limitation for

[7] Section 9.050(A) also includes an exception for buildings set back more than 300 feet from the abutting roadway or public right-of-way. R. 36, Exh. A, Sign. Ord. § 9.050(A). But that restriction has never been at issue because Leibundguth's building is not set that far back.

signs facing the BNSF railway is "unconstitutional for the same reasons that Section 9.050(A) [sic] size restrictions are unconstitutional." Pl.'s Amend J. Br. at 10. Because Leibundguth has not shown that the Court committed a manifest error in finding that § 9.050(A)'s size restriction is constitutional, it has likewise failed to show that § 9.050(C)(5)'s restriction should be found unconstitutional. Accordingly, while the Court will revise its judgment to reflect that Leibundguth's claim under revised § 9.050(C)(5) is not moot for Article III purposes, reconsideration of the Court's decision to grant the Village summary judgment on this Count is not warranted.

## IV. Conclusion

For the reasons discussed above, Leibundguth's Rule 59(e) motion to alter or amend the December 2015 Opinion [R. 63] is denied. But the Court will revise its judgment to reflect the fact that Leibundguth's challenge to § 9.050(C)(5)'s size restriction is not moot for Article III purposes, but that its claim is still dismissed for the same reasons Leibundguth's challenge to the other size restriction in § 9.050(A) was dismissed.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: June 29, 2016

**Downers Grove Zoning Ordinance**

[9-1] **Article 9 | Signs**



## Sec. 9.010 General

### A. Purpose

The sign regulations of this article are established to create a comprehensive but balanced system of sign regulations to promote effective communication and to prevent placement of signs that are potentially harmful to motorized and non-motorized traffic safety, property

values, business opportunities and community appearance. This article is adopted for the following specific purposes:

**1.** to preserve, protect and promote public health, safety and welfare;

**2.** to preserve the value of private property by assuring the compatibility of signs with surrounding land uses;

**3.** to enhance the physical appearance of the village;

**4.** to enhance the village's economy, business and industry by promoting the reasonable, orderly and effective display of signs, and encouraging better communication between an activity and the public it seeks with its message;

**5.** to protect the general public from damage and injury, that may be caused by the faulty and uncontrolled construction and use of signs within the village;

**6.** to protect motorized and non-motorized travelers by reducing distraction that may increase the number and severity of traffic accidents; and

**7.** to encourage sound practices and lessen the objectionable effects of competition with respect to size and placement of street signs.

## B. Applicability

The regulations of this article apply to all signs in the village, unless otherwise expressly stated.

## C. Public Health and Safety

No sign may be designed, constructed or maintained in a manner that presents a danger to the public health, safety or welfare, as determined by the village.

## [9-2] D. Content and Location

Except as otherwise expressly provided in this article, the following regulations apply to all signs:

**1.** The content of signs is limited to the business, service, and activity available or conducted on the subject lot.

**2.** Unless otherwise specified in the Article, signs are subject to setback regulations of the subject zoning district.

**3.** When a business or service does not have direct access to a public street, signs directing traffic to the subject business or service may be located off premises at the nearest point of access. Such signs are counted as part of the total allowable sign area.

**Sec. 9.020 Prohibited Signs and Sign Characteristics**

The following are expressly prohibited under this ordinance:

[9-3] **A.** any sign or structure that constitutes a hazard to public health or safety;

**B.** any signs attached to utility, traffic signal poles, light poles, or standards except for governmental signs;

**C.** signs, that by their color, location, or design resemble or conflict with traffic control signs or signals;

**D.** except for governmental signs erected by, or on behalf of, the unit of government having jurisdiction, no sign may be located on the public right-of-way, or affixed to or upon public property. This prohibition includes any sidewalk, parkway, crosswalk, curb, curbstone, street lamppost, hydrant, tree, shrub, tree stake or guard, electric light or power, CATV, telephone or telegraph system, fire alarm, lighting system, public bridge, drinking fountain, trash receptacle, street sign or traffic sign;

**E.** portable signs, except for sandwich board signs that are allowed in the DB, DT and Fairview concentrated business districts;

**F.** vehicle signs when the vehicle is not licensed, insured or operational;

**G.** advertising off-premise signs;

**H.** moving signs;

**I.** LED and flashing signs;

**J.** signs with bare bulb illumination, except for marquees located in the DB, DT or Fairview concentrated business districts;

**K.** attention-getting devices;

**L.** signs containing exposed gas tubing, exterior to the building, including argon and neon;

**M.** roof signs;

**N.** box-type signs in the DB, DT or Fairview concentrated business districts;

**O.** any sign that advertises, identifies, or pertains to a business no longer conducted, or a product no longer sold, on the premises where such sign is located, within the previous 30 days;

**P.** any sign painted directly on a wall, roof, or fence, except in the DB, DT or Fairview concentrated business district;

**Q.** any sign placed or attached to a telecommunications tower, pole or antenna;

**R.** signs containing manual changeable copy consisting of more than 2 lines, except that fueling stations, governmental agencies, schools and religious assembly uses have up [sic] 4 lines of manual changeable copy. The changeable copy surface area is included in the total surface area allowed;

**S.** signs containing electronic changeable copy/message board;

**T.** single pole signs with a base of less than 2 feet in width; and

**U.** any other sign not expressly permitted in this article.

### Sec. 9.030 Signs Allowed without a Sign Permit

The following signs do not require a sign permit and are subject to the following regulations:

[9-4] **A.** Governmental signs, public signs and other signs incidental to those signs for identification, information or directional purposes erected or required by governmental bodies, or authorized for a public purpose by any law, statute or ordinance.

**B.** Railroad crossing and signs of public utility companies indicating danger or that serve as an aid to public safety or that show the location of underground facilities.

**C.** Street address signs up to 4 square feet in area.

**D.** Decorations temporarily displayed in connection with a village-sponsored or approved event or a generally recognized or national holiday.

**E.** Temporary signs at a residence commemorating a personal event, such as a birth, birthday, anniversary or graduation.

**F.** "No trespassing" or similar signs regulating the use of property, provided such signs are no more than 2 square feet in area.

**G.** Noncommercial flags of any country, state or unit of local government.

**H.** Real estate signs, provided that in residential zoning districts, real estate signs may not exceed 5.5

square feet in area, including all attached tags. In nonresidential zoning districts, real estate signs may not exceed 36 square feet in area. Real estate signs may be used solely for advertising the sale, rental or lease of the property where such sign is located. Real estate signs may not exceed 10 feet in height. No more than one real estate sign is allowed per lot where such lot contains a single use, except on a corner lot one real estate sign is allowed per street frontage. When a lot contains multiple uses one real estate sign is allowed per use. Real estate signs may not be placed in the public right-of-way, except that "open house" signs may be placed in the public right-of-way on Friday, Saturday and Sunday of the weekend that the open house will take place. Such open house signs may be posted only between the hours of 5:00 a.m. Friday to 10:00 p.m. on Sunday, provided that:

**1.** the open house sign may not exceed 4 square feet in area;

**2.** the open house sign must be freestanding, not attached to any utility pole, traffic control sign or other similar structured [sic] and must be placed at least 3 feet from the curb or edge of the pavement;

**3.** only one open house sign is permitted within 150 feet of another sign that relates to the same address. There may be only one open house sign relating to the same address placed in [sic] on a single lot;

**4.** no attention-getting or attracting devices may be attached to any open house sign;

**5.** each open house sign must have attached to it an adhesive label or other means to identify the name, address and telephone number of the person responsible for placement and removal of the sign; and

**6.** a minimum fine of $75.00, per Section 1.16(f) of the municipal code, will be levied on the person whose name is on the sign if the sign does not comply with the preceding regulations. If no names are found on the sign the fine will be levied on the owner of the property identified on the sign.

[9-5] **I.** Political signs and noncommercial signs, provided that total area of all such signs together may not exceed a maximum area of 12 square feet per lot. Political and noncommercial signs may not be placed in the public right-of-way.

**J.** Garage sale, rummage sale, yard sale and estate sale signs, provided that such signs may be placed in the public right-of-way only on Friday, Saturday, Sunday and federal holidays that are observed on Mondays of the weekend that the sale will take place. Such sale signs may be posted only between the hours of 5:00 a.m. Friday to 10:00 p.m. on Sunday, provided that:

**1.** the sign may not exceed 4 square feet in area;

**2.** the sign must be freestanding, not attached to any utility pole, traffic control sign or other similar structured and must be placed at least 3 feet from the curb or edge of the pavement;

**3.** only one sale sign is permitted within 150 feet of another sign that relates to the same

address. There may be only one sale sign relating to the same address placed in on a single lot;

**4.** no attention-getting or attracting devices may be attached to any sale sign;

**5.** each sale sign must have attached to it an adhesive label or other means to identify the name, address and telephone number of the person responsible for placement and removal of the sign; and

**6.** a minimum fine of $75.00, per Section 1.16(f) of the municipal code, will be levied on the person whose name is on the sig if the sign does not comply with the preceding regulations. If no names are found on the sign the fine will be levied on the owner of the property identified on the sign.

**K.** Memorial signs and tablets, names of buildings and date of erection when cut into masonry surface or inlaid so as to be part of the building or when constructed of bronze or other noncombustible material.

**L.** "Help wanted" signs up to 2 square feet in area. The "help wanted" sign text must be the predominant text on the sign. Help wanted signs may only be located on a window or door.

**M.** Public notice signs are permitted on property that is the subject of a public meeting or hearing. Such signs may not exceed 9 square feet in area or 6 feet in height.

**N.** Vehicle signs are allowed when the vehicle to which the sign is attached is licensed, insured, and operational. The vehicle must be used for the operation of the business and may not remain stationary for an extended period of time for the purpose of attracting attention to a business.

**O.** Up to one contractor sign is allowed per lot. Such sign may not exceed 6 square feet in area and must be removed upon completion of related work.

### Sec. 9.040 Temporary Signs

Temporary signs as identified in this article may be permitted for promoting special community activities, special events, grand openings for businesses, or the activities of nonprofit organizations, subject to the issuance of a sign permit and compliance with the following regulations.

[9-6] **A.** No more than 8 permits for temporary signs may be issued in any calendar year for a single lot. Permits may be valid for a maximum period of 7 days. Applications for temporary sign permits must be approved by the village and must contain at minimum a general description of the sign, including size and lighting.

**B.** All temporary signs must be properly maintained while displayed and be able to withstand all weather elements.

**C.** Temporary signs may not contain changeable copy.

**D.** Temporary signs may not exceed 32 square feet in area.

**E.** A maximum of one temporary sign may be permitted for each street frontage on a lot.

**F.** All temporary signs must be removed by the person or organization that erected or caused the erection of the sign within 3 days of the end of the event to which they relate, or at the end of the maximum period for which the sign is allowed, whichever date comes first.

**G.** Temporary window signs are exempt from sign permit requirements. However, unless they are promoting an upcoming event of a nonprofit agency, such temporary window signs are subject to the restrictions regarding allowable area for window signs.

**H.** Temporary signs may not be located above the first floor in the DB, DT and Fairview Avenue Concentrated Business Districts.

**I.** The following additional regulations apply to all (temporary) development signs.

**1.** A sign permit must be obtained before the erection of any development sign. A sign permit may be issued in connection with the following types of developments after the village has issued a final approval for the development.

**a.** Residential developments of 3 or more dwelling units.

**b.** Commercial, industrial or institutional developments consisting of at least 20,000 square feet of land area.

**2.** Only one development sign per street frontage is permitted.

**3.** Development signs may not exceed 36 square feet in area.

**4.** Development signs must be removed at such time a final certificate of occupancy is issued. If more than one final certificate of occupancy will be issued for the development, the development signs must be removed when at least 75% of the final certificates of occupancy have been issued.

**5.** Development signs may display only information pertinent to the entity or entities participating in the development project.

### Sec. 9.050 Sign Regulations Generally

The regulations of this section (Sec. 9.050) apply to signs in all areas of the village except the DB and DT zoning districts and the Fairview concentrated business district.

### A. Maximum Total Sign Area

The maximum allowable sign area may not exceed 1.5 square feet per linear foot of tenant frontage, plus any signs expressly excluded from maximum sign area calculations. Buildings set back more than 300 feet from the abutting street right-of-way are allowed a maximum [9-7] allowable sign area of 2 square feet per linear foot of tenant frontage, plus any allowed excluding menu boards,

window and temporary signs. In no case, may a single tenant exceed 300 square feet in total sign surface area.

## B. Monument Signs and Shingle Signs

Unless otherwise expressly stated, each lot is allowed either one monument sign or one shingle sign.

### 1. Monument Signs

**a.** Monument signs are limited to a maximum of 2 sign faces and are subject to the height and area limitations of Table 9-1.

*Table 9-1: Monument Sign Height and Area Regulations*

| | **Lot Size** | | |
|---|---|---|---|
| **Monument Sign Regulations** | **Less than 100 ft. Lot Width** | **100-259 ft. Lot Width** | **260 ft. or Greater Lot Width and at Least 2.5 Acres in Area** (B-3 District only) |
| **Maximum Height** (feet) | 8 | 10 | 15 |
| **Maximum Area** (sq. ft.) | 24 | 36 | 60 |

**b.** Monument signs must be set back at least 10 feet from all street rights-of-way and at least 25 feet from all other lot lines. Monument signs that are greater than 10 feet in height and 36 square feet in size must be set back at least 100 feet from interior (non-street) lot lines.

**c.** Monument signs are subject to the intersection visibility regulations of Sec. 10.020.

**d.** Monument signs must display the address number of the subject property with numbers or characters between 8 and 10 inches in height. Address numbers are excluded when calculating the area of the monument sign.

**e.** Lots with more than one street frontage are allowed 2 monument signs, provided the signs are located on different street frontages and separated by a minimum distance of 100 feet.

**f.** The base of all monument signs must be landscaped. Every permit application for a monument sign must be accompanied by a landscape plan demonstrating compliance with the following standards:

**(1)** Signs must be surrounded by a landscaped area of at least 3 feet

in width, measured outward from the face of the sign.

**(2)** Landscaping within the required landscape area must consist of shrubs, evergreens, perennial or annual flowers, ornamental grasses, vegetative ground cover or some combination of such live plants. Sodded, seeded, mulched or rocked areas may not be counted as meeting these monument sign landscaping requirements.

**(3)** Monument sign landscaping is subject to the landscape maintenance provisions of Sec. 8.060I.

[9-8] **2. Multi-tenant Shopping Centers**

**a.** Multi-tenant shopping centers located on lots with more than 500 feet of street frontage are allowed 2 monument signs, provided the signs are separated by a minimum distance of 200 feet. Such signs may not exceed 15 feet in height or 60 square feet in area and must contain the names of more than one tenant. A shopping center tenant's panel sign is not counted toward allowable sign surface area.

**b.** Multi-tenant shopping centers located on lots with 100 to 500 feet of

street frontage are allowed a maximum of one monument sign. The sign may not exceed 10 feet in height or 36 square feet in area and must contain the names of more than one tenant. A shopping center tenant's panel sign is not counted toward allowable sign surface area.

**c.** Multi-tenant shopping centers located on lots with less than 100 feet of street frontage age [sic] are allowed a maximum of one monument sign. The sign may not exceed 8 feet in height or 24 square feet in area and must contain the names of more than one tenant. A shopping center tenant's panel sign is not counted toward allowable sign surface area.

**3. Tollway Corridor**

Signs on lots abutting the right-of-way of I-88 or I-355 are subject to all regulations of this article, with the following exceptions:

**a.** In addition to the monument sign otherwise allowed by Sec. 9.050B, one additional monument sign is allowed for lots with a minimum frontage of 100 feet along the tollway or on IDOT frontage along the tollway.

**b.** The additional monument sign must be placed adjacent to the tollway and may not exceed 225 square feet in

area or 20 feet in height. The additional monument sign will not be counted in calculating the lot's total sign area.

**c.** Monument signs must be separated by a minimum distance of 30 feet from any existing tollway signs.

**4. Shingle Signs**

The maximum allowed sign area of a shingle sign is 10 square feet per side. The maximum allowed height is 7 feet. Shingle signs must be set back at least 8 feet from interior lot lines. No street setback applies.

**C. Wall Signs**

**1.** Each business or property owner is allowed to display one wall sign per tenant frontage along a public roadway or drivable right-of-way.

**2.** If the structural support of a wall sign is visible it must be the same color as the exterior building to which it is attached.

**3.** Wall signs may not cover (wholly or partially) any wall opening, and may not extend beyond the perimeter of the wall to which it is attached or extend more than 12 inches from the vertical plane of the wall to which it is attached.

[9-9] **4.** Buildings with a height of 4 stories or more are allowed one wall sign on up to 3 sides of the building, with a

maximum area of 100 square feet per sign. Such wall signs are not counted in calculating maximum allowable sign area.

## D. Menu Boards

Menu boards for restaurants are allowed on the exterior wall of the business. Such signs may not exceed 4 square feet in area. The menu board area is not counted in calculating maximum allowable sign area. The menu board sign may include menus or notice of special events including community events. All menu board signs must be enclosed in a tempered glass or Plexiglas frame.

## E. Projecting Signs

### 1. First Floor

Each first floor establishment is allowed one projecting sign. Such signs may not extend more than 36 inches from the vertical plane of the façade to which it is attached and may not exceed 6 square feet in area. First floor projecting signs must be placed to allow at least 8 feet of vertical clearance above the ground directly beneath the sign. Projecting signs may not be internally illuminated.

### 2. Second Floor

The second floor of any building is allowed only one projecting sign, which

must be located immediately over or within 2 feet of the first floor pedestrian access to the building. Such signs may not extend more than 36 inches from the vertical plane of the façade to which it is attached and may not exceed 6 square feet in area. The projecting signs must be placed to allow at least 8 feet of vertical clearance above the ground directly beneath the sign. Projecting signs may not be internally illuminated.

## F. Awning Signs

Awning or canopy signs are allowed, subject to the following requirements:

**1.** Awnings and canopies may not extend above the first floor of the building to which it is attached and must be constructed and erected so that the lowest portion of the awning or canopy is at least 8 feet above the ground directly beneath it.

**2.** Awning or canopy signs may include only the name, address, and logo of the business conducted within the building. No advertising may be placed on any awning or canopy sign. Lettering must be painted or otherwise permanently affixed to the awning or canopy.

### G. Under-Canopy Signs

Under-canopy signs must be attached to the underside of the soffit or ceiling of a canopy. The face of any such sign may not exceed 12 inches in height or 4 feet in length. Such signs must be placed to allow at least 8 feet of vertical clearance above the ground directly beneath the sign.

### H. Window Signs

**1.** First floor businesses are allowed permanent and temporary window signs covering a maximum of 25% of each window. The window sign area is in addition to the total maximum allowable sign area.

[9-10] **2.** Businesses located above the first floor are allowed permanent window signs of individual letters or etching, covering up to 25% of one window per floor per tenant.

## Sec. 9.060 Sign Regulations for Downtown and the Fairview Concentrated Business District

The regulations of this section (Sec. 9.060) apply in the DB and DT zoning districts and the Fairview concentrated business district.

### A. Maximum Total Sign Area

The maximum allowable sign area may not exceed one square feet per linear foot of

tenant frontage or 300 square feet, whichever is less, plus any signs expressly excluded from maximum sign area calculations.

## B. Box Signs Prohibited

Box-type signs are prohibited.

## C. Monument, Shingle and Freestanding Signs

Unless otherwise expressly stated, each lot is allowed either one monument sign, one shingle sign or one freestanding sign, subject to the following regulations.

### 1. Monument Sign

Monument signs may not exceed 20 square feet in area per side or a height of 7 feet. Monument signs must be set back at least 8 feet from all interior lot lines. No street setback applies.

### 2. Shingle Sign

Shingle signs may not exceed 10 square feet in area per side or a height of 7 feet. Shingle signs must be set back at least 8 feet from all interior lot lines. No street setback applies.

### 3. Freestanding Sign

Freestanding signs may not exceed 20 square feet in area per side or a height of 7 feet. Freestanding signs must be set

back at least 8 feet from all interior lot lines. No street setback applies.

**D. Landscaping**

The base of all freestanding and monument signs must be landscaped. Every permit application for a monument sign must be accompanied by a landscape plan demonstrating compliance with the following standards:

**1.** Signs must be surrounded by a landscaped area of at least 3 feet in width, measured outward from the face of the sign.

**2.** Landscaping within the required landscape area must consist of shrubs, evergreens, perennial or annual flowers, ornamental grasses, vegetative ground cover or some combination of such live plants. Sodded, seeded, mulched or rocked areas may not be counted as meeting these landscaping requirements.

**3.** Freestanding and monument sign landscaping is subject to the landscape maintenance provisions of Sec. 8.0601.

[9-11] **E. Wall Signs**

**1.** Each business or property owner is allowed to display one wall sign per tenant frontage along a public roadway or drivable right-of-way.

**2.** If the structural support of a wall sign is visible it must be the same color as the exterior building to which it is attached.

**3.** Wall signs may not cover (wholly or partially) any wall opening, and may not extend beyond the perimeter of the wall to which it is attached or extend more than 12 inches from the vertical plane of the wall to which it is attached.

## F. Menu Boards

Menu boards for restaurants are allowed on the exterior wall of the business. Such signs may not exceed 4 square feet in area. The menu board area is not counted in calculating maximum allowable sign area. The menu board sign may include menus or notice of special events including community events. All menu board signs must be enclosed in a tempered glass or Plexiglas frame.

## G. Projecting Signs

### 1. First Floor

Each first floor establishment is allowed one projecting sign. Such signs may not extend more than 36 inches from the vertical plane of the façade to which it is attached and may not exceed 6 square feet in area. First floor projecting signs must be placed to allow at least 8 feet of vertical clearance above the ground directly

beneath the sign. Projecting signs may not be internally illuminated.

**2. Second Floor**

The second floor of any building is allowed only one projecting sign, which must be located immediately over or within 2 feet of the first floor pedestrian access to the building. Such signs may not extend more than 36 inches from the vertical plane of the façade to which it is attached and may not exceed 6 square feet in area. First floor projecting signs must be placed to allow at least 8 feet of vertical clearance above the ground directly beneath the sign. Projecting signs may not be internally illuminated.

## H. Awning Signs

Awning or canopy signs are allowed, subject to the following requirements:

**1.** Awnings and canopies may not extend above the first floor of the building to which it is attached and must be constructed and erected so that the lowest portion of the awning or canopy is at least 8 feet above the ground directly beneath it.

**2.** Awning or canopy signs may include only the name, address, and logo of the business conducted within the building. No advertising may be placed on any awning or canopy sign. Lettering must be painted

or otherwise permanently affixed to the awning or canopy.

## I. Under-Canopy Signs

Under-canopy signs must be attached to the underside of the soffit or ceiling of a canopy. The face of any such sign may not exceed 12 inches in height or 4 feet in length. Such signs must be placed to allow at least 8 feet of vertical clearance above the ground directly beneath the sign.

[9-12] **J. Window Signs**

**1.** First floor businesses are allowed permanent and temporary window signs covering a maximum of 25% of each window. The window sign area is in addition to the total maximum allowable sign area.

**2.** Businesses located above the first floor are allowed permanent window signs of individual letters or etching, covering up to 25% of one window per floor per tenant. Window signs above the first floor may not be illuminated by means of exposed gas tubing including, but not limited to, argon, neon or neon-like substances.

## K. Heritage Signs

Signs in place in the DB or DT zoning districts or Fairview concentrated business district before January 1, 1965 are hereby deemed to be "heritage signs" and are allowed to remain in

place and be maintained in any manner to allow for continued use. In order to be deemed a "heritage sign," the owner of the sign must provide conclusive evidence to the community development director that the sign was in place before January 1, 1965.

## L. Sandwich Board Signs

First floor businesses are allowed up to one sandwich board sign, not to exceed 6 square feet in area. They are not counted in calculating the maximum sign area allowed on a lot. Sandwich board signs are allowed within the public right-of-way, provided the following requirements are met:

**1.** A license agreement must entered into in a form and amount approved by the village indemnifying and holding the village harmless from liability and naming the village, its officers and employees as an additional insured on a general liability insurance policy. Such license agreements require the approval and signature of the village manager.

**2.** Sandwich board signs may be displayed only during business hours and must be removed each day at the end of business.

**3.** Sandwich board signs may not be placed in any location where the paved area for passage is reduced to less than 6 feet or within 15 feet of any intersection, driveway or crosswalk.

**4.** Sandwich board signs must be constructed of wood, metal or durable plastic.

**5.** The minimum fine for a violation of these sandwich board sign regulations is $750. Each day that such violation continues constitutes a separate fineable offense.

## Sec. 9.070 Special Sign Types

### A. Ornamental Entry Gate Signs

Ornamental entry gate signs are allowed at the entry to a development along an arterial or collector street, subject to the following regulations:

**1.** The maximum area of any ornamental entry gate sign in a residential zoning district is 25 square feet, and the maximum height is 8 feet.

**2.** The maximum area of any ornamental entry gate sign in a manufacturing zoning district is 50 square feet, and the maximum height is 10 feet.

[9-13] **3.** In residential zoning districts, the sign may display only the name of the subdivision or development.

**4.** In manufacturing zoning districts, the sign may display only a directory for an industrial subdivision or an industrial park.

**5.** One ornamental entry gate sign may be located on each side of the point of ingress

to the development, but not in the public right-of-way or otherwise upon public property. Any ornamental entry gate sign on public property before August 1, 2006 may remain in place, subject to approval of a fully executed license agreement with the village.

## B. Home Occupation Signs

Permitted home occupations are allowed one sign per lot, subject [sic] the following regulations.

**1.** The sign must be flat-mounted against the principal building.

**2.** The sign may not exceed 2 square feet in area.

**3.** The sign may display only the name, address, phone number and occupation.

**4.** The sign may not be directly or indirectly illuminated, other than by those lights incidental to the residential use of the premises.

## C. Signs Accessory to Parking Areas

Signs directing and guiding vehicular ingress and egress to public or private off-street parking areas may not exceed 2 square feet in sign area. No more than 2 such signs are allowed at each point of ingress/egress from the parking area. One sign with a maximum sign area of 4 square feet may be maintained on each

street side of a parking area for the purpose of designating the conditions of use or identity of the parking area. Signs accessory to parking areas are not included in calculating the total sign area on a lot. Signs accessory to parking areas must be set back at least 3 feet from the public right-of-way.

**D. Institutional Signs**

Exterior identification signs up to 20 square feet in area and a maximum height of 6 feet are allowed on the site of a public, charitable or religious assembly use. No more than one such sign is allowed per lot. Changeable copy consisting of a maximum of 4 lines is allowed. The changeable copy area is included in calculating the total sign area on a lot.

**E. College and University Signage**

Any educational campus with an area of 40 acres or more is subject to the regulations of this section. Entry monument signs are allowed at the perimeter of the campus on private property. The monument sign may not exceed 6 feet in height or 50 square feet in area, including ornamentation. Entry monument signs must be set back at least 40 feet from all curb lines. Exterior building identification may consist of no more than one monument sign on each side of the primary building entrance.

## Sec. 9.080 Administration and Permits

Except as otherwise expressly stated, all signs require a permit.

### A. Application

Any person or activity proposing to erect or display a sign must file an application on a form provided by the village, which must include a plat of survey.

### [9-14] B. Fees

All applicable permit fees as established in the User-Fee, License & Fine Schedule must be paid in full.

### C. Conformance with the National Electrical Code

All signs in which electrical wiring and connections are required for direct or indirect illumination must comply with all applicable provisions of the National Electrical Code.

### D. Wind Pressure and Dead Load Requirements

Signs must be designed and constructed to withstand a wind pressure of at least 40 pounds per square foot of net surface area and to receive dead loads as required in the building code.

## E. Insurance and Bond Requirements

Every applicant for a sign that will extend over a public right-of-way or that is so located that it may fall upon the public right-of-way, must file with the community development director an encroachment license agreement indemnifying the village and holding the village harmless from any liability. The applicant must also provide a liability insurance policy covering all damage or injury that might be caused by such signs, or certificate of insurance therefore, issued by an insurance company authorized to do business in the state of Illinois and satisfactory to the community development director, with limits of liability of not less than $1,000,000 for property damage and $1,000,000 for personal injuries. The village, its officers, agents and employees must be named as additional insured. Such liability insurance policy must be maintained in force throughout the life of the permit, and if at any time it is not in full force, the permit must be revoked.

## F. Completion of Authorized Work

If the work authorized under a sign permit has not been completed within 6 months of the date of issuance, the permit becomes null and void.

**Sec. 9.090 Nonconforming Signs**

Any sign that existed lawfully on the effective date of the sign regulations of this article that remains or becomes nonconforming by reason of adoption of these sign regulations or because of subsequent amendments to these sign regulations, or that become nonconforming by reason of annexation to the village of the lot on which the sign is located, are considered nonconforming signs and their continuance is allowed in accordance with the following regulations:

[9-15] **A.** Ordinary repairs and maintenance, including the removing and replacing of the outer panels is permitted, provided that the panels are replaced with identical panels and that no structural alterations or other work that extends the normal life of the nonconforming sign is permitted.

**B.** Single panels on multi-panel monument signs for multi-tenant shopping centers may be changed to reflect tenant changes.

**C.** No repair or alteration that increases the size of the nonconforming sign is permitted.

**D.** No nonconforming sign may be moved in whole or in part to any other location on the same or any other premises unless every portion of such sign is made to conform to all of the regulations of these sign regulations.

**E.** If a nonconforming sign is located on property that is sold, with the full ownership of the property being transferred, the nonconforming sign must be brought into conformance with the sign regulations of this article at the time of the transfer

unless the business will continue to operate under the same name.

**F.** If a nonconforming sign is abandoned or the described business discontinued for a continuous period of 30 days or more, it must be discontinued and any subsequent sign must conform to all of the sign regulations of this article.

**G.** On or prior to May 5, 2014 all nonconforming signs must be brought into conformance with the sign regulations of this article. This period is for all purposes deemed an appropriate amortization period for each and every nonconforming sign presently located within the corporate limits of the village or hereinafter located within the village by reason of annexation into the village of the lot or parcel on which the sign is located. Such amortization period shall be non-compensated.

**H.** Paragraph G does not apply to signs previously granted variances by the zoning board of appeals. Such signs are deemed nonconforming signs to which all other provisions of this section apply.

### Sec. 9.100 Illumination

Except as otherwise expressly stated, internally or externally illuminated signs are allowed, provided they comply with the following requirements:

**A.** Signs may be illuminated only by steady, stationary light sources directed solely at the sign or internal to it so that the light intensity or brightness does not create a nuisance to adjacent property or a traffic hazard.

**B.** Individual letters or logos may be internally illuminated. All other portions of the sign must be opaque.

**C.** Signs may not be illuminated by exposed reflective type bulbs, exterior exposed neon, fluorescent, incandescent or strobe lights.

### Sec. 9.110 Maintenance

All signs must be properly maintained, which includes repair or replacement of all broken or missing parts, elimination of rust or oxidation, elimination of faded or chipped paint, and correcting all similar conditions of disrepair. If a sign is illuminated, the source of such illumination must be kept in a state of safe working order at all times. Failure to properly maintain any sign constitutes a violation of this zoning ordinance.

### Sec. 9.120 Enforcement

The community development director is hereby authorized and directed to enforce all of the provisions of this article. Upon presentation of proper credentials, village personnel may enter, at reasonable times, any building, structure or premises to perform any duty imposed under this article.

[9-16] **A. Notice of Violation**

If the community development director finds that any sign has been erected in violation of the provisions of this article, or is unsafe or insecure, the community development director must issue a citation and/or cause the sign

to be removed by the village upon 10 days written notice. However, the community development director may cause any sign that poses an immediate threat of harm to persons or property to be removed summarily and without notice. The cost of such removal will be collected from the owner and/or occupant of the property by an action at law or assessed as a lien against the subject property after notice to the property owner.

**B. Temporary Signs**

If the community development director finds that any temporary sign has been erected in violation of the provisions of this article, or is unsafe or insecure, written notice must be provided to the owner and/or occupant of the property on which the sign is located or to the person or organization whose message is on the sign. If the sign is not removed or altered to comply with the provisions of this article within 24 hours of such notice, the community development director must cause such sign to be removed by the village without further notice. The owner and occupant of the property are jointly responsible for the cost of such removal, which may be recovered by the village in an action at law or by filing a lien against the property after notice to the property owner.