UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Plaintiff,

v. **Case No. 8:01-cv-1663-T-30MSS**

CITY OF CLEARWATER, FLORIDA, et al.,

Defendants.

ORDER

This cause came before the Court for consideration upon the following Motions:

1. Individual Defendants' Motion to Dismiss the Complaint with Prejudice (Dkt. #10) and Motion to Dismiss the Amended Complaint (Dkt. 62),[1] Plaintiff's response in opposition thereto (Dkt. #13) and the individual Defendants' reply thereto (Dkt. 22);

2. Plaintiff's Motion for Preliminary Injunction (Dkt. #16), supporting memorandum (Dkt. #17) and Defendants' memorandum in opposition thereto (Dkt. #30);

3. Plaintiff's Motion for Partial Summary Judgment (Dkt. #18), supporting memorandum (Dkt. #19), and Defendants' memorandum in opposition thereto (Dkt. #42), and

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[1] The parties have entered into a stipulation regarding the filing of the Amended Complaint. (Dkt. #59) wherein they specifically agree that the Amended Complaint "contains no additional legal theories or grounds for relief which would affect the Court's disposition of the parties' pending motions."

4. Defendants' Motion for Final Summary Judgment (Dkt. #41), supporting memorandum (Dkt. #42) and Plaintiff's response in opposition thereto (Dkt. #51).

Both parties have also filed supporting affidavits and exhibits to their Motions, including certified copies of the ordinance at issue. The Court heard the arguments of counsel on March 15, 2002. Additionally, the Court requested (Dkt. 71), and considered, the parties additional briefs on standing. (Dkts. 74, 75).

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has filed a separate Statement of Facts in support of its Motions for Partial Summary Judgment and Preliminary Injunction. (See Dkt. #20). Defendants have incorporated their recitation of the facts as part of their memorandum in support of their Motion for Summary Judgment. (See Dkt. #42). The undisputed facts are as follows.

Plaintiff, Granite State Outdoor Advertising, Inc., ("Granite State") is a Georgia corporation in the business of buying or leasing land upon which to construct signs and billboards to be used for the dissemination of both commercial and non-commercial speech. (Amded. Compl., ¶ 6). Defendants point out that Granite State employs only two persons, the president and vice-president, and operates out of the Georgia residence of its president, who previously worked for two outdoor advertising companies. Since its incorporation in 1997, Granite State has "never erected a billboard, never operated a billboard, has never been licensed as an outdoor advertising company, and has not yet held a permit in its own name to erect a billboard." (Charles Dep. at 39-41, 47, 68). To date, Granite State has received profits

from the sale of at least twenty-two billboard permits to Eller Media which were obtained from similar litigation brought against various cities and municipalities in the state of Georgia. (Id. at 12, 69).

In the case at bar, Granite State entered into lease agreements for five different parcels of real property located in commercial or industrial areas in the city of Clearwater, Florida ("Clearwater"), upon which to construct and operate one freestanding billboard sign on each parcel of property. Id., ¶ 8. Plaintiff subsequently obtained three other lease agreements and filed an amended complaint to add its claims regarding these three parcels. Id., ¶ 8A.

Defendant Clearwater is a political subdivision of the state of Florida and describes itself as a "resort community on the west coast of the state with more than five miles of beaches on the Gulf of Mexico" which has an economic base that relies "heavily on tourism." (See §3-1801). Clearwater has codified various sign regulations to create a comprehensive scheme for regulating, *inter alia*, the permitting, placement, number, construction, size, height, design, operation, and maintenance of the signs within the city's boundaries. (Amded. Compl., ¶ 9). Clearwater has regulated the height and size of signs for more than twenty-five years and enacted various codes over the years. (See Dkt. #42, pp. 6-8).

The sign regulations at issue are contained within Division 18 of Clearwater's Community Development Code (the "Code"). The entirety of the sign ordinance, "Division 18" containing §§ 3-1801 through 3-1807 (the "Ordinance"), is attached as Appendix 1 to this Order and is referred to herein by section number. Section 3-1802 contains the specific

purposes and intentions for which the sign regulations were promulgated. Clearwater's sign regulations are intended to:

A. Enable the identification of places of residence and business.

B. Allow for the communication of information necessary for the conduct of commerce.

C. Lessen hazardous situations, confusion and visual clutter caused by proliferation, improper placement, illumination, animation and excessive height, area and bulk of signs which compete for the attention of pedestrian and vehicular traffic.

D. Enhance the attractiveness and economic well-being of the city as a place to live, vacation and conduct business.

E. Protect the public from the dangers of unsafe signs.

F. Permit signs that are compatible with their surroundings and aid orientation, and preclude placement of signs in a manner that conceals or obstructs adjacent land uses or signs.

G. Encourage signs that are appropriate to the zoning district in which they are located and consistent with the category of use to which they pertain.

H. Curtail the size and number of signs and sign messages to the minimum reasonably necessary to identify a residential or business location and the nature of any such business.

I. Establish a sign size in relationship to the scale of the lot and building on which the sign is to be placed or to which it pertains.

J. Preclude signs from conflicting with the principal permitted use of the site or adjoining sites.

K. Regulate signs in a manner so as to not interfere with, obstruct vision of or distract motorists, bicyclists or pedestrians.

L. Require signs to be constructed, installed and maintained in a safe and satisfactory manner.

M. Preserve and enhance the natural and scenic characteristics of this waterfront resort community.

The sign ordinance also contains a provision under its "General Standards" section that provides, "[n]ot withstanding any other provision of this Code, no sign shall be subject to any limitation based on the content of the message contained on such sign." §3-1804.H. Similarly, there is no distinction between commercial or non-commercial speech within the sign ordinance. The sign ordinance regulates four categories of signs: 1) §3-1803 prohibits twenty-five different types of signs (such as portable signs, vehicle signs and roof signs); 2) §3-1805 allows twenty different types of signs without a permit (such as safety or warning signs, holiday decorations, garage or yard sale signs and for sale signs); 3) §3-1806 proscribes certain height, area and lighting requirements for residential signs (subdivision development and multifamily entry signs and school and park identification monument signs) and non-residential signs (freestanding, monument, transit shelter and attached signs) - these signs require a permit under the development review process; and 4) §3-1807 permits signs that comply with eight enumerated "flexibility criteria"[2] that may be approved under the City's Comprehensive Sign Program. The sign ordinance also contains a provision, §3-1804, titled "General Standards," that prescribes building and electrical code compliance and regulates

[2] The specific flexibility criteria for signs allowed under the City's Comprehensive Sign Program involve: (1) architectural theme; (2) height; (3) lighting; (4) total area of sign face; (5) community character; (6) property values; (7) elimination of unattractive signage; and (8) special area or scenic corridor plan. §3-1807.C.

setback, lighting and illumination, banners and flags, gasoline price signs, and time and temperature signs.

The Permitting Process

Article 4 of the City's Code, titled "Development Review and Other Procedures," sets forth the process for obtaining various levels of permit approval and the appeals process. Division 10 of Article 4 requires that the application for approval of a sign "shall be reviewed and approved by the community development coordinator as a level one approval."[3] The process for a level one approval is set forth in Division 3 of Article 4, with appropriate references to the appeals process set forth in Division 5 – §§4-504 and 206 (community development board appeals and public hearings) and §4-505 (appeals to hearing officer). The relevant divisions of Article 4, §§4-206, 301-303, 501-505 and 1001-1007 are attached to this Order as Appendix 2.

The initial step in the permitting process is to complete the application process. Once submitted, a determination of completeness shall be made by the community development coordinator within five days. §4-202C.1. Within five or ten working days after that determination is made, the community development coordinator or members of the development review committee (depending on whether the level one approval sought is for "standard development" or "flexible standard development") shall determine whether the

[3] As further supported by affidavit of Clearwater's community development director. See Tarapini Aff., ¶7.

application is "legally sufficient" (defined as "whether the required application materials have been prepared in a substantively competent manner"). §4-202C.2 and 3. If insufficient, the application is deemed withdrawn.

Once an application is deemed complete and legally sufficient, the development review committee shall review the application in accordance with the applicable division of the Code; in the case of a sign permit, Article 3, Division 18. §4-202.D. An appeal may be taken to the Community Development Board which holds a "quasi-judicial public hearing." See §§4-501, 504, 206. A hearing officer has the authority to hear appeals from the Community Development Board. §4-501.B.

There are no time limits in the Code for an appeal to be heard.[4] See §§4-504 and 206 (community development board appeals); §4-505 (hearing officer appeals of community development board decisions, which are required to establish a "timely date" for the hearing, and must issue a decision within 45 days of the hearing). To overturn a decision, the Community Development Board must find by "substantial competent evidence" that the decision (1) "misconstrued or incorrectly interpreted" the Code, (2) is in "harmony with the general intent and purpose" of the Code and (3) will not be "detrimental to the public health, safety and general welfare." §4-504.C.

Severability Provision

[4] Appeals from abutting property owners are, however, placed on the "next scheduled meeting of the board." §4-504.B

Under the Code's "General Provisions," there is a severability provision that reads as follows: "[s]hould any section or provision of this Development Code be declared to be unconstitutional or invalid by a court of competent jurisdiction, such decision shall not affect the validity of this Development Code as a whole or any part thereof other than the part so declared to be unconstitutional or invalid." §1-107.

Granite State's Applications

Clearwater's ordinance limits freestanding billboard signs in excess of fourteen feet in height and in excess of sixty-four square feet in area per side. § 3-1806.B. Plaintiff applied to Clearwater for permission to post a 65 foot high and 672 square foot billboard sign on each of its leased parcels of property. (Charles[5] Aff. at ¶¶ 6-8). Clearwater's Planning Department denied the applications on August 10, 2001, the same day they were submitted. (Amded. Compl., ¶ 11; Tarapini[6] Aff. at ¶9). On each application, Clearwater noted the reason for denial - "Refer to Section 3 - 1806(B1)" and "Height, Size and Numbers of Signs (Total Square Feet on Parcel)." (Charles Dep., Exh. 1-5). The Plaintiff's proposed signs were more than four times the allowable height and ten times the allowable area. Granite State did not appeal the initial denial of the sign permits and instead, on August 31, 2001, initiated this action by filing an eleven count complaint against Clearwater, its Mayor, Defendant Brian

[5] Wayne Charles is the president of Granite State.

[6] Cyndi Tarapini is Clearwater's Community Development Coordinator and Director of its Planning Department.

Aungst, Sr., and its City Manager, Defendant William Horne. (Charles Dep. at 92; Tarapini Aff. ¶9).

The Individual Defendants

Defendants Aungst and Horne appear to have been sued in both their individual and official capacities. Neither of these Defendants was personally involved in the denial of Granite State's billboard permit applications and did not learn about the permit applications until after their denial. (See Aungst and Horne Affs.). Neither Defendant has had any verbal or written communications with Granite State or its principals, nor have they ever met with representatives of Granite State. (Id.).

II. LEGAL ANALYSIS

A. Individual Defendants' Motion to Dismiss

The individual Defendants move to dismiss the claims made against them in both their individual and official capacities. In their individual capacities, these Defendants claim that they are entitled to the defense of qualified immunity for any governmental actions taken while they served in their capacities of mayor and city manager. Defendants further maintain that there is no basis for individual liability because Plaintiff has failed to make any allegations whatsoever against the individual Defendants in the Amended Complaint.

Plaintiff opposes the Motion to Dismiss on the basis that these Defendants have enforced "clearly unconstitutional restrictions on the fundamental right of speech," and as such, they should be held liable in their individual capacities. Plaintiff appears to argue,

without legal support, that elected or appointed officials[7] can be personally liable for an allegedly unconstitutional ordinance solely by virtue of the fact that the official is responsible for the enforcement of the ordinance.

The Court agrees with Defendants that there is no basis for individual liability in this case because Plaintiff has not alleged any specific allegations against these Defendants; that is, Plaintiff makes no claim against these Defendants for any action taken by these Defendants, supervisory or otherwise, but instead sues them personally for an allegedly unconstitutional ordinance. Moreover, the individual Defendants should be dismissed because they are entitled to qualified immunity.

Qualified immunity acts to cloak public officials from lawsuits unless they have violated "clearly established statutory or constitutional law of which a reasonable person would have known." See Lassiter v. Alabama A&M Univ., 28 F.3d 1146, 1149 (11th Cir. 1994). The Eleventh Circuit determines whether a law is clearly established through a fact-specific analysis that focuses on the "actual" and "specific details of [a] concrete case." Id. at 1150; see also Granite State Outdoor Advertising, Inc. v. Cobb County, Case No. 1:01-CV-1376-WBH at 7-9 (attached as Exh. B to Dkt. 51). The contours of such right must be

[7] In the Amended Complaint, Plaintiff identifies these Defendants, respectively, as serving as Clearwater's elected Mayor/Chairman of the City Commission and appointed City Manager. (Amded Compl., ¶¶3, 4).

"sufficiently clear that a reasonable official would understand what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Not only are there no specific factual allegations as to the individual Defendants (who were acting within their discretionary authority), the constitutional law at issue in this case is far from clearly established (as this order will undoubtedly demonstrate). See Naturist Society, Inc. v. Fillyaw, 858 F. Supp. 1559, 1571 (S.D. Fla. 1994) (with regard to qualified immunity in First Amendment case, public officials are not expected to be more knowledgeable than the courts with respect to the "complexities of constitutional law"). Accordingly, the individual Defendants are entitled to qualified immunity.[8]

[8] The Court makes this finding at the motion to dismiss stage on the allegations of the complaint; and were it to consider the issue at summary judgment after considering the individual Defendants' affidavits and other deposition testimony (submitted in support of its motion for summary judgment) and Plaintiff's response thereto, the Court would make the same finding.

Defendants also argue that the Amended Complaint should be dismissed against the individual Defendants in their official capacities because suits against local governments in their official capacities are duplicative of actions against the local government entity itself.[9] The Court agrees. Plaintiff has sued the city of Clearwater for the same alleged constitutional violations. Therefore, naming the individual Defendants in their official capacities is redundant. See Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989); Busby v. City of Orlando, 931 F. 2d 764 (11th Cir. 1991). Plaintiff's contention that if the Court invalidates the sign ordinance the inclusion of the individual Defendants, in their official capacities, is necessary to insure issuance of the sign permits previously denied to Granite State is meritless.[10] See Granite State Outdoor Advertising, Inc. v. Cobb County, Case No. 1:01-CV-1376-WBH at 5-6 (attached as Exh. B to Dkt. 51). The Court may direct Defendant Clearwater, if necessary.

B. First Amendment Analysis

1. Standing

Typically, standing requires that: 1) a plaintiff suffered an "injury in fact;" 2) that there be a "causal connection" between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action of the defendant and not the result of

[9] Plaintiff concedes that Clearwater is liable for the official conduct of its city officials. See Dkt. 13 at 7.

[10] Defendants point out that such a cause of action may be necessary when there is a claim against a county or state that is barred by the Eleventh Amendment. This is not such a case.

the independent action of some third party not before the court; and 3) it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." See Bischoff v. Osceola County, Fla., 222 F. 3d 874, 883 (11th Cir. 2000). However, for First Amendment overbreadth challenges, the requirements for standing are generally more lenient. Id. at 884.

The Supreme Court recognized overbreadth challenges as "exceptions" to the general rule of standing for laws that are written "so broadly that they may inhibit the constitutionally protected speech of third parties." Members of the City Council of Los Angeles v. Taxpayers for St. Vincent, 466 U.S. 789, 798 (1984) (addressing an ordinance banning handbills on public property). Such a challenge, in essence, permits third party standing for claims on the grounds that ordinance may pose a "realistic danger" that the statute itself will "significantly compromise recognized First Amendment protections of parties not before the court." Id. at 801. Generally, courts have permitted such challenges when the constitutional rights involve the First Amendment.[11] See, e.g., Sec'y of State of Md. v. Joseph H Munson Co., Inc., 467 U.S. 947, 957-9, 967-8 (1984). Nonetheless, it still remains that a plaintiff must establish that he or she suffered some "injury in fact" as a result of the defendant's actions. Bischoff, 222

[11] The overbreadth doctrine is referred to frequently, yet it remains little understood and a source of much confusion. See generally, Hill, Alfred, "The Puzzling First Amendment Overbreadth Doctrine," 25 Hofstra L.Rev. 1063 (Summer 1997); Fallon, Jr., Richard H., "Making Sense of Overbreadth," 100 Yale L.J. 853 (Jan. 1991).

F.3d at 884 (citing Virginia v. Amer. Booksellers Assoc., Inc., 484 U.S. 383, 392 (1988); Munson, 467 U.S. at 958; National Council for Improved Health v. Shalala, 122 F. 3d 878, 883 (10th Cir. 1997); Bordell v. General Electric Co., 922 F. 2d 1057, 1061 (2nd Cir. 1991)).

Defendants contend that Granite State does not have standing to assert the First Amendment claims it makes in this case; nor should it be permitted to make an overbreadth challenge to the Code. Specifically, Defendants make the argument that Granite State cannot contend that the section under which it was denied its permits, §3-1806.B, which imposes height, size and location limitations on freestanding signs, is unconstitutional. (Dkt. #42 at 19). To the contrary, Granite State contends that §3-1806.B is unconstitutional because: 1) it requires applicants to seek permission for development review, a procedure which affords government officials an improper level of discretion without reference to objective standards; 2) it requires applicants to file for permits prior to posting the sign, procedures which are void as impermissible prior restraints on speech; 3) the section restricts commercial and non-commercial signs without satisfying the Central Hudson[12] analysis; 4) the section violates equal protection; and 5) it is invalid because it is inextricably intertwined with the

[12] In Central Hudson, the Court struck down as unconstitutional a **regulation of the New York Public Service Commission which completely banned promotional advertising by the utility**. Central Hudson Gas & Electric Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980). Central Hudson established a four part test for determining the validity of government regulations on commercial speech. Id. at 463-64. The first element deals with the regulation of misleading or unlawful information. Id. The other elements of an otherwise valid restriction on protected commercial speech are: (1) it only seeks to implement a substantial government interest; (2) it directly advances that interest; and, (3) it reaches no further than necessary to accomplish the given objective. Id.; see also Metromedia, 453 U.S. at 490.

unconstitutional whole of the sign ordinance, preventing severance. (Dkt. #51 at 3). Defendants also contend that Granite State has not suffered an injury in fact because it did not participate in the appeals process. (Dkt.#74 at 9-15). Defendants further contend that Granite State does not have standing because it does not have a "commercial speech interest."

The Supreme Court has recognized that 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. (1981). Although Defendants acknowledge this holding, they claim that Granite State has no speech interest because it has been neither an advertiser nor a billboard operator, instead it merely obtained leases for properties upon which billboards would be constructed. In essence, Defendants argue that these activities are not sufficient to establish an interest in speech sufficient to confer standing.

But Granite State claims that it has a commercial interest in speech. It holds leases on property upon which it has applied for permission to place billboards. In fact, Granite State contends that if victorious in this litigation, it may well choose to build and operate the signs itself. Clearly, parties with a commercial interest in speech may assert facial challenges to the First Amendment, in essence, filing suit on the grounds that there is an infringement of the rights of third parties as well as of their own free speech rights. See, e.g., Metromedia, 453 U.S. at 504, n.11 ("we have never held that one with a "commercial interest" in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement

of the First Amendment rights of others"); but see id. at 544-48 (Steven, J., dissenting) (no standing, even under the "limited exception" for overbreadth, for "hypothetical cases" of property owners not before the Court). See also National Advertising v. Ft. Lauderdale, 934 F. 2d 283, 285 (11th Cir. 1991).

The more central issue is whether Granite State has standing to make a facial challenge to Clearwaters's entire sign ordinance on overbreadth grounds. After extensive review, the Court is constrained to find that Granite State has standing to make an overbreadth challenge to those portions of the ordinance that directly implicate, and could accordingly "chill," the First Amendment rights of persons not before the Court, but not to the appeals portion of the permitting section as Granite State was not affected in any way by this provision because it did not appeal the City's denial.

The overbreadth doctrine is "manifestly, strong medicine" that should be use "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).[13] In Taxpayers for St. Vincent, after analyzing the plaintiffs' claims to determine whether they had standing to bring a facial challenge on overbreadth grounds, the Supreme Court found that their challenge was only "as applied" to their activities and heard only the "concrete case" before them. Taxpayers for St. Vincent, 466 U.S. at 802-3 (plaintiffs did not demonstrate that the ordinance applies to "any conduct more likely to be protected by the First Amendment" than their own).

[13] In Broadrick, which dealt with a statutory restriction on political speech activities of government employees, the Court first established limited exceptions to the strict standing test in cases involving "weighty countervailing policies." Id. at 611 (citations omitted). A facial overbreadth challenge is one such exception.

For a valid facial challenge on overbreadth grounds, the Court found that there must be a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." Id. at 801. Indeed, the overbreadth of the statute must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 800-1 (quoting Broadrick, 413 U.S. at 615).

There is no exact definition of "substantial overbreadth;" however, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Id. at 800; see also Sec'y of the State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984). "The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." Taxpayers for St. Vincent, 466 U.S. at 800-1 (quoting New York v. Ferber, 458 U.S. 747, 772 (1982)). In Ferber, the Court rejected an overbreadth challenge to a statute prohibiting persons from knowingly promoting sexual performances by children, even acknowledging that the statute may reach certain educational materials, finding that the "**arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." Ferber, 458 U.S. at 773.**

Accordingly, the Court turns to whether Granite State's claims fit within the limited exception to the standing doctrine for overbreadth challenges. From the Amended Complaint and Granite State's motions, it appears to mount two distinct facial challenges in its quest to have the ordinance declared unconstitutional: (1) that Article 3, Division 18 is an unconstitutional content-based regulation and vests government officials with "undue discretion," and (2) that Article 4, the permitting and appeals section, is an impermissible "prior restraint" that does not comply with the requirements of Freedman v. Maryland, 380 U.S. 51 (1965),[14] because it contains no time limits for the appeals process.

In Granite State's first overbreadth challenge, it claims that the regulations set forth in Article 3, Division 18, when applied to Granite State, as well as to other third parties who would be denied a sign permit, are in violation of the First Amendment because the sign ordinance is impermissibly content-based on its face. In Granite State's facial challenge to Article 3, it points to several specific provisions which it alleges are constitutionally infirm,

[14] Freedman involved a content-based censorship scheme for motion pictures which required certain procedural safeguards to avoid constituting an invalid prior restraint: "(1) any restraint prior to judicial review can be imposed only for a brief period during which the *status quo* must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden once in court." Freedman, 380 U.S. at 58-59; FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990) (limiting the third requirement); see also Thomas v. Chicago Park, 122 S. Ct. 775, 779 (2002).

but, ironically, not to the provision under which Clearwater denied Granite State's permit applications. Nonetheless, the Court finds that Article 3 of Clearwater's ordinance is one that when applied to speech, in the form of signs, may effectively chill First Amendment rights. Hence, the Court is constrained to find that Granite State has standing to challenge Article 3, Division 18 under the limited exception to the standing doctrine for a facial overbreadth challenge.

However, in viewing Granite State's second argument, that the lack of time limits on the appeals process renders it facially invalid, the Court has greater difficulty in finding that Granite State has standing to raise a facial challenge that fits within the limited exception for an overbreadth challenge. Granite State did not appeal the denial of its permit applications; instead, it filed this lawsuit. Granite State contends that it has standing to facially challenge Clearwater's permitting process as an unconstitutional "prior restraint" on speech. Plaintiff points to several cases involving permitting schemes for adult businesses in which the Court allowed a facial challenge to the ordinance based on a lack of time limits on the permitting process. See, e.g., Redner v. Dean, 29 F.3d 1495, 1502 (11th Cir. 1994) (allowing facial challenge for prior restraint that **could result in the** "suppression of expressive activity for an indefinite period of time").

Defendant acknowledges, as does this Court, that facial overbreadth challenges are permitted in some circumstances when a permitting scheme is deemed a "prior restraint" and fails to comply with the requirements of Freedman. See Redner, 29 F.3d at 1495; Artistic

Entertainment, Inc. v. City of Warner Robbins, 223 F.3d 1306 (11th Cir. 2000) (adult business ordinance); U.S. v. Frandsen, 212 F.3d 1231 (11th Cir. 2000) (park ordinance regarding assembly); see also Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761 (11th Cir. 2000) (street closing and sound ordinance declared facially unconstitutional as "prior restraint"), *judgment vacated*, 122 S.Ct. 914 (Jan. 22, 2002) (remanded to consider in light of Thomas v. Chicago Park).[15] For these requirements to apply, the permitting scheme must be a censorship scheme. See Thomas v. Chicago Park, 122 S.Ct. 775, 780 (2002) ("[w]e have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in Freedman."). For reasons discussed infra, the Court finds that Clearwater's ordinance is not such a scheme.

[15] Pending the Eleventh Circuit's reconsideration of Cannabis Action Network in light of Thomas, this area of the law remains somewhat unsettled.

Granite State's initial applications were denied within the time provisions provided. Granite State did not seek an appeal of these denials.[16] Hence, it could not be injured by the lack of time limits in the Code's appeals provisions. Without an actual injury under Article 4, the Court cannot extend Granite State's standing to challenge this Article under the limited exception for overbreadth, especially in light the Supreme Court's guidance to use it "sparingly. Granite State's injury lies in the enactment of the sign ordinance in Article 3, to which the Court has permitted a facial challenge.[17] See Messer v. City of Douglasville, Georgia, 975 F. 2d 1505, 1514 (11th Cir. 1992) (affirming district court's holding that Messer does not have standing to challenge the board of appeals, as he did not request or receive a

[16] For the initial application review, there is a five day time limit for review of the application for completeness and five or ten working days for review of legal sufficiency. See §4-202.C. The Court finds this time limit reasonable. Plaintiff contends that these provisions are unconstitutional because it is not allowed to put up its sign, or automatically move to the next step in the appeals process, if the city fails to act within the prescribed time limit. Although it is preferable to have such a mechanism, if it were to reach the issue, the Court does not find these time periods to be *per se* unconstitutional or unreasonable. See Thomas, 112 S.Ct. at 781 (Chicago Park's ordinance has reasonable time limits for application process, but no mechanism if official fails to act within time limits); see also Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 613 (9th Cir. 1993).

[17] It should be noted that in Plaintiff's facial challenge to Article 3, it attacks several provisions that involve signs that do not need permits.

hearing - the appeal in this case had been made by the co-defendant billboard companies who had since been dismissed from the case with prejudice).

Moreover, the permitting and appeals process set forth in Article 4 applies to all development review decisions by the City, not just to sign permits. As such, the alleged unbridled discretion of government officials to arbitrarily delay appeal decisions through the lack of time limits in Article 4 is not specific just to speech rights, as Plaintiff alleges with respect to Article 3, but applies equally to other permitting decisions and appeals.[18] Hence, the Court views the reach of Article 4 as much broader – implicating many permitting situations not involving First Amendment rights.

[18] Although the Court agrees with Granite State that the permitting process is intertwined with the sign ordinance, this argument goes to severability of Article 4, not to whether Granite State has standing to challenge this part of the Code. Severability is discussed in detail infra.

In conclusion, the Court finds that the permitting portion of this ordinance, Article 4, has much less potential to chill the exercise of First Amendment activity than Article 3. Additionally, there is a very limited set of third parties whose First Amendment rights could be chilled under the appeal portion of the regulation;[19] particularly in light of the City's ordinance protecting content of any signs from serving as a basis for denial. See §3-1804.H. Accordingly, the Court declines, for the reasons discussed supra, to permit Granite State to raise this type of hypothetical scenario in a facial overbreadth challenge to Article 4.[20] Rather than speculate on a hypothetical case involving an individual whose sign permit was arbitrarily and impermissibly denied, the Court saves this question for another day, and for a plaintiff who has actually been injured by such a delay. See Messer, 975 F. 2d at 1514. Granite State has suffered no such injury.[21]

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[19] In Thomas, the Court found that if censorship or favoritism occurred, it would be unconstitutional, but should be dealt with on a case-by-case basis. Thomas, 122 S.Ct. at 781. Accordingly, if the City appeared to be impermissibly censoring the content of a sign by delaying an appeal (despite the Code's prohibition against making any determination based on the content of the sign), the party could file suit on the grounds that the City's application of its appeal process *to that party* is unconstitutional. Such a suit would challenge the ordinance "as applied" to that plaintiff instead of on a facial basis.

[20] Even if Granite State were found to have standing to raise such a claim, the next determination would be whether Clearwater's permitting scheme is an impermissible "prior restraint" on speech. As the Court finds infra, Clearwater's ordinance is content neutral and under Thomas, the Freedman requirements do not apply. See Thomas, 122 S.Ct. at 779. The Court would have to agree, however, that were this permitting scheme considered a "prior restraint," the requirements set forth in Freedman would control, and the ordinance would be unconstitutional for failing to have time limits on its appeals process.

[21] The Court notes the irony of Granite State's claim and the continuing "catch-22" facing governments in drafting regulation to survive First Amendment facial challenges. If Granite State was permitted to challenge the constitutionality of Article 4 and this Article was found to be

2. Severability

Granite State argues that any unconstitutional provision(s) of the sign ordinance cannot be salvaged by simply severing them. Generally, Granite State argues that severance would remove incentives to challenge unconstitutional regulations, and specifically, that any alleged sections of Clearwater's sign ordinance which violate equal protection are "inextricably intertwined" with the "whole of the sign ordinance" and to sever any permit requirements from the ordinance would remove "the very heart of the ordinance and impermissibly leave the ordinance more restrictive of speech." (Dkt. #51 at 3, 13), *citing* Rappa v. Newcastle County, 18 F.3d 1043, 1073 (3rd Cir. 1994).

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unconstitutional, Granite State would win this case on the basis of a process that it did not utilize. This turns the notion of standing on its head – Granite State could not have been injured by the lack of time limits in the appeals provisions when it did not take advantage of the appeal process! Granite State's real injury was as a result of the application of the height and size requirements of the freestanding sign provision, a provision which it does not directly attack, but to which the Court permits a facial overbreadth challenge.

On the contrary, Defendants contend that any unconstitutional portions of the ordinance may be severed and specifically point to the severability clause contained within the Code to evidence Clearwater's legislative intent to severe any portions of the Code found to be invalid.[22] Severability of a local ordinance is a question of state law. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759 (1988); see also Metromedia, 453 U.S. at 521 n.26. Under Florida law, the test for severability is as follows: "[w]hen a part of a statute is declared unconstitutional, the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and bad features are not so inseparable in substance that it can be said that the legislature would have passed the one without the other, and (4) an act complete in itself remains after the invalid provisions are stricken." Waldupe v. Duger, 562 So. 2d 687, 693 (Fla. 1990) (challenging application of revised gain time statute for habeas corpus challenge). **The Florida Supreme Court simply stated: "[t]he severability of a**

[22] Section 1-107 of the Code provides separately for the severability of any section of the development code, as set forth supra. Additionally, this current sign ordinance was part of the Land Development Code passed by Ordinance #6348-99 on January 21, 1999, which also contained a severability provision: "Section Four. Should any part or provision of this ordinance be declared by a court of competent jurisdiction to be invalid, the same shall not affect the validity of the ordinance as a whole, or any part thereof other than the part declared to be invalid." (App. to Dkt. 42, Tab 17).

statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent." Ray v. Mortham, 742 So.2d 1276, 1280 (Fla. 1999) (citations omitted).

Courts have noted that the existence of a severability clause carries with it a "presumption" that the legislative authority would have enacted the remaining provisions and that the preference for severance is "particularly strong in cases containing a severability clause." See Major Media of Southeast, Inc. v. City of Raleigh, 621 F. Supp. 1446, 1454 (E.D. N.C. 1985) (upholding severability clause). Cf. National Advertising v. Town of Niagra, 942 F. 2d 145, 148 (2nd Cir. 1991) (finding severance improper despite existence of severability clause); United States v. Jackson, 390 U.S. 570, 585 n.27 (1968) (the ultimate determination of severability rarely turns on the presence or absence of a severability clause). Of course, in construing an ordinance for purposes of a facial challenge, the Court must construe any ambiguities in the ordinance as a whole in a manner which avoids any constitutional problems, if possible. See South Lake Property Ass., Ltd. v. City of Morrow, Ga., 112 F. 3d 114, 119 (11th Cir. 1997).

With these guiding principles in mind, the Court addresses Granite State's constitutional challenges to Clearwater's sign ordinance, and specifically addresses Defendants' suggestions that certain provisions, if found to be invalid, may be severed. (See Dkt. #42 at n. 9, 14, 15). In large measure, the Court finds, as set forth in detail infra, that most of the provisions Plaintiff alleges are "content-based" or permit "undue discretion" by

government officials, do not do so. There are, however, some provisions regarding which the Court agrees with Plaintiff, but finds that those provisions are severable,[23] such that the legislative purpose of Clearwater's sign ordinance is preserved and speech is not more restricted after severance.

3. Content Based v. Content Neutral Distinction

It is truly a Herculean task to wade through the mire of First Amendment opinions to ascertain the state of the law relating to sign regulations, beginning with the Supreme Court's leading decision on billboard regulations in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 570 (1981) (plurality decision) (Rehnquist, J., dissenting, who referred to the plurality decision as a "virtual Tower of Babel, from which no definitive principles can be clearly drawn"). As the Court more fully discusses below, there is much variety and diversity of opinions in this area (in addition to sign ordinances, courts have reviewed First Amendment challenges to adult entertainment clubs, tobacco advertising and the noise volume of music concerts), suggesting that constitutional law on this subject is far from clear.

[23] Because the Court finds that Granite State does not have standing to challenge the lack of time limits in the appeals process in Article 4, it does not reach Granite State's argument that the permitting portion of the ordinance is not severable because it is "so inseparable in substance" that the ordinance would not have been passed without those permitting procedures. If it were to reach such an argument, the Court would agree with Granite State.

One of Granite State's primary arguments, based in large part on the plurality decision in Metromedia, is that the Clearwater sign ordinance is unconstitutional because it is an impermissible content-based ordinance that cannot survive strict scrutiny review. In Metromedia, Justice White, writing for the plurality, found that San Diego's sign ordinance was unconstitutional because it impermissibly favored commercial over non-commercial speech. It was also noted that although the ordinance's general prohibition of signs created the "infringement," the additional exceptions to the prohibition "are of great significance in assessing the strength of the city's interest in prohibiting billboards." Id. at 520. Relying on this argument and its claim that the ordinance favors commercial speech over non-commercial speech, Granite State cites to many of the exceptions contained in Clearwater's sign ordinance (for example, construction signs or for sale signs) as evidence that the sign ordinance is content-based.[24]

The "Catch-22" of Sign Regulations

[24] This theory of categorizing an ordinance that provides for, in some cases, legally required exceptions, and in other cases, justifiable exceptions, as content-based first began with the Supreme Court's decision in Linmark Assoc., Inc. v. **Township of Willingboro, 431 U.S. 85 (1977),** which held that the city's interest in maintaining stable and racially integrated neighborhoods was not sufficient to support a ban on residential "for sale" signs. Id. at 93.

This almost-conclusory mandate that an ordinance with a category or exception for a sign based on its content automatically makes the ordinance unconstitutional *per se* is the proverbial "catch-22" confronting many cities and municipalities when they attempt to regulate signs in their communities. See Metromedia, 453 U.S. at 560 (Burger, J. dissenting,) ("having acknowledged the legitimacy of local government authority, the plurality largely ignores it").[25] Granite State's argument clearly demonstrates this "catch-22": (1) it is permissible for the government to regulate, or prohibit, signs to further legitimate governmental interests (Metromedia); (2) any sign prohibition must provide an exception for "For Sale" signs (Linmark); (3) exceptions or regulations of signs requiring a reading of their message are content-based (Nat'l Advertising Co. v. Town of Niagra, 942 F.2d 145 (2nd Cir. 1991); (4) content-based sign regulations are generally unconstitutional when subject to strict scrutiny review (Burson v. Freeman, 504 U.S. 191 (1992)); and (5) since an exemption allowing "For Sale" signs necessarily requires one to read the words "for sale" on the sign, it is impossible to draft a sign ordinance that is constitutional. Some courts have followed this conclusory theory, see, e.g., North Olmstead Chamber of Commerce v. City of North Olmstead, 86 F. Supp. 2d 755 (N.D. Ohio 2000); Nat'l Advertising Co. v. Town of Bablyon, 900 F2d 551 (2nd Cir.

[25] In fact, the other dissenting opinions in Metromedia recognize San Diego's ordinance as viewpoint neutral such that the exceptions are rendered content neutral. Metromedia, 453 U.S. at 541-42, 554 (Stevens, J., dissenting in part); 565 (Burger, J., dissenting); 570 (Rehnquist, J., dissenting).

1990); however, others have tried to formulate ways to avoid this "catch-22." See, e.g., Rappa v. Newcastle County, 18 F. 3d 1043 (3rd Cir. 1994).[26]

Review of Relevant Cases

[26] In Rappa, the Third Circuit attempted to deal with the issue of whether exemptions to a sign ordinance makes the ordinance unconstitutional. Rappa focused on the relationship between the content of a sign and its particular location or use. Rappa, 81 F.3d at 1065. The decision in Rappa took the position that due to the lack of agreement in reasoning, there was little discernable law on this issue from Metromedia. Id. at 1056-60. Although the ordinance was ultimately struck down, the Third Circuit recognized that the city's purpose in enacting a particular exemption is significant, especially as related to the governmental interest it was enacted to further. Id. at 1043, 1063 (finding that the exceptions are "quite small . . . not for particular subjects likely to generate much debate . . . and do not discriminate by viewpoint. Thus, they do not appear to be motivated by a desire to suppress certain speech. . . in a way that makes it likely that the government is aiming to shape the public agenda or is in fact significantly affecting the shape of that agenda."). See also Outdoor Media Dimensions Inc. v. State of Oregon, 945 P.2d 614, 622 (Or. 1997) (finding distinction between on-premises and off-premises advertising is not content-based restriction).

It is instructive to review the Supreme Court's seminal decisions in this area. Justice Stevens, who filed a dissenting opinion in Metromedia, authored the Court's majority opinion in Members of the City Council of Los Angeles v. Taxpayers for St. Vincent, 466 U.S. 789 (1984), which discussed at great length the general principles, history and other cases involving the First Amendment, beginning with the country's first printing presses and censorship of movies,[27] stressing the "unacceptable risk of suppression of ideas." Id. at 797, 804 (concluding that the "general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"). In Taxpayers for St. Vincent, the Court upheld an ordinance prohibiting the posting of handbills and signs on public property and public objects (like utility poles), because it found that it was within that city's constitutional power to attempt to improve its appearance, an interest that was "basically unrelated to the suppression of ideas" and the ordinance was reasonably tailored to do so, with available alternative channels of communication. Id. at 804, 813-15. The Court held "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas the City finds distasteful or that has been applied to Appellees because of the views that they express." Id. at 804. This

[27] See Freedman v. Maryland, 380 U.S. 51 (1965) (striking down a state motion picture censorship statue as unconstitutional which required theater to submit film to state board of censors before exhibiting it).

decision suggests that an ordinance need only be subject to strict scrutiny if it serves to regulate a particular viewpoint or amounts to censorship.[28]

This content-based theory warranted mention by the Court in a non-sign case, Cincinnati v. Discovery Network, 507 U.S. 410 (1993) (Stevens, J. delivered the majority opinion). Discovery Network involved the city's attempt to enforce an ordinance banning "commercial handbills" on public property by ordering the removal of newsracks from which the "commercial handbills" were disseminated. These newsracks looked just like those containing newspapers. The Court found the ordinance unconstitutional primarily because it was not a "reasonable fit" of the city's legitimate interests in aesthetics and safety and their chosen means of furthering those interests, a "sweeping ban" on the "commercial handbill" newsracks which were only a small fraction of the total newsracks on the street. Id. at 428-29.

[28] One commentator concluded that Taxpayers for St. Vincent "impliedly overruled" the content-based discrimination theory from Metromedia, emphasizing the need for "viewpoint rather than content neutrality." Gerard, Jules, B., "Evolving Voices in Land Use Law: Election Signs and Time Limits," 3 Wash. U.J.L. & Pol. 379, 383 (2000). He noted that the ordinance at issue in Taxpayers for St. Vincent contained a "host of specific exemptions that were similarly identical to those that have proved fatal to the San Diego ordinance in Metromedia. The Vincent court simply ignored them." Id.

After so holding, the Court discussed the content-based versus content-neutral distinction, finding that the ban on newsracks with "commercial handbills" was impermissibly content-based. Id. at 428-9. Beginning with the premise that the government may impose "reasonable restrictions on time, place, or manner of engaging in protected speech provided that they are adequately justified 'without reference to the content of the regulated speech,'" the Court was not persuaded that the justification of preserving aesthetics and safety adequately justified the regulation because "the very basis of the regulation is the difference in content between ordinary newspapers and commercial speech." Id. at 429.[29] Although this is one of the few commentaries by the Supreme Court on this specific issue, it does not appear to be critical to the Court's holding, which focused primarily on the lack of "reasonable fit."[30]

Earlier, in Ward v. Rock Against Racism, 491 U.S. 781 (1989), the Court upheld a municipal regulation that required performers to use sound technicians and a sound system provided by the city, finding that it did not violate the free speech rights of the performers.

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[29] The Supreme Court noted that "[u]nder the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside the newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content-based.'" Id. These troubling words seem to invite the type of automatic or *per se* strict scrutiny analysis that makes regulating signs a risky business. Yet, the Supreme Court continues, "[i]t **is the absence of a *neutral justification* for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral." Id. at 429-30 (emphasis added).** Also, as discussed in greater detail infra, the Supreme Court has approved other ordinances with exemptions that arguably fit this analysis, such as the one in Thomas v. Chicago Park Distr., 122 S. Ct. 775 (2002).

[30] The facts reveal that the ordinance was not a reasonable fit for the government's interest in promoting aesthetics (or preventing "visual blight" caused by littering) since the reduction in the overall number of newsracks would be "minute" or "paltry" - only 62 out of a total of 1500-2000. Discovery Network, 507 U.S. at 417-18.

The Court held that the regulation (of the expressive activity of music) is content-neutral, "so long as it is justified without reference to the content of the regulated speech." Id. at 791 (citations omitted). The Court found the government's purpose of controlling noise levels at bandshell events was a "controlling consideration. . . [that had] nothing to do with the content." Id. at 791-2 (citations omitted). The Court also considered, and rejected, the plaintiff's argument that the statute was unconstitutional on its face because it placed "unbridled discretion in the hands of city officials charged with enforcing it." Id. at 793 (citations omitted). The Court concluded that the city's regulation was narrowly tailored to serve a significant government interest by protecting its citizens from unwelcome noise. Id. at 796.

It is also instructive to review the Supreme Court's ruling in Ladue v. Gilleo, 512 U.S. 43 (1994). This case involved an ordinance that banned all residential signs except those falling within one of ten exemptions. The petitioner resident wanted to place a sign about the war in the Persian Gulf – first on her front lawn, and when that was denied, then in the window of her home. Id. at 45-46. The Court found that the ordinance violated the resident's right to free speech, in large part because there were no alternative means of communication for her. Id. at 54. The Court found that as a resident, the plaintiff was "almost completely foreclosed in any venerable means of communication that is both unique and important." Id. As Justice O'Connor added in her concurrence, the Court circumvented its "normal inquiry," which first determines whether a regulation is content-based or content-neutral, then applies

the appropriate level of review (i.e. strict or intermediate scrutiny). Id. at 59 (O'Connor, J., concurring). Justice O'Connor even goes so far as to note that regulations are "occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable. . . [t]he content distinctions present in this ordinance may, to some, be a good example of this." Id. at 60.

It is equally instructive to review the Supreme Court's most recent rulings on the facial constitutionality of a municipal park ordinance as reviewed under the First Amendment. See Thomas v. Chicago Park Distr., 122 S. Ct. 775 (2002). Thomas involved a municipal park ordinance requiring individuals to obtain a permit before conducting events for more than fifty persons and providing an application process with a fourteen day time limit for granting or denying the application. Applications could be denied on any of thirteen specific grounds. An applicant is given seven days to appeal the decision on the application after which it may seek judicial review in state court by common law certiorari. The plaintiffs in Thomas sought to secure a permit to hold a rally advocating the legalization of marijuana. Upon the denial of their application, they filed an action alleging that the ordinance was unconstitutional on its face. The Supreme Court found otherwise, upholding the ordinance as content-neutral.

This Court notes that most of Chicago Park's listed grounds to deny a permit, eleven of which are noted in footnote 1 of the Court's opinion, are decidedly content-neutral. Id. at 777 n.1. For example, a permit may be denied[31] if the application is not complete, the application

[31] The Court did not find the fact that the government "may" deny the permit rather than "must" do so allows them to impermissibly waive the permit requirements for some "favored

fee is not attached, or the applicant is legally incompetent to contract. Id. Yet, interestingly, others may be construed as being more "content-based." For example, a permit may be denied if the "use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park . . . or the public" or a permit has previously been granted authorizing uses that "do not reasonably permit multiple occupancy of the particular park or part thereof." Id. But these grounds are clearly not using any content distinction as a censorship scheme nor are they an attempt to limit activities in the park based on the applicant's viewpoint. In fact, the Court upheld the park ordinance as a "content-neutral time, plan and manner regulation," finding that the licensor is not authorized to "pass judgment on the content of the speech" and that "[n]one of the grounds for denying a permit has anything to do with what a speaker might say." Id. at 779.

In comparison, the Supreme Court did not agree with the plaintiffs that the park ordinance was like the censorship scheme in Freedman v. Maryland,[32] which would have required that litigation be initiated by the park district every time it denies a permit and that the

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speakers" while insisting upon them for others, which would clearly constitute unconstitutional conduct. Id. at 781 ("[t]hat is certainly not the intent of the ordinance" as the government has "reasonably interpreted" it to "permit overlooking only those inadequacies that [] do no harm to the policies furthered by the application requirements"). The Court cautioned that if and when a situation of "unlawful favoritism" were to occur, such an abuse "would be dealt with," rather than "insisting upon a degree of rigidity that is found in few legal arrangements." Id.

[32] As set forth supra, Freedman involved a content-based censorship scheme which required certain procedural safeguards: "(1) any restraint prior to judicial review can be imposed only for a brief period during which the *status quo* must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden once in court." Freedman, 380 U.S. at 58-59. See also FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990); Thomas, 122 S. Ct. at 779.

ordinance specify a deadline for judicial review. Id. at 779. Specifically, the Court found that the park's licensing scheme was not "subject matter censorship" and as a "content-neutral time, place, and manner regulation of the use of a public forum," it does not have to adhere to the procedural requirements set forth in Freedman. Id. at 779-80. The Court also found that government officials were not given unduly broad discretion in determining whether to grant or deny a permit. Id. at 780-81.

Application to Clearwater Ordinance

Of course, Defendants argue that the Clearwater's sign ordinance is similar to the ordinance in Thomas in that the requirements of Freedman do not apply because it is content-neutral. Defendants further maintain that if Clearwater's Code were subject to a more limited variation of the Freedman requirements,[33] it would meet this higher level of review because the sign permitting decisions must be made within a limited time period and are subject to judicial review. (Dkt. #42 at 23). Granite State opposes this argument in part because it believes that the Clearwater ordinance is not content-neutral, and also because government officials are allowed undue discretion (as discussed infra).

[33] Citing FW/PBS, Inc., 493 U.S. at 215, Defendants argue that only the "latter two procedural safeguards" from Freedman are required where there is no censorship scheme or element.

One of the few issues that is clear under the Supreme Court's decision in Metromedia is that government is permitted to regulate speech through sign ordinances that are not content-based, provided they are narrowly tailored to further the significant government interests. Metromedia, 453 U.S. at 511-12, 516. Once a regulation is found to be viewpoint-neutral, it is subject to intermediate scrutiny, which requires that the state demonstrate that: 1) the act serves a substantial governmental interest (unrelated to the suppression of free expression), and 2) it is narrowly drawn to serve that interest without unnecessarily interfering on First Amendment freedoms (that is, the restriction in First Amendment freedoms is no greater than is essential to the furtherance of the interest). Taxpayers for St. Vincent, 466 U.S. at 805. The Eleventh Circuit summarized that to uphold a viewpoint-neutral regulation of speech, a government must show that "1) it has the constitutional power to make the regulation, 2) an important or substantial government interest unrelated to the suppression of free speech is at stake, and 3) the ordinance is narrowly drawn to achieve its desired ends, leaving other channels for the communication of information." Messer v. City of Douglasville, Ga., 975 F. 2d 1505, 1510 (1992). Indeed, in Messer, the Eleventh Circuit upheld a limit on the use of portable signs as a partial solution for its aesthetic concerns, stating "[since] it could have prohibited *all* portable signs in furtherance of this interest, by allowing a limited number, it is in fact more narrowly tailoring the restrictions to meet its purpose." Messer, 795 F. 2d at 1514. However, it need not be the least restrictive means possible. See Rock Against Racism,

491 U.S. at 781. And, the ordinance should leave open ample alternative channels of communication.

The Supreme Court specifically addressed two "significant government interests" in Metromedia – traffic safety and aesthetics of the community. Metromedia 453 U.S. at 509-10 ("[t]here is nothing here to suggest that these . . . accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards . . . are unreasonable. . . [w]e reach a similar result with respect to the second asserted justification for the ordinance – advancement of the city's esthetic interests. It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an esthetic harm") (citations and quotations omitted). It is also clear from the decision in Taxpayers for St. Vincent that a state may legitimately exercise its police powers to advance its aesthetic interests and traffic safety. See Taxpayers for St. Vincent, 466 U.S. at 806-07 (in effect affirming Metromedia's holding that a city's aesthetic interests are sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the use of billboards). See also Messer, 975 F.2d at 1510 (it is "well settled that both traffic safety and aesthetics are substantial governmental goals"); Southlake Property Assoc., Ltd. v. City of Morrow, Ga., 112 F.3d 1114, 1116 (11th Cir. 1997) (recognizing Morrow's right to "clean, aesthetically pleasing and safe business thoroughfares"); Harnish v. Manatee County, Fla., 783 F.2d 1535 (11th Cir. 1986) ("prohibition of portable signs to eliminate aesthetic blight passed muster under the First Amendment").

But what is not clear from Metromedia, or the Court's other decisions, is exactly *how* a city or municipality can constitutionally regulate signs to further these interests. Many courts, like this one, and many commentators, are concerned that local governments have been placed in a tenuous and near impossible position in drafting a constitutional or content-neutral sign ordinance. See, e.g., Cordes, Mark, "Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection," 74 Neb. L. Rev. 36 (1995); Bond, R. Douglass, "Making Sense of Billboard Law: Justifying Prohibitions and Exemptions," 88 Mich. L. Rev. 2482 (1990).

In essence, courts are left to define the constitutional perch upon which local governments may rest on the slippery slope of permissible content-neutral regulations. It is impossible not to acknowledge, as this Court does, that a sign ordinance must be justified by something other than its content, stressing Justice Stevens' opinion that the First Amendment (and the resulting content-based distinction) was created to protect speech from the dangers of government censorship and to stop the government from suppressing the expression of ideas and public debate through the guise of regulation. Ward v. Rock Against Racism, 491 U.S. 781 (1989). See also Members of the City Council of the City of Los Angeles v. Taxpayers for St. Vincent, 466 U.S. 789 (1984); Rappa v. Newcastle County, 18 F. 3d 1043 (3rd Cir. 1994).

What makes the content-based versus content-neutral distinction so difficult in cases involving sign ordinances is that, by their very nature, signs are speech and thus can only be

categorized, or differentiated, by what they say. This makes it impossible to overlook a sign's "content" or message in attempting to formulate regulations on signage and make exceptions for distinctions required by law (i.e., for sale signs) or for those signs that are narrowly tailored to a significant government interest of safety (i.e., warning or construction signs). For example, there is simply no other way to make an exemption or classify a for sale sign as a for sale sign without reading the words "For Sale" on the sign, or classifying a sign as a warning sign without reading the words "Warning Bad Dog" on the sign. In many cases, this classification raises the "red flag" of an impermissible[34] "content-based" regulation. See Metromedia, 453 U.S. at 565 (Burger, J. dissenting) (referring to differentiating among topics and "noncontroversial things" and "conventional" signs such as time-and-temperature signs, historical markers, and for sale signs).

Hence, in looking at the general principles of the First Amendment as the Court did in Taxpayers for St. Vincent, the real issue becomes whether the distinctions or exceptions to a regulation (as well as any areas of government discretion) are a disguised effort to control the free expression of ideas or to censor speech. Common sense and rationality would dictate that the only method of distinguishing signs for purposes of enforcing even content-neutral regulations, such as number, size or height restrictions, is by their message. For example, a

[34] Of course, if a content-based regulation were to withstand strict scrutiny, it would not be impermissible. See Burson v. Freeman, 504 U.S. 191 (1992) ("it is the rare case in which we have held that a law survives strict scrutiny"). See also Amer. Library Assoc. v. United States, 2002 WL 1126046 (E.D. Pa. May 31, 2002) (statute requiring filtering of Internet at libraries cannot withstand strict scrutiny because the use of filters are not narrowly tailored to further government's legitimate interests).

regulation permitting a freestanding billboard sign to be larger than a political yard sign which is larger than an address sign is a differentiation based on content (albeit for purposes of regulating size). This should not, on its own, render an ordinance unconstitutional. Indeed, it appears to be a matter of semantics.[35] In rendering its opinion today, this Court focuses on whether the government regulation is trying to impermissibly censor speech or limit the free expression of ideas.

[35] Even differentiations previously approved could be considered "content-based" as they fit within the troubling distinction made in Discovery Network. See Messer, 975 F.2d at 1509 (on-premise and off-premise distinction); Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 613 (9th Cir. 1993) (same).

The Court finds that Clearwater's ordinance is, in general, not content-based and therefore does not require strict scrutiny review. However, in making this finding and given the guiding principles set forth supra regarding severance, the Court finds that some provisions of the sign ordinance are impermissible, but severable, eliminating any unjustified content-based distinctions and preserving the content neutrality of the sign ordinance.[36]

Specific Provisions of Clearwater's Ordinance

Initially, the Court addresses two patently inconsistent provisions in Clearwater's ordinance regulating window signs. Section §3-1803.U prohibits temporary window signs in residential areas whereas §3-1805.Q allows window signs "up to eight square feet in area . . . on any window area provided such sign does not exceed 25 percent of the total area of the window where the sign is located. . . [i]n no case shall the cumulative area of all window signs erected exceed 24 square feet in area." Section 3-1805.Q makes no residential/non-residential distinction. These provisions are in direct conflict. As Defendants suggest, the Court can easily sever §3-1803.U, leaving §3-1805.Q regulating window signs. In doing so, the Court thus construes Clearwater's sign ordinance, as it must, in such a way as to preserve its

[36] Granite State contends that there are "dozens of content-based limitations on speech" in Clearwater's ordinance – "too many to discuss in detail" – and cites to more than 25 different provisions of the ordinance, concluding that the ordinance is "unquestionably and repeatedly content-based." See Dkts. 17, p. 14, n.3; 51, pp. 9-10, n.4. The Court discusses many of these provisions in more detail infra; however, the Court also finds that many of them are *de minimus* exceptions such as holiday decorations, marina slip numbers or garage or yard sale signs; or legally required or justifiable exceptions such as for sale or construction signs; or others are simply not content based such as flags, pavement markings or signs attached to vegetation. The Court disagrees with Granite State that this list of exceptions renders the ordinance unconstitutional *per se*.

constitutionality. Additionally, the Court succeeds in increasing, instead of restricting, speech, by severing §3-1803.U, rather than §3-1805.Q.

The Court next turns to §3-1803 which lists twenty-six types of signs that are prohibited, such as roof signs, portable signs or signs that present traffic or pedestrian hazards. Section 3-1803.T prohibits "snipe" signs. This is defined as "an off-premises sign which is tacked, nailed, posted, pasted, glued or otherwise attached to trees, poles, stakes, fences or to other objects." §8-102. But Clearwater's sign ordinance already prohibits signs attached to trees in §3-1803.R and allows attached signs in §3-1806.B.3. To the extent the portion of the definition of a snipe sign prohibits attaching signs to "other objects" contradicts the provision allowing attached signs, it cannot stand. Accordingly, in keeping with the guiding principles set forth supra regarding severance, the Court finds that part of the definition of snipe signs is severable and must therefore be stricken.

In another provision of this section, §3-1803.B,[37] the Court finds that this provision makes an unjustified content-based distinction on these signs for governmental and public purpose signs. Like Discovery Network, it does not appear that there is a "reasonable fit" in making a distinction between governmental and public purpose signs (for a limited time and frequency) and non-governmental and non-public purpose signs (for a limited time and frequency). In furthering the governmental interests of the aesthetics and traffic safety, the

[37] This section prohibits certain signs, including "[b]alloons, cold air inflatable, streamers, and pennants, except where allowed as governmental and public purpose signs for special events of limited time and frequency, as approved by the city manager or the city commission."

Court can discern no justifiable distinction between these types of signs as it relates to the government interests of aesthetics and traffic safety.[38] Moreover, the existence of this provision undermines the content-neutrality of the ordinance.

Accordingly, under the general principles guiding severance set forth supra, the Court strikes this entire provision. Because this provision is included in the list of prohibited signs, the Court finds that it is unable to sever just the portion of the provision which makes the content-based distinction (government and public purpose signs) as that would be result in a

[38] Although it is not necessary to get beyond this initial finding of an impermissible content-based distinction, the Court notes that it is not persuaded by Defendants' supporting affidavit attesting that the only approval made under this provision is for "cold air inflatable" figures "for temporary events held in Coachman Park or held in connection with the annual Jazz Festival." Tarapini Aff., ¶ 11. See Forsyth Cty v. Nationalist Movement, 505 U.S. 123, 131 (1992) (in facial challenge of assembly and parade ordinance, court considers the city's own "implementation and interpretation" of ordinance). Nor is the Court persuaded by Granite State's argument that government officials have unbridled discretion in their decision whether to approve such signage. See id. at 126-27 (impermissible to allow government administrator to vary the of amount of fees to be paid for permit without reference to objective standards and by using his "own judgment of what would be reasonable").

greater restriction on speech by totally banning balloon, cold air inflatables, streamers and pennants.[39]

[39] Although the Defendants apparently read this provision as being applicable to public property (see Dkt. #42 at 25-6), these words are not contained in this provision of the ordinance. If this were the case, the Court may have come to a different result.

Granite State also contends that §3-1803.Y[40] is an impermissible content-based distinction that renders the ordinance unconstitutional. The Court disagrees. This section forms the "catch-all" provision in the list of prohibited signs. Granite State seems to argue, in a conclusory fashion, that this provision is invalid simply because it prohibits signs not specifically enumerated within the Code. Finding the ordinance content-neutral, the Court does not reach the same conclusion.

Plaintiff attacks only two provision of §3-1804, which sets forth "General Standards" for Clearwater's sign ordinance. In reviewing this section, the Court finds that it does not contain impermissible content-based distinctions.

Specifically, Granite State contends that §§3-1804.E and F are impermissible content-based exceptions that render the ordinance unconstitutional. These provisions are contained in the part of the ordinance addressing "General Standards" and specifically regulate the placement, size and location of gasoline price signs (subsection E) and time and temperature signs (subsection F). The Court again disagrees with Plaintiff's conclusion. These sign categories and the regulations therein are good examples of how the Court finds that this ordinance is content-neutral. These provisions are not an attempt to censor speech or enforce regulations based on viewpoint – a time and temperature sign or gasoline price sign has no viewpoint, it merely relates factual information. Hence, these provisions are not an attempt to censor speech or limit the free expression of ideas – especially in light of Clearwater's specific

[40] This provision prohibits "[a]ny sign that is not specifically described or enumerated as permitted within the specific zoning district classifications in this development code."

prohibition on placing any limitation on a sign based on the content of the message. See §3-1804.H.

Section 3-1805 contains a list of twenty types of signs that are "permitted without a permit." By far the most controversial provision (and one which has been similarly attacked in other cases), is the provision on temporary yard signs and corresponding time limits to display these types of signs.

Temporary Yard Signs

Granite State also contends that Clearwater's regulations on temporary yard signs set forth in §3-1805.N are unconstitutional. There are two regulations on the size and duration of temporary yard signs: (1) yard signs "for each political candidate or issue for each frontage per parcel of land" are permitted "no sooner that 60 days prior to the election for which they were intended, and shall be removed within seven days after the election for which they are intended," not to exceed six square feet in area on residential land or thirty-two square feet of total sign face area on non-residential land, and (2) "other" temporary signs are allowed to be displayed *in residential areas*"no more than three times a year for a total of 90 days during a one year period" and may not to exceed six square feet in size.

The Supreme Court has upheld the "unique and important" right of residents to post political signs at their residences. See City of Ladue v. Gilleo, 512 U.S. 43 (1994) (finding that sign ordinance banning residential signs violated plaintiff's right to free speech by prohibiting her from displaying a sign stating "For Peace in the Gulf" from her home). The Court stressed that displaying a sign from one's own residence carries a message quite distinct

from placing the sign someplace else or conveying the same text or picture by other means, "for it provides information about the speaker's identity, an important component of many attempts to persuade." The Court also stressed that residential signs are a fairly cheap and convenient form of communication and there was not sufficient alternative means for the plaintiff in Ladue to express her message. Id. at 2045. Given the priority the Supreme Court placed on political signs at residences, Clearwater has not banned yard signs, but merely placed time limits and size limitations on the yard signs in this provision. Additionally and significantly, Clearwater also allows window signs pursuant to the regulations this Court has upheld in §3-1805.Q (limiting the signs to no more than 25% of the window). With this reasonable alternative of communication available, this case moves outside the province of Ladue.

Other cases have specifically addressed political speech. For example, the Court has held that singling out political speech is not *per se* unconstitutional. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding government's right to refuse to accept political advertising for space on city transit system buses); see also Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding government's right to limit locations on public fairground to distribute religious literature). Courts, and commentators, have also addressed whether a time limitation on political signs is constitutional. See Whitton v. City of Gladstone, 54 F. 3d 1400, 1403-04 (8th Cir. 1995) (thirty day time restriction on political signs is unconstitutional); Union City Bd. of Zoning

Appeals v Justice Outdoor Displays, Inc., 467 S.E.2d 875, 882 (Ga. 1996) (striking down time limits of seven weeks on political signs); Collier v. City of Tacoma, 854 P. 2d 1046 (Wash. 1993) (prohibiting political signs sixty days before election was unconstitutional); see also Gerard, Jules B., "Evolving Voices in Land Use Law: Election Signs and Time Limits," 3 Wash. U.J.L. & Pol. 379 (2000). At least one case has found a reasonable time limit after the election to take down an election-related sign is constitutional. Collier v. City of Tacoma, 854 P. 2d 1046, 1057 (Wash. 1993).

In this case, the sixty day time limit, as written, may actually extend to a total of 127 days if there were a primary and general election (sixty days for each, plus seven days after the election). Although this Court finds this time period reasonable (in some part because there are sufficient alternative forums of expression available, i.e., window signs), in the totality of the case law and commentary on this issue, the Court feels constrained to find that the sixty day time limit is unconstitutional, with the exception of the seven day limit on removing the sign after the election. The Court finds this seven day time period for removal is a reasonable limitation justified by Clearwater's purpose of controlling aesthetics.

However, for the reasons indicated supra, the Court finds that the sixty and ninety day time limits are severable by striking them; thus increasing speech and maintaining the constitutionality of the ordinance. On this issue, the Court agrees with the reasoning of a similar case, Brayton v. City of New Brighton, 519 N.W. 2d 243 (Minn. 1994) (upholding ordinance that allowed one non-commercial sign all year long and additional non-commercial

signs during the election season). Accordingly, the Court finds that §3-1805.N is constitutional after the sixty and ninety day time limits are severed; thus, allowing one temporary yard sign "for each political candidate or issue" with no time limit except that the sign(s) shall be removed within seven days after the election for which it/they are intended, and the other temporary yard sign (in residential areas) is allowed without a time limitation. The size requirements set forth in §3-1805.N remain unchanged.

Additionally, Plaintiff contends that §§3-1806.A.1-3 are impermissible content-based provisions. These sections delineate specific height and size requirements for certain residential signs that require permits and development review (i.e., freestanding subdivision development entry signs, freestanding multifamily entry signs, school and park identification monument signs). This section also allows certain commercial signs (freestanding, monument and transit shelter signs) with a permit and specifies size, height and illumination requirements. After a thorough review of this section, the Court finds it to be a content-neutral time, place and manner restriction of certain signs that require a permit whether they appear in residential or commercial areas. The Court does not agree with Plaintiff that these provisions of the sign ordinance are content-based (and therefore *per se* unconstitutional). As described supra, these provisions do not limit the expression of ideas or censor speech.

In conclusion, the Court finds that the regulations contained in Article 3, Division 18 are not facially unconstitutional, after certain provisions are severed. Hence, the Court turns to whether the ordinance permits undue discretion by government officials.

4. Discretion of Government Officials

Where licensing is applicable to speech, the discretion of the licensing official must be limited to avoid the dangers of censorship. As Justice Scalia explained for the unanimous Court in Thomas:

> Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review.

Thomas, 122 S. Ct. at 780 (citations omitted). A court may look to well-understood or uniformly applied practice or binding administrative construction to set limits on official discretion that are not otherwise apparent from the face of the regulation. See, e.g., Griffin v. Sec'y of Veteran Affairs, 2002 WL 826931 (Fed. Cir. April 30, 2002).

With that in mind, the Court turns to Granite State's argument that Clearwater's sign ordinance does not provide adequate standards to guide the city's officials in approving or denying certain signs or permits. In some cases, the Court agrees and finds that a particular section should be stricken. In others, the Court finds that the government's discretion is acceptable or reasonable.

The Court agrees with Granite State that §3-1805.C.2[41] vests city officials with too much discretion in allowing temporary special event or public purpose signs without a permit.

[41] This section allows certain signs without a permit and reads as follows: "[o]ther temporary special event and/or public purpose signs of a temporary nature may be approved on a case by case

Even though the provision only relates to signage for a "temporary special event and/or public purpose," the approval and sign type, size and length of display is determined by a government official on a "case by case basis." There is no other criteria guiding the official's decision. As such, this section allows the government too much discretion and cannot withstand constitutional challenge. However, in analyzing whether this section is severable, the Court agrees with Defendants that this section may be severed in its entirety. (See Dkt. 42 at n.8).

The Court also agrees with Granite State that §3-1803.L[42] vests too much discretion in officials in granting exceptions for certain signs that are located on public land with the permission of the city manager or city commission. Again, the Court finds that the remainder of this ordinance may be upheld as constitutional by simply striking the portion of the ordinance that allows the impermissible discretion. Accordingly, the Court upholds this

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basis. The type of sign, size, design and length of display shall be determined by the community development coordinator."

[42] This section prohibits certain signs and this provision includes "[s]igns located on publicly owned land or easements or inside street rights-of-way, except signs required or erected by permission of the city manager or city commission, signs or transit shelters erected pursuant to section 3-2203, and sandwich board signs to the extent permitted in the downtown district. Prohibited signs shall include but shall not be limited to handbills, posters, advertisements, or notices that are attached in any way upon lampposts, telephone poles, utility poles, bridges, and sidewalks.

section of the ordinance by striking the words "signs required or erected by permission of the city manager or city commission" from the provision, leaving the rest of the provision unchanged and intact.

Granite State also argues that §3-1806B.5[43] gives government officials unbridled discretion in determining whether to permit changeable copy signs. Specifically, Granite State contends that the phrase "significant public purpose" gives officials impermissible discretion in the permitting process. The Court disagrees with Plaintiff and finds that the discretion to ascertain what constitutes a "significant public purpose" is reasonable, especially given that this section only applies to signs on public property. See Taxpayers for St. Vincent, 466 U.S. at 812-15 (upholding regulations on signage on public property); see also Heffron; Lehman. Accordingly, the Court finds this regulation, and the discretion to determine a "significant public purpose," reasonable.

Granite State also contends that the Comprehensive Sign Program in §3-1807 allows officials too much, and therefore, impermissible, discretion in denying sign applications. This section is specifically designed to allow deviations from the requirements of the other sign provisions (except monument signs) provided they comply with the flexibility criteria set forth therein. See §3-1807.B, C. The flexibility criteria covers signs designed as part of a architectural theme (C.1); specifies certain height, size and lighting requirements (C.2 - 4);

[43] This section allows certain signs by permit through the development review process and reads as follows: "[c]hangeable copy signs provided located on public property serving a significant public purpose."

does not permit signs that have an "adverse impact" on "community character" or surrounding property values (C.5 - 6); eliminates "existing unattractive signage" or results in "improvement of appearance" (C.7); and allows signs "consistent with any special area or scenic corridor plan (C.8). The Court finds that this criteria is sufficiently objective and clear such that it does not give officials undue or impermissible discretion.

5. Equal Protection Challenges

Granite State also claims that the ordinance violates the equal protection clause because it impermissibly favors commercial speech over non-commercial speech. The real basis of Granite State's equal protection claim is that the ordinance favors "commercial speech of certain businesses about certain commercial topics while prohibiting other legal and truthful and commercial information." (See Amded Compl., ¶¶ 57, 65). Granite State cites, as an example, certain provisions that allow businesses such as gas stations, the construction industry, restaurants, and marinas to post signs while claiming that these provisions do not allow other businesses, such as Granite State, to do the same.

Within the context of commercial speech, the Court finds that the Code's exemptions of certain signs, such as gas price signs and construction signs, are rationally related to the advancement of the enumerated purposes of the Code. Just as the Court has found that the other exemptions in the Code are a "reasonable fit" between the Defendants' means and the ends of satisfying First Amendment concerns, so it similarly finds for the commercial speech Plaintiff alleges is impermissibly favored. As the Court reasoned supra, the ordinance is

content or viewpoint-neutral (after severing certain provisions) and the exemptions in the ordinance are not impermissible content-based restrictions.

Moreover, as it relates to commercial speech, the Court finds that the restrictions are valid under the Central Hudson analysis because they seek to implement and directly advance substantial government interests and reach no further than necessary to accomplish that objective. As other courts have held, the government may make certain restrictions on commercial speech, which is not entitled to as much protection as non-commercial speech. See, e.g., Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989); see also Metromedia, 453 U.S. at 506.

Granite State also contends that the Code violates equal protection by impermissibly favoring noncommercial speech over commercial speech. (Dkt. #19 at pp. 5-6, n.1). Plaintiff provides a rather simplistic example that a sign measuring sixteen square feet could be posted in a residential district without a permit as long as it contained a (commercial) message regarding construction. (See §3-1805.F.1). Granite State correctly points out that if a permit was requested for the same sign to say "Save the Whales" (a noncommercial message), the application would be denied. (See §3-1805.N.1, 2; 3-1803.Y).

As the Court has ruled supra, Clearwater's ordinance is content-neutral (with the appropriate provisions severed), and as such, the Court finds that the time, place and manner regulations contained therein are reasonable and narrowly tailored to advance the substantial and carefully enumerated government interests set forth in §3-1802 of Clearwater's Code. It

does not impermissibly favor commercial speech over noncommercial speech. Additionally, Plaintiff's conclusory example fails to take into account that private residences are given ample alternatives to express their viewpoint (to "Save the Whales") by a window sign (up to eight square feet in size), a temporary yard sign, or a flag. The Court finds that the Code does not violate the equal protection clause.

Further, Clearwater's ordinance makes no specific distinction between commercial and non-commercial speech. The only provision that makes a commercial speech distinction is set forth in §3-1803.S which prohibits signs that are "carried, waved or otherwise displayed" in public rights-of-way or "in a manner visible from public rights-of-way." This provision contains additional guidance by providing that the prohibition is "directed toward such displays intended to draw attention for a *commercial purpose*, and is not intended to limit the display of placards, banners, flags or other signage by persons demonstrating in demonstrations, political rallies or similar events." The Court finds this restriction is content or viewpoint-neutral and is justified by Clearwater's stated interests in safety and aesthetics. Moreover, the additional guidance provided in the provision assures that government officials are not given unbridled discretion. And, just because public property can be used as a "vehicle for communication" does not mean that the Constitution requires such uses to be permitted. See Taxpayers for St. Vincent, 466 U.S. 814-15. Thus, in light of the viewpoint-neutrality of the ordinance, the additional guidance provided and the alternative channels of communication available for expression, the Court finds this section of the ordinance is valid.

C. Fifth Amendment Claim

The Court agrees with Defendants for the reasons set forth in their motion that Plaintiff's Fifth Amendment claim is not ripe. (Dkt. #42 at 44).

4. Damages

In light of its ruling herein, the Court does not reach the issue of damages or whether Plaintiff has any vested rights in the denials of its permit applications.

III. CONCLUSION

It is therefore **ORDERED AND ADJUDGED** for the reasons set forth herein that:

1. Individual Defendants' Motion to Dismiss the Complaint (and Amended Complaint) with Prejudice (Dkts. #10, 62) are **GRANTED with prejudice**. Any attempt at amendment as to these Defendants would be futile in light of the Court's ruling herein.

2. Plaintiff's Motion for Preliminary Injunction (Dkt. #16) is **DENIED**. As more fully set forth herein, the Court finds that Plaintiff has failed to establish the requisite elements for a preliminary injunction. See Telef v. Reno, 180 F.3d 1286, 1295 (11th Cir. 1999).

3. Plaintiff's Motion for Partial Summary Judgment (Dkt. #18) is **DENIED** as specifically set forth herein.

4. Defendants' Motion for Final Summary Judgment (Dkt. #41) is **GRANTED** as specifically set forth herein.

5. The Clerk is directed to close this case and enter judgment against Plaintiff.

DONE and **ORDERED** in Tampa, Florida on this _____ day of July, 2002.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Attachments:
App. 1 – Clearwater Sign Ordinance - Article 3, Division 18
App. 2 – Relevant Development Review Procedures - Article 4, Divisions 2, 3, 5, 10

Copies furnished to:
Counsel/Parties of Record