IN THE CIRCUIT COURT OF SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

STATE,

Plaintiff,

v. Uniform Case No.: 522013MO024375XXXXNO
Pinellas Case No.: CTC1324375MOANO

FOUNDERS PROPERTIES, LLC,
And DAVID MCKALIP,

Defendant(s).
_____/

MOTION TO DISMISS AND
ACCOMPANYING MEMORANDUM OF LAW

COME NOW Defendants, Founders Properties, LLC, and David McKalip, by and through the undersigned counsel, pursuant to Fla. R. Crim. P. § 3.190(b), and move to dismiss the above-referenced case. In support of this motion, Defendants state as follows:

1. This is a non-criminal action based on an alleged violation of the City of St. Petersburg Code of Ordinances § 16.40.120.15, entitled "Supplementary sign regulations."

2. The Complaint asserts that an electronic message located at 401 Southwest Blvd. North, St. Petersburg, FL 33703 did "not conform with the current sign codes as described in Sections 4 & 5, Subsection B of Section 16. 40. 120.15."

3. Sections 4 & 5, Subsection B of Section 16.40.120.15 state as follows:

> *4. Dwell time.* The dwell time, defined as the interval of change between each individual message, shall be at least one minute. Any change of message shall be completed instantaneously. There shall be no special effects between messages.
> 5. *Images and messaging*. a. *Consecutive images and messages*. Consecutive images and messages on a single electronic changeable message sign face are prohibited when the second message answers a textual question posed on the prior slot, continues or completes a sentence started on the prior slot, or continues or completes a story line started on the prior slot. b. *Static images and messages*. The image or message shall be static. There shall be no animation, flashing, scintillating lighting, movement, or the varying of light intensity during the message. Messages or images shall not scroll and shall not give any appearance or optical illusion of movement.

4. The Complaint alleges that on the 23rd day of August 2013 "[e]lectronic message center has continuous display of scrolling messages and information which does not remain stationary for the required one minute."

5. Fla. R. Crim. P. § 3.190(b) states that: "All defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information, whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense."

6. Defendants submit that the municipal sign ordinances are an unconstitutional restriction on free speech as guaranteed by the First Amendment of Constitution of the United States and Article 1, Section 4 of the Constitution of the State of Florida.

7. Defendants challenge the constitutional validity of the City of St. Petersburg Code of Ordinances § 16.40.120.15 and § 16.40.120, Sign Code, both facially and as applied, as overbroad restrictions on speech and seek to dismiss this action as a result.

8. As more fully set forth in the memorandum below, the City of St. Petersburg's Sign Code is an invalid and unenforceable attempt to proscribe protected speech.

MEMORANDUM OF LAW

The First Amendment provides: "Congress shall make no law … abridging the freedom of speech …." *U.S. Const., Amend. I.* The rights guaranteed by the First Amendment apply with equal force to state governments through the due process clause of the Fourteenth Amendment to the Constitution. *U.S. Const., Amend. XIV.* Furthermore, municipal ordinances adopted under state authority constitute state action and are within the prohibition of the First Amendment. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). Where a First Amendment violation is alleged, the burden is on the government to justify its restrictions. *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

At issue in this case is the constitutional validity of the sign code contained in the City of St. Petersburg Code of Ordinances. The Sign Code in its entirety is found at § 16.40.120. A true and correct copy of the Section 16.40.120 of the City

of St. Petersburg Code of Ordinances (hereinafter referred to as the "Sign Code") is attached hereto as Exhibit A.

The Defendants' sign located at 401 Southwest Blvd. North, St. Petersburg, FL 33703 – which is the subject of the citation in this case – is used for commercial purposes to identify Dr. David McKalip's business, to convey information about its products and services, as well as for noncommercial purposes to convey social and political ideas. On the date cited in the Complaint, the Defendants' sign was displaying noncommercial speech in the form of political speech and the displaying the text of the Florida Constitution.[1]

As the Supreme Court of the United States has noted, outdoor signs are protected under the First Amendment. See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) quoting *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 888 (1980) (Clark, J., dissenting) ("[t]he outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes").

[1] The fact that a speaker is a corporate entity does not render its speech *per se* commercial. *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1332 (M.D. Fla. 2009)

The Defendants in this case challenge the Sign Code as an unconstitutional, content-based restriction on both noncommercial and commercial speech in violation of the First Amendment. The Sign Code exempts from regulation certain categories of signs based on their content, without compelling or substantial justification for the disparate treatment and makes exceptions for some speech on the basis of content and the identity of the speaker.

I. The Sign Code is a content-based regulation.

The first step in analyzing a law that restricts speech is generally a determination of whether it is content-neutral or content-based. *Café Erotica of Florida, Inc. v. St. Johns County*, 360 F.3d 1274, 1286-87 (11th Cir. 2004); *Rappa v. New Castle County*. 18 F.3d 1043, 1053 (3rd Cir. 1994). Content-neutrality depends on whether the regulation is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A content-neutral ordinance is one that "places no restrictions on ... either a particular viewpoint or any subject matter that may be discussed." *Hill v. Colorado*, 530 U.S. 703, 723, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). On the other hand, content-based laws regulate the content of the speaker's message. *See Hill* at 767.

For content-neutral regulations, a court applies a "time, place, and manner" standard (or intermediate scrutiny), which allows regulation if it is narrowly tailored to serve a significant governmental interest and leaves open ample

alternative means of communication. *See Rock Against Racism*, 491 U.S. at 791; *see also One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1286 (11th Cir. 1999).

If a regulation is content-based, however, it is subject to higher scrutiny. The specific standard of scrutiny applied to content-based regulations of speech generally depends upon whether the speech is commercial or noncommercial.

Content-based restrictions of noncommercial speech must meet a strict scrutiny standard – i.e. the government "must show that its regulation is narrowly tailored to serve a compelling state interest." *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455,461 (1980); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). Content-based restrictions of commercial speech are reviewed under a less stringent standard articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), known as the "serve and directly advance" standard. Under the *Central Hudson* four-part test, the court must determine: (1) the expression is protected by the First Amendment; (2) the government interest is "substantial"; (3) the regulation directly and materially advances the governmental interest asserted; and (4) the regulation is narrowly tailored to serve that interest. *Id.*

The "sign code applies to any sign displayed, erected, or visible within the City," §16.40.120.2, and applies to "any device, fixture, placard, structure or representation that uses any color, form, graphic, illumination, or writing to advertise, attract attention, announce the existence of, or identify the purpose of a person, entity, product or service or to communicate information of any kind to the public." §16.40.120.19.

Section 16.40.120.3 requires that a permit be obtained before a sign may be erected. However, § 16.40.120.3.2 expressly exempts certain types of signs from these regulations certain enumerated categories of signs. In addition, § 16.40.120.15 establishes numerous limitations, such as location, design, requires a dwell time of one minute, and prohibits special effects between messages, scrolling text, optical illusion of movement, animation, flashing, scintillating lighting, movement, or the varying of light intensity during the message, among other things. Section 16.40.120.15 also provides specific regulations relating to flags and large facility signs. 16.40.120.15(C) and (D).

The Sign Code is a facially unconstitutional content-based restriction on speech, since it exempts from its regulations some categories of signs, based on their content, but not others. The Sign Code distinguishes between permissible and impermissible signs at a particular location by reference to content, and therefore, a content-based analysis should be employed.

At the outset, it is important to note that "[c]ontent-based regulations are presumptively invalid." *R.A.V.* at 382. In addition, the Eleventh Circuit Court of Appeals has explored sign ordinances similar to St. Petersburg's and found them facially unconstitutional. See *Dimmitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir.1993); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005).

The Court's decision in *Solantic* is particularly instructive. The Court provides an in-depth analysis of the Supreme Court's plurality opinion, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) and notes that "we subsequently adopted the same reasoning in *Dimmitt v. City of Clearwater*." *Solantic* at 1261. The Court stated:

> In *Dimmitt*, a panel of this Court addressed an ordinance very similar to Neptune Beach's, striking it down as a facially unconstitutional content-based restriction on speech. The Clearwater ordinance required a permit to erect or alter a sign, but exempted from this requirement certain types of signs, including: flags representing a governmental unit or body (limited to two per property), public signs posted by the government, temporary political signs, real estate signs, construction signs, temporary window advertisements, occupant identification signs, street address signs, warning signs, directional signs, memorial signs, signs commemorating public service, stadium signs, certain signs displayed on vehicles, signs commemorating holidays, menus posted outside restaurants, yard sale signs, and signs customarily attached to fixtures such as newspaper machines and public telephones.

Id. at 1262.

The Eleventh Circuit went on to hold that Neptune Beach's sign ordinance was a content based regulation that was not narrowly tailored to

serve a compelling government purpose, and thus struck down the ordinance in its entirety. *Id.* at 1268-69.

Similar to the ordinances at issue in *Dimmitt* and *Solantic*, the St. Petersburg Sign Code exempts from its prohibitions, *inter alia*, commemorative and historic signs; construction/contractor signs; government and public signs; neighborhood and business recognition signs; certain types of political signs; religious emblems; and real estate signs. Sign Code, § 16.40.120.3.2.

Furthermore, the Sign Code carves out special treatment for performing arts venues and large facilities. Section 16.40.120.15(B)(1)(a) prohibits digital or electronic message center signs within the boundary of a locally designated historic structure or site. But, "[p]erforming arts venues are exempt from this prohibition with approval of a certificate of appropriateness." Sign Code, §16.40.120.15(B)(1)(a). In addition, "large facility signs for an arena, theater, or other place of public assembly" are permitted to have a digital or electronic message center with a dwell time of only ten seconds – compared to one minute for all others. Sign Code, §16.40.120.15(D). What is more, the preferential treatment for large facility signs also includes a carve-out for the City itself: "Due to the changeable message capabilities of the electronic message center portion of the large facility sign, prior to issuance of the permit for the sign, the operator of the sign shall enter into an agreement with the City to provide for public service

announcements on a regular basis. Such announcements shall be provided regularly throughout the day and year and shall include messages of significant public interest related to safety and traffic matters (e.g., Amber Alerts, traffic hazards and congestion, hurricane evacuation notices, and traffic alerts or advisories) and messages related to city-sponsored and co-sponsored events." Sign Code, §16.40.120.15(D)(10).

Exceptions that favor certain speech based on the *speaker*, rather than the content of the message are no less content-based. "The Supreme Court has 'frequently condemned such discrimination among different users of the same medium for expression,' which is another form of content-based speech regulation." *Mosley*, 408 U.S. at 96; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak *and the speakers who may address a public issue.*" (emphasis added))." *Solantic* at 1266.

Here, the St. Petersburg has allowed performing arts venues and large facilities to display messages and has allowed the City itself to display "messages of significant public interest" and "messages related to city-sponsored and co-sponsored events" using electronic message centers with a dwell time of a full 50 seconds fewer than that required of all other speakers. This is impermissible; if the

City allows some noncommercial messages to be conveyed in a particular manner, it must allow other noncommercial messages to be conveyed in that same manner. See *Metromedia*, 453 U.S. at 514; see also *King Enterprises, Inc. v. Thomas Twp.*, 215 F. Supp. 2d 891, 912 (E.D. Mich. 2002) ("The distinction between what is allowed and what is prohibited is based on the content of the message or the identity of the person or institution displaying the sign. The ordinance, then, allows the [local government] to regulate which messages are displayed, and by whom, and which are prohibited. However, '[w]ith respect to noncommercial speech, the [Township] may not choose the appropriate subjects for public discourse.'"). The City's distinction between certain types of speech and certain speakers is a content-based restriction on speech.

a) The Sign Code fails to survive strict scrutiny.

Because the Sign Code restricts speech based on content, a time, place and manner analysis is inappropriate, and the appropriate standard of scrutiny instead depends upon whether the regulation restricts commercial or noncommercial speech. The Sign Code, by its own terms, regulates both noncommercial and commercial messages (A "sign" is "any device, fixture, placard, structure or representation that uses any color, form, graphic, illumination, or writing to advertise, attract attention, announce the existence of, or identify the purpose of a

person, entity, product or service or **to communicate information of any kind to the public.**")(emphasis added). Sign Code § 16.40.120.19.[2]

For commercial speech, the City ordinarily must demonstrate that its restrictions on commercial speech meet the standard set forth in *Central Hudson*, i.e., that the restrictions serve and directly advance a substantial governmental interest and reach no further than necessary to accomplish that goal. 447 U.S. at 563-66.[3] However, because the Sign Code applies to signs bearing commercial and noncommercial messages, the *Central Hudson* test has no application here. See *Solantic* at n. 15 ("Because the sign code does not regulate commercial speech as such, but rather applies without distinction to signs bearing commercial and noncommercial messages, the *Central Hudson* test has no application here."). See also *Dimmitt* at 1569 ("We need not determine whether the Dimmitt display is itself expressive conduct or whether any expressive element should be classified as commercial or noncommercial. By its own terms, the Clearwater ordinance applies to virtually any form of graphic communication that is publicly displayed, and thus plainly reaches conduct that is both expressive and noncommercial.").

[2] The speech for which Defendants were cited was noncommercial speech. Specifically, on the day in question, the sign was displaying political speech and a quotation from the free speech clause of the Florida Constitution.

[3] Even individuals with a "commercial interest" in speech may raise a facial challenge to an ordinance, raising the non-commercial speech interests of third parties. *Metromedia Inc. v. City of San Diego,* 453 U.S. 490, 504, n. 11, 101 S.Ct. 2882, 69 L.Ed.2d 800. (1981).

Rather, the appropriate test is strict scrutiny, as the Sign Code applies to both commercial and non-commercial speech without distinction. Under the strict scrutiny standard, the City must show that the Sign Code is the least restrictive means to further a compelling governmental interest. See *R.A.V.*, 505 U.S. at 395; *Perry Educational Ass'n*, 460 U.S. at 45 (1983).

On the face of the Sign Code, the City fails to meet its burden. The content-based restrictions are not narrowly tailored to accomplish the City's interests. As set forth in the City of St. Petersburg Code of Ordinances:

> The purpose of this sign code is to establish minimum standards for an orderly system of signs and improve the quality of sign regulation in the City in a manner that contributes to the economic well-being, visual appearance, and overall quality of life in the City. In particular, it is the purpose of this sign code to further the following objectives:
> To establish a comprehensive system of sign regulation that addresses the full spectrum of principal sign considerations on a uniform basis;
> To establish a system of sign regulation that gives special recognition to protecting the natural characteristics and visual attractiveness that are essential to the economy of the City;
> To address the minimum standards necessary to reduce the visual distraction and safety hazard created by sign proliferation along the public rights-of-way; and
> To recognize the significance of signs and appropriate uniform regulation thereof as a component of community appearance and character in the City.

City of St. Petersburg Code of Ordinances §16.40.120.1.

None of the City's stated objections is substantial or compelling enough to justify the restraint on speech. The Sign Code contains content-based restrictions on noncommercial and commercial speech, and the City's interests in aesthetics

and public safety are not served by these restrictions. As the Eleventh Circuit has clearly held: "[Aesthetics and traffic safety] are not sufficiently 'compelling' to sustain content-based restrictions on signs." *Solantic* at 1268.

Furthermore, the Eleventh Circuit has explained:

> Even if we were to assume that Neptune Beach's proffered interests in aesthetics or traffic safety were adequate justification for content-based sign regulations, the sign code cannot withstand strict scrutiny because it is not narrowly drawn to accomplish those ends. The problem is that the ordinance recites those interests only at the highest order of abstraction, without ever explaining how they are served by the sign code's regulations generally, much less by its content-based exemptions from those regulations. In *Dimmitt*, we noted that even if the government's interest in aesthetics and traffic safety could be sufficient justification for content-based regulation of signs, those interests "clearly are not served *by the distinction* between government and other types of flags; therefore, the regulation is not 'narrowly drawn' to achieve its asserted end." The same is true here—the sign code recites only the general purposes of aesthetics and traffic safety, offering no reason for applying its requirements to some types of signs but not others.

Id. at 1267 (internal citations omitted)(emphasis in original).

Just as in *Solantic*, St. Petersburg's Sign Code clearly distinguishes between permissible and impermissible by reference to content and the identity of the speaker. That is, the City has expressly permitted some noncommercial messages to be conveyed in a particular manner, while prohibiting the conveyance of other noncommercial messages in the same manner. Even if safety and aesthetics were compelling governmental interests, the interests are not shown to be advanced by

the ordinance and are undermined significantly by the exceptions the City has carved out for certain speakers and certain types of signs.

II. The Sign Code is an impermissible time, place, and manner restriction.

Assuming *arguendo* that this Court deems that Sign Code to be content-neutral, the restrictions imposed still fail to pass constitutional muster. A regulation is content-neutral if it regulates speech "without reference to the content of the regulated speech." *Ward v. Rock Against Racism,* 491 U.S. 781, 791. This is known as time, place, manner restriction on speech. "[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.*, quoting *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984). With regard to sign ordinances in general, content-neutral restrictions could include limitations on the size, number, and height of signs.

As discussed above, Defendants submit that the Sign Code is in fact content-based. The City asserts that the regulations contained within the Sign Code "are content-neutral and regulate only the form, not the content, of signs." City of St. Petersburg Code of Ordinances §16.40.120.1. However, even a content-neutral

analysis reveals that the Sign Code is not narrowly tailored to serve a significant governmental interest and therefore an invalid restriction on protected speech.

The City states that the intent of the Sign Code is to promote uniformity, aesthetics, and safety. See City of St. Petersburg Code of Ordinances §16.40.120.1. The Sign Code recites these interests only at the highest order of abstraction, without explaining how they are served by the Sign Code's regulations generally. Furthermore, the numerous exemptions and exceptions undermine the City's stated interests. If, as the City claims, the Sign Code is aimed at promoting uniformity, aesthetics, and safety, why does it provide certain types of signs disparate treatment? The City offers no reason for applying its requirements to some types of signs but not others.

A regulation is not "narrowly tailored"—even under the more lenient tailoring standards —where, as here, "a substantial portion of the burden on speech does not serve to advance the stated content-neutral goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799. The Sign Code is underinclusive, irrational, and arbitrary, and therefore fails to advance its stated goals. The exceptions for large facilities and performing arts venues are particularly illustrative. These exceptions severely undermine the City's stated goals without justification or rational basis. The City does not explain how or why signs in front of large facilities and performing arts venues would be less threatening to safe driving or would detract

less from the beauty of the city. In short, safety and aesthetics are not truly furthered by an ordinance that allows some signs special exception but not others.

The Sign Code carves out an exception for large facility signs – namely Tropicana Field – and allows a dwell time of a full 50 seconds fewer than other signs throughout the city. It is entirely unclear why a sign located on a dangerous and crowded stretch of the Interstate is allowed such an exception. In addition, the City cannot offer a reason why it is less safe or aesthetic pleasing for a non-large facility sign to abut an interstate highway than it is for Tropicana Field to occupy the very same location.

Moreover, the City undermines its stated interests by allowing for numerous other exceptions, including signs located at performing arts venues, signs located on City trolleys, and traffic signs. A video of select signs that are excepted or exempted from the Sign Code's dwell time and/or scrolling text provisions is attached hereto as Exhibit B. As evidenced by these signs, the City's stated interests in uniformity, aesthetics, and safety are not served by these exceptions. Indeed, the City's stated interests are subverted by the numerous exceptions and undercut the Sign Code's narrow tailoring.

The Sign Code's restriction on some speech but not others does not serve to advance the stated content-neutral goals and as such cannot pass intermediate scrutiny. A municipality does not have the power to impose arbitrary and

irrational restrictions that deprive individuals of their free speech rights under the banner of regulation. The Sign Code unconstitutionally singles out certain types of signs while allowing others, thus disadvantaging certain types of speech. As a result, it does not genuinely serve a significant governmental interest.

III. Conclusion

WHEREFORE, in light of the foregoing arguments, Defendants David McKalip and Founders Properties, LLC, respectfully request that this Court dismiss the above-styled action, declare the City of St. Petersburg Sign Code an unconstitutional restriction on speech, and for such other and further relief as the Court deems just and proper.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via U.S. Mail and email service to D. Lynn Gordon, St Petersburg City Attorney's Office, P.O. Box 2842, Saint Petersburg, FL 33731-2842, lynn.gordon@stpete.org this 14th day of November 2013.

_/s/ George K. Rahdert
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