UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NEIGHBORHOOD ENTERPRISES, INC., SANCTUARY IN THE ORDINARY, and JIM ROOS, Plaintiffs, v. CITY OF ST. LOUIS and CITY OF ST. LOUIS BOARD OF ADJUSTMENT, Defendants.	**Case 4:07-cv-01546-HEA**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This case involves an attempt by the City of St. Louis and its Board of Adjustment to suppress speech regarding the City's long history of eminent domain abuse. Specifically, they used unconstitutional provisions of the City's Zoning Code to require, then deny, a sign permit when Sanctuary In The Ordinary ("Sanctuary")—a non-profit, low-income housing provider—sought to display a mural protesting the City's eminent domain practices. Sanctuary, along with Neighborhood Enterprises and Jim Roos, filed federal and state claims challenging the permit denial and sign regulations. Summary judgment in their favor is now warranted.

I. FACTUAL BACKGROUND

Sanctuary is a non-profit, low-income housing provider for persons in need in the St. Louis area. Its properties are managed by Neighborhood Enterprises, a self-supporting housing ministry that manages rental properties in St. Louis. Joint Stm't Uncont. Material Facts (hereafter, "Jt. Stm't") ¶¶ 1, 2; Admin. R. (Doc. 33-3) at 52, 53; Admin. R. (Doc. 33-4) at 31.[1]

[1] The administrative record in this case is comprised of Documents 33, 33-2, 33-3, and 33-4. Plaintiffs will accordingly cite to the administrative record by document and page number (*e.g.*, Doc. 33-4 at 31).

From 2000 to 2004, the City used eminent domain to acquire 24 buildings owned or managed by Sanctuary or Neighborhood Enterprises. The buildings had housed 60 low-income apartments. The City took the buildings for private development. Doc. 33-3 at 52, 53, 56.

Sanctuary, Neighborhood Enterprises, and their tenants continue to face the threat of eminent domain for private development. Sanctuary owns a residential building at 1806-08 S. 13th Street. It is located within the "Near Southside Redevelopment Area," a 219-acre area that the City has declared "blighted" under Missouri's Land Clearance for Redevelopment Law. Jt. Stm't ¶ 7; Doc. 33-3 at 50, 53; Doc. 33-4 at 24-25, 36. This "blight" declaration authorizes the City to use eminent domain to acquire properties within the area for private redevelopment. *See* Mo. Rev. Stat. § 99.420(4); § 99.320(3) & (10)(a); St. Louis, Mo., Ordinance 64831 § 8 & Ex. B § D(2) (Dec. 17, 1999). In early 2007, the City in fact notified Sanctuary that it intended to acquire this building for redevelopment. Doc. 33-3 at 56.

In March 2007, to protest the City's penchant for eminent domain abuse, Sanctuary, with tenant[2] approval, commissioned a mural for the building that the City sought to acquire. Jt. Stm't ¶ 7; Doc. 33-3 at 56; Doc. 33-4 at 24-25. The mural, which contains the words "End Eminent Domain Abuse" inside a red circle and slash, was funded by the Missouri Eminent Domain Abuse Coalition ("MEDAC")[3], a civic organization concerned about abusive eminent domain practices. Jt. Stm't ¶ 7-8, 3. The mural's design reflects a design used by MEDAC in its literature, buttons, and materials. Jt. Stm't ¶ 8; Doc. 33-4 at 17.

Promptly after the mural was completed, the City issued a citation declaring it an "illegal sign." The citation insisted that "[p]ermits must be acquired for signs of this type" and provided

[2] One of the tenants is Jackie Ingram, a Sanctuary resident displaced by one of the earlier 24 condemnations. Doc. 33-3 at 53; Doc. 33-4 at 31.

[3] Plaintiff Jim Roos founded Sanctuary and Neighborhood Enterprises and is a member of MEDAC. Jt. Stm't ¶ 4.

instructions explaining how to obtain a permit. Consistent with the instructions, Sanctuary and Neighborhood Enterprises filed a permit application in May 2007. Jt. Stm't ¶¶ 11, 12.

The City's Zoning Administrator denied the permit on May 30, 2007, because it did not meet certain requirements of the City's Zoning Code. She advised Sanctuary that it could appeal the denial to the Board of Adjustment ("Board"), which Sanctuary did. Jt. Stm't ¶¶ 13, 15.

Before Sanctuary's appeal was heard, however, Alderman Phyllis Young—who had introduced the ordinance declaring Sanctuary's property "blighted" and authorizing eminent domain—wrote a letter "urg[ing] the Board . . . to uphold the . . . denial." She argued, "If this sign is allowed to remain then anyone with property along any thoroughfare can paint signs indicating the opinion or current matter relevant to the owner to influence passsersby with no control by any City agency. The precedent should not be allowed." Doc. 33-3 at 45.

The Board heard Sanctuary's appeal in July 2007. Sanctuary argued, among other things, that: the mural did not require a permit because, as a "work of art" or "civic symbol or crest," it was exempted from the code's definition of "sign"; and the Zoning Code's sign provisions violate the free speech protections of the U.S. and Missouri Constitutions. Jt. Stm't ¶ 16.

Notwithstanding Sanctuary's arguments, the Board upheld the denial on July 25, 2007, because the "size and location of the sign were in violation of the Zoning Code." The Board's "Conclusion of Law and Order" explained that the "sign is located in Zone D," "is substantially larger than the footage allowed by the Zoning Code," and "is located on the side of the building in contravention to the requirements of the Zoning Code." Jt. Stm't ¶ 17; Doc. 33-2 at 3, 5. Presumably, the Board was referring to St. Louis, Mo., Code § 26.68.080(E)(2), which provides that signs in Zone D "shall not exceed thirty (30) square feet," and § 26.68.080(D), which imposes a "Maximum Number" of "[o]ne (1) sign for each front line of the premises."

Sanctuary promptly filed this action in state court, challenging the Board's permit denial and the Zoning Code's sign regulations. The City removed the action to this Court.

II. ARGUMENT

Sanctuary's mural is political speech at its purest: a protest of abusive government actions. The First Amendment and Article I, section 8, of the Missouri Constitution have their fullest and most urgent application to such a protest, because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see also Republican Party of Minn. v. White*, 416 F.3d 738, 748 (8th Cir. 2005) (en banc); *State v. Vollmar*, 389 S.W.2d 20, 27 (Mo. 1965).

Sanctuary is entitled to summary judgment on its challenge to the City's use of unconstitutional sign regulations to silence its protest because there is "no genuine issue of material fact" and Sanctuary "is entitled to judgment as a matter of law." *Fitzgerald v. Action, Inc.*, 521 F.3d 867, 871 (8th Cir. 2008). Judgment on Sanctuary's challenge under Mo. Rev. Stat. § 89.110 is appropriate because the Board of Adjustment's permit denial, in relying on unconstitutional sign regulations, was not "authorized by law." *State v. City of Springfield*, 672 S.W.2d 349, 355 (Mo. Ct. App. 1984) (internal quotation marks omitted).[4]

A. The Zoning Code's Content-Based Sign Regulations Violate The Free Speech Protections Of The U.S. And Missouri Constitutions

The Zoning Code provisions relied on to suppress Sanctuary's protest are impermissible content-based regulations that violate the First Amendment and Article I, section 8. A content-

[4] Sanctuary's Petition and Complaint asserts claims under Mo. Rev. Stat. § 89.110, which provides for judicial review of "illegal" board of adjustment decisions, as well as federal and state constitutional claims under 42 U.S.C. § 1983 and Mo. Rev. Stat. § 527.010. The claims under Mo. Rev. Stat. § 89.110 parallel the federal and state constitutional claims: They allege that the Board's decision was illegal because it relied on Zoning Code provisions that violate the U.S. and Missouri Constitutions. Because the claims are parallel, Plaintiffs will brief the claims together. Moreover, because the Missouri courts appear not to have authoritatively addressed what distinctions, if any, there are in the free speech protections of the First Amendment and Article I, section 8, *see State v. Roberts*, 779 S.W.2d 576, 579 (Mo. 1989), Plaintiffs will brief the federal and state constitutional issues together.

based regulation that restricts political speech is *presumptively* unconstitutional and will only be sustained if the government can prove that it "advances a compelling state interest and is narrowly tailored to serve that interest." *Id.* at 749, 763 n.14. The City cannot meet that burden.

1. The City's Zoning Code Provisions Are Content-Based

The City's Zoning Code is riddled with content-based sign regulations. And notwithstanding the constitutional imperative to provide political speech the utmost protection, these regulations treat political protests like Sanctuary's mural far more restrictively than they do signs containing other types of speech. In fact, the City excludes a number of content-based categories from *any* regulation by exempting them from the very definition of "sign" itself:

> Signs do not include the following:
>
> a. Flags of nations, states and cities, fraternal, religious and civic organization[s];
> b. Merchandise, pictures of models of products or services incorporated in a window display;
> c. Time and temperature devices;
> d. National, state, religious, fraternal, professional and civic symbols or crests, or on site ground based measure display device used to show time and subject matter of religious services;
> e. Works of art which in no way identify a product.

St. Louis, Mo., Rev. Code § 26.68.020(17). Thus, a mural containing the words "End Eminent Domain Abuse" is a "sign" subject to regulation and restriction, while a mural of the same size, in the same location, containing instead a "professional [or] civic symbol[]" or a "work[] of art" escapes regulation completely.[5]

Countless courts have held exemptions like those found in the City's definition of "sign" to be impermissibly content-based. For example, the Southern District of New York recently

[5] Even without the exemptions, the definition of "sign" is content-based. An enforcement officer must examine a would-be sign's content to determine whether it is used to "advertise, identify, display, direct or attract attention to an object, person, institution, organization, business product, service, event, or location." *Id.* § 26.68.020(17). "If an official must consider the content of a sign to determine whether an ordinance applies, then that ordinance is content-based." *Advantage Media, L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030, 1040 (D. Minn. 2005).

considered a challenge by a property owner who was cited for posting, without a permit, signs on his property protesting a planned development. *Lusk v. Village of Cold Spring*, 418 F. Supp. 2d 314, 318 (S.D.N.Y. 2005), *rev'd in part on other grounds*, 475 F.3d 480 (2d Cir. 2007). The property owner "challenge[d] as unconstitutional the fact that his political signs [we]re subject to the permitting and other requirements . . ., while the 'flag, badge or insignia of any governmental agency or any civic, charitable religious, patriotic, fraternal or similar organization' [was] not subject to those requirements, because [it was] excluded from the definition of the word 'sign.'" *Id.* at 321-22. The court concluded that the exemption—and, therefore, the definition itself—were impermissibly content-based and, in that light held the entire chapter of sign regulations unconstitutional. *Id.* at 324 & n.1. Numerous other courts, including the Eight Circuit, have come to the same conclusion.[6]

It is not just the Zoning Code's definition of "sign," however, that draws impermissible content-based distinctions. For example, Section 26.68.030 lists some fourteen categories of "signs" that, unlike Sanctuary's mural, are exempted from the Zoning Code's permit requirement. Nearly *all* the categories are content-based.

Indeed, one of the exempted categories is "political signs." St. Louis, Mo., Rev. Code § 26.68.030(H). It is unclear whether the City believes this exemption applies in Zone D, where Sanctuary's property is located. Regardless, the exemption *itself* is content-based: It covers only

[6] *See, e.g.*, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1257, 1264, 1268-69 (11th Cir. 2005) (holding entire sign code unconstitutional because it exempted, among other things, "[f]lags and insignia of any government, religious, charitable, fraternal, or other organization"); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1404, 1409 (8th Cir. 1995) (holding durational limits on political signs unconstitutional when code permitted, among other things, "permanent ground sign indicating upcoming church activities and times of services"); *Bonita Media Enters. v. Code Enforcement Bd.*, ___ F. Supp. 2d ___, 2008 WL 423449, at * 7, *9 (M.D. Fla. Feb. 13, 2008) (enjoining enforcement of sign code provisions that exempted, among other things, "flags or insignias of 'governmental, religious, charitable, fraternal or other nonprofit organizations'"); *Clear Channel Outdoor, Inc. v. Town Bd.*, 352 F. Supp. 2d 297, 301, 309-10 (N.D.N.Y. 2005) (holding sign ordinance unconstitutional in its entirety in part because of exemption providing, "A sign does not include the flag, pennant or insignia of any nation or association of nations or of any state, city or other political unit, or of any political, charitable, educational, philanthropic, civic, professional, or like campaign, drive, movement or event.").

"election . . . related" signs. Signs that comment on government policy, such as Sanctuary's mural (or "No Iraq War," "Support Our Troops," *etc.*), are *not* exempted. Regulations that distinguish between election-related signs and political signs not related to an election are impermissibly content-based. *XXL of Ohio, Inc. v. City of Broadview Heights*, 341 F. Supp. 2d 765, 787 (N.D. Ohio 2004); *Goward v. Minneapolis*, 456 N.W.2d 460, 465-66 (Minn. Ct. App. 1990); *see City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984).[7]

2. The City's Content-Based Zoning Code Provisions Do Not Advance A Compelling Governmental Interest And Are Not Narrowly-Tailored

As noted above, a content-based regulation that limits political speech will only be upheld if the government proves it "advances a compelling state interest and is narrowly tailored to serve that interest." *White*, 416 F.3d at 749. The City cannot meet that burden.

First, the City has no compelling interest in forbidding Sanctuary's mural while treating other categories of speech more favorably or exempting them from regulation altogether. In fact, the only interests the City has identified, traffic safety and aesthetics, "have never been held to be compelling." *Whitton*, 54 F.3d at 1408; *see also Solantic*, 410 F.3d at 1267.

Even assuming traffic safety and aesthetics were compelling interests, however, the inquiry does not end there: The City must also prove that its regulations are "narrowly tailored to serve th[ose] interest[s]." *White*, 416 F.3d at 751. This requires proof that the Zoning Code "*actually* advances the [City's] interest." *Id.* at 416 F.3d at 751. Here, however, the City concedes that it is knows of no studies, reports, or memoranda showing that its sign restrictions even *affect* traffic safety or aesthetics. Jt. Stm't ¶¶ 20, 21. In fact, the City has acknowledged

[7] To make matters worse, even the "political signs" that Section 26.68.030 exempts from the permitting requirement are subject to size, quantity, durational, and other limits that are more restrictive than those applicable to other exempted signs. *Compare* St. Louis, Mo., Rev. Code § 26.68.030(H) *with id.* § 26.68.030(J) *and id.* § 26.68.030(E). Regulations that impose greater time, place, or manner restrictions on political signs than on commercial or other types of non-commercial signs are impermissibly content-based. *E.g.*, *Whitton*, 54 F.3d at 1403-09; *Clear Channel Outdoor*, 352 F. Supp. 2d at 308; *Outdoor Sys., Inc. v. City of Merriam*, 67 F. Supp. 2d 1258, 1269 (D. Kan. 1999).

that it possess no documents whatsoever supporting Chapter 26.68's regulation of outdoor signs. *Id.* ¶ 19. In this light, it simply cannot prove that its regulations "*actually* advance[]" its purported interest in traffic safety and aesthetics. *White*, 416 F.3d at 751.

The City's definition of "sign" and the concomitant regulations on "signs" fail the narrow-tailoring requirement for another reason: they are under-inclusive. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("[T]he facial underinclusiveness [of a speech regulation] raises serious doubts about whether [the government] is, in fact, serving . . . the significant interests which [it] invokes . . . ."). A regulation is under-inclusive if it "leave[s] significant influences bearing on the interest unregulated." *White*, 416 F.3d at 751. Here, the City treats Sanctuary's "End Eminent Domain Abuse" mural as a prohibited "sign," yet allows—indeed, does not even consider to *be* a "sign"—a mural of the same size, in the same location, that contains, instead, the Masonic crest, Papal coat of arms, American Bar Association symbol, or a "work of art." *See* St. Louis, Mo., Rev. Code § 26.68.020(17)(D) & (E). The City has presented no evidence that Sanctuary's mural presents any more of a threat to traffic safety and aesthetics than these exempted items. *See Whitton*, 54 F.3d at 1408; *Solantic*, 410 F.3d at 1268. In fact, assuming aesthetics can be compromised, and motorists distracted, by the mural (a dubious proposition), then they may be "just as compromised, and . . . just as distracted, by displays of governmental, religious or charitable flags, badges and insignia." *Lusk*, 418 F. Supp. 2d at 324.

In short, "the City has simply failed to demonstrate how [its] interests are served by the distinction it has drawn in the treatment of exempt and nonexempt categories of signs. Simply put, the sign code's exemptions are not narrowly tailored to accomplish either the City's traffic safety or aesthetic goals," and they are therefore unconstitutional. *Solantic*, 410 F.3d at 1268.

B. Even If Deemed Content-Neutral, The Zoning Code Provisions Relied On To Deny Sanctuary's Sign Permit Violate The U.S. And Missouri Constitutions

Even if this Court concludes that the Zoning Code is not content-based and instead considers the 30-square-foot and street frontage requirements for Zone D properties as content-neutral place and manner restrictions, they are still unconstitutional. Such restrictions are only valid if they are "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).[8] As with the test for content-based restrictions, the government has the burden to prove constitutionality. *ACORN v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983). The City cannot meet its burden.

1. The Restrictions On The Size And Location Of Sanctuary's Mural Do Not Serve A Significant Governmental Interest.

The City cannot carry its burden of proving that its regulations "serve a significant governmental interest" because it has no evidence demonstrating that Sanctuary's mural (or any "painted wall sign," for that matter) threatens its asserted interests. Assuming, arguendo, traffic safety and aesthetics are "significant" interests[9], "merely invoking [them] is insufficient. The [City] must also show that the proposed communicative activity endangers those interests." *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 859 (9th Cir. 2004). Here, the City has proffered no evidence that Sanctuary's mural threatens traffic safety and aesthetics and thus may not rely on those interests to support its size and location restrictions. *See Weinberg v. City of Chicago*, 310 F.3d 1029, 1039 (7th Cir. 2002) (holding book peddling ban unconstitutional because city

[8] *But see BBC Fireworks, Inc. v. State Highway and Transp. Comm'n*, 828 S.W.2d 879, 882 n.2 (Mo. 1992) (suggesting same test may not be appropriate under Article I, section 8, of the Missouri Constitution).

[9] *Compare Whitton*, 54 F.3d at 1408 (stating interests in traffic safety and aesthetics are significant) *and BBC Fireworks*, 828 S.W.2d at 883 (suggesting highway safety and aesthetics may justify content-neutral speech regulations) *with Goward*, 456 N.W.2d at 467 ("The Supreme Court has never held that aesthetic interests alone can constitute a governmental interest significant enough to override political speech *on property owned by the speaker*. We hold it cannot." (emphasis added)).

"provided no objective evidence that traffic flow on the sidewalk or street is disrupted when [plaintiff] sells his book"); *Wexler v. New Orleans*, 267 F. Supp. 2d 559, 567 (E.D. La. 2003).

Even if there were evidence that Sanctuary's mural threatens the City's interests, however, the City must also "produce 'objective evidence' showing that [its] restrictions *serve[]* the interests asserted." *Horina v. City of Granite City*, 538 F.3d 624, 634 (7th Cir. 2008) (emphasis added); *see also Pagan v. Fruchey*, 492 F.3d 766, 772-78 (6th Cir. 2007) (en banc). Here the City concedes there is no evidence that its regulations even *affect* its interests. Jt. Stm't ¶¶ 19-21. The size and location restrictions, therefore, cannot be said to "serve a significant governmental interest." *Clark*, 468 U.S. at 293.

2. The Restrictions On The Size And Location Of Sanctuary's Mural Are Not Narrowly Tailored

Even assuming the City can establish that its Zone D size and location restrictions serve a significant governmental interest, it must also prove that the regulations are narrowly tailored. A regulation is "narrowly tailored" if it: (1) "promotes a substantial government interest that would be achieved less effectively absent the regulation"; and (2) does not "burden substantially more speech than is necessary to further" that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (internal quotation marks omitted). Here, neither requirement is satisfied.

As already noted, the City concedes it has no documents demonstrating that its restrictions have any effect on traffic safety and aesthetics. Therefore, it cannot establish that those interests would be "achieved less effectively absent the regulation." *Id.*

Moreover, the restrictions burden substantially more speech than is necessary because they "do[] not sufficiently match [the City's] stated interest[s]." *Kuba*, 387 F.3d at 862 (internal quotation marks omitted). For example, the City claims traffic safety and aesthetics necessitate the 30-square-foot and street-front restrictions on Sanctuary's mural, yet the City allows such

things as "works of art," "professional [or] civic symbols," and "[s]igns in the nature of decorations" to be of *unlimited* size and location. *See* St. Louis, Mo., Rev. Code § 28.68.020(D), (E); *id.* § 28.68.030(E). This mismatch between the City's asserted interests and the restrictions it has applied to Sanctuary makes clear that the restrictions are not narrowly tailored.

3. The Restrictions On The Size And Location Of Its Mural Leave Sanctuary With No Ample and Adequate Alternative For Its Political Protest

Even if the City's size and location restrictions are deemed content-neutral and narrowly-tailored to serve a significant interest, they are unconstitutional because they fail to "leave open ample alternative channels for communication of the information" Sanctuary seeks to convey. *Clark*, 468 U.S. at 293. The City cannot meet its burden "to show that the alternatives . . . are ample and adequate." *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1553 (7th Cir. 1986) (internal quotation marks omitted), *aff'd*, 479 U.S. 1048 (1987).

The adequacy of an alternative often turns on *location*—the location in which the speaker *desires* to speak, as well as the location of the venue or medium that the government asserts is an adequate alternative. In *Ladue*, for example, the Supreme Court stressed the importance of location to message in holding there was no adequate alternative for a residential political sign:

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the "speaker." . . . [T]he identity of the speaker is an important component of many attempts to persuade.

Ladue, 512 U.S. at 56-57.

This connection between location and message was likewise emphasized in *Goward v. City of Minneapolis*. There, a homeowner harmed by a city zoning decision protested the decision by displaying yard signs that read, among other things, "Drive up the back alley & see what man's inhumanity to man has done to my home." 456 N.W.2d at 462. The city forced him

to remove them because of an ordinance prohibiting certain lawn signs. The court struck down the ordinance for failure to leave open adequate alternatives:

> We think the messages contained on respondent's signs are so closely connected to their location that no adequate alternative means of communication exists. The signs invite passers by to look at the house, and to consider whether the city treated respondent in a humane fashion. The same message communicated any place other than the house would carry little impact.

Id. at 468. Many other cases similarly stress the importance of location to message. *E.g.*, *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93 (1977); *Weinberg*, 310 F.3d at 1041-42.

As in each of these cases, the location of Sanctuary's mural (a building threatened with eminent domain abuse) is a critical component of the message itself ("End Eminent Domain Abuse"). Sanctuary placed the mural where it did precisely because the building was threatened with condemnation for private development: The LCRA was actively trying to acquire the building for "redevelopment" when Sanctuary commissioned the mural, and, to this day, the building is under a "blight" declaration that grants the LCRA the power to condemn it. Doc. 33-3 at 56; Doc. 33-4 at 24-25, 36. Protesting the City's eminent domain abuse at the very site of—indeed, on the very object of—that abuse is the only adequate means of conveying the message that such abuse is wrong.

Moreover, "[t]he First Amendment protects [Sanctuary's] right not only to advocate [its] cause but also to select what [it] believe[s] to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Thus, an alternative will only be considered "ample" and "adequate" if it "is accessible and [capable of reaching] where the intended audience is expected to pass." *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333, 339 (W.D. Va. 1987). Here, Sanctuary's message is to the city at large—even those citizens not necessarily seeking information regarding eminent domain abuse. To that end, the message is most

effectively expressed by a large mural on the side of Sanctuary's property that is most visible to the public. *See Linmark*, 431 U.S. at 93 (noting alternatives may be inadequate if they "are less likely to reach persons not deliberately seeking [the] information").

The City's highly restrictive size and location requirements leave Sanctuary with no adequate alternative for effectively conveying its message and reaching its intended audience. They are therefore unconstitutional.

C. The City's Zoning Code Effects A Prior Restraint On Sanctuary's Speech In Violation Of The U.S. And Missouri Constitutions

The Zoning Code's permitting requirement effects an unconstitutional prior restraint on speech. Laws that require a permit to engage in speech are presumptively unconstitutional prior restraints and will only be upheld if the permitting authority is "bounded by precise and clear standards." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 558 (1975); *City of St. Louis v. Kiely*, 652 S.W.2d 694, 697 (Mo. Ct. App. 1983). Here, the City's permitting requirement contains *no* standards—much less clear and precise ones.

Prior restraints that "plac[e] unbridled discretion in the hands of a government official or agency" raise the specter of censorship. *City of Lakewood v. Plain Dealer Publ'g Corp.*, 486 U.S. 750, 757 (1988); *see also Kiely*, 652 S.W.2d at 697-98. "To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain *narrow, objective, and definite standards* to guide the licensing authority." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (emphasis added; internal quotation marks omitted); *see also Kiely*, 652 S.W.2d at 698. "If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." *Forsyth*, 505 U.S. at 131 (internal quotation marks omitted).

Here, the City has divided regulated speech from unregulated speech and given itself the power to grant or deny permits on standards that are anything but "narrow, objective, and definite." *Id.* The Zoning Code exempts from the definition of "sign," and therefore from regulation, such things as "works of art" and "civic symbols or crests." The Code provides no definition of these terms, and the City concedes it has no standards outside the Code for determining whether they apply. Jt. Stm't ¶¶ 29, 30. Not surprisingly, when Sanctuary requested a determination as to whether its mural constituted a work of art or a civic crest or symbol, the City provided no explanation for its (implicit) determination that it constituted neither and was therefore a "sign."

This lack of "narrow, objective, and definite" standards is only compounded by the inherent vagueness of the term "art" itself. The question, "What is art?" has been described as "one of the most elusive of the traditional problems of human culture," Richard Wollheim, *Art and Its Objects* 1 (1980), and courts have found the term "works of art" inherently vague. *E.g.*, *Household Goods Carriers' Bureau v. ICC*, 584 F.2d 437, 440 (D.C. Cir. 1978).[10]

Nevertheless, the City has tasked its administrative staff and Planning Commission with reviewing potential "signs" and asking, "Is this art? Is this a civic symbol?" This consideration occurs with no guidance from the legislative authority of the City, and with no written policy on the part of the City's administrative staff. Jt. Stm't ¶ 30. Instead, it "involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority"—things the Supreme Court has said are forbidden in the prior restraint context. *Forsyth*, 505 U.S. at 131.

[10] In fact, the definition of "sign," with its exemptions for "art" and other undefined types of speech, is void for vagueness: It uses "terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *Baugus v. Director of Revenue*, 878 S.W.2d 39, 41 (Mo. 1994) (same). The same is true of the limit on signs in Zone D to "[o]ne (1) for each front line of the premises." St. Louis, Mo., Rev. Code § 26.68.080(D). The term "front line" is undefined, and it is unclear whether the restriction means one sign *per* front line (*i.e.*, the *number* of signs is a function of the number of front lines); or one sign *on* each front line (*i.e.*, the *location* of signs is a function of the front line(s)).

D. The Zoning Code's Differential Treatment Of Signs Based On Geographic Zone Violates The Equal Protection Clause

Finally, the Zoning Code discriminates against Zone D property owners in their display of political signs. The Equal Protection Clause prohibits such discrimination unless the City can prove the differential treatment is narrowly tailored to serve a substantial governmental interest. *Police Dept. v. Mosley*, 408 U.S. 92, 99 (1972). The City cannot do so.

Sanctuary's building is located in "Zone D," where sign permits are required and signs are limited to "thirty . . . square feet" and "[o]ne . . . for each front line of the premises." St. Louis, Mo., Rev. Code § 26.68.080(D) & (E). Property owners in Zones F through K, on the other hand, need not obtain permits to display political signs and have *no* limits on the size or location of political signs they may display. St. Louis, Mo., Rev. Code § 26.68.050(C) & (E).

Such discrimination is prohibited by the Equal Protection Clause. First, there is nothing on the face of the Zoning Code that indicates what the City's interest is in regulating speech based on the geographic location of the speaker. Second, even if the City could demonstrate a substantial interest, there is nothing in the record or on the face of the code that justifies regulating speech differently in different areas based on *content*. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) ("[U]nder the Equal Protection Clause, . . . [a] regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions." (internal quotation marks)). The City cannot treat Zone D property owners differently unless it can show that political signs in Zone D are "clearly more disruptive" than political signs in Zones F through K. *Mosley*, 408 U.S. at 100. There is no such evidence, and the Zoning Code therefore violates the Equal Protection Clause.

III. CONCLUSION

For the foregoing reasons, judgment in favor of Sanctuary is warranted on all claims.

RESPECTFULLY SUBMITTED this 16th day of March, 2009.

INSTITUTE FOR JUSTICE

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2009, a copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT and the attached JOINT STATEMENT OF UNCONTROVERTED MATERIAL FACTS were filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on the following:

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