UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CENTRAL RADIO COMPANY, INC.,

ROBERT WILSON, and

KELLY DICKINSON,

Plaintiffs,

v. Civil Action No. 2:12cv247

CITY OF NORFOLK, VIRGINIA,

Defendants.

ORDER

On May 2, 2012, Plaintiffs Central Radio Company, Inc. ("Central Radio"), Robert Wilson, and Kelly Dickinson brought this suit against the City of Norfolk ("the City") seeking to enjoin enforcement of the City's Sign Code (the "Sign Code") against a banner that Plaintiffs have erected in protest of the seizure of their property. Plaintiffs argue that the Sign Code violates their First Amendment right to freedom of speech.

Both parties filed cross-motions for summary judgment. For the reasons that follow, Plaintiffs' Motion for Summary Judgment (ECF No. 44) is **DENIED** and Defendants' Motion for Summary Judgment (ECF No. 45) is **GRANTED**.

I. FACTUAL BACKGROUND

In deciding a motion for summary judgment, the Court must determine whether there is a "*genuine* issue of *material* fact," that is, a factual dispute where: (1) the evidence is such that a reasonable jury could resolve the dispute in favor of either party, rendering the dispute

"genuine," and (2) the resolution of the dispute will affect the outcome of the case, rendering the fact "material." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). The substantive law governs whether disputed facts are material. *Id.* The Court begins by recounting the facts of this case.

A. NORFOLK'S SIGN CODE

Norfolk's Sign Code regulates "any sign within the city which is visible from any street, sidewalk or public or private common open space." Norfolk Code app. A § 16-2 (2012). This definition excludes works of art or the "flag or emblem of any nation, organization of nations, state, city, or any religious organization." *Id.* § 2-3. The purpose of the Sign Code is to promote safety and improve Norfolk's aesthetics. *Id.* § 16-1.

Central Radio is located in a limited industrial area referred to as an "I-1 district." The Sign Code permits three categories of signs in an I-1 district: temporary signs, freestanding signs, and wall signs. *Id.* § 16-8.3. Most signs require a permit from the City before they can be erected, although several categories of signs are exempt from this requirement. *Id.* §§ 16-5.1, 16-5.2.

The Sign Code allows certain temporary signs: (1) signs for commercial sale events, new businesses, or "grand openings" that are no larger than sixty square feet, (2) signs for construction and new project development that are no larger than thirty-two square feet, (3) political campaign signs and real estate signs that are no larger than sixteen square feet, and (4) signs for noncommercial events that are no larger than eight square feet. *Id.* § 16-8.3(a).

Properties that are not corner lots may only have one temporary sign at a time. *Id.* However, this restriction has not been enforced against political campaign signs since the Fourth

Circuit struck a similar restriction as unconstitutional in *Arlington County Republican Committee v. Arlington County, Virginia*, 983 F.2d 587, 595 (4th Cir. 1993).

Businesses in industrial districts with more than 200 feet of lot frontage may erect freestanding signs of up to seventy-five square feet in area, which must be surrounded by landscaping. Norfolk Code app. A §§ 16-6.9 16-8.3(b). The Sign Code allows wall signs facing public streets, if those signs do not exceed one square foot of signage per linear foot of building frontage along the street they face. *Id.* §§ 16-6.8(c), 16-8.3(c).

The City refrains from actively investigating Sign Code violations, but instead only inspects signage in response to complaints by the public. Officers examining a property may inspect neighboring properties for similar problems. Plaintiffs contend, and the City denies, that this method has led to marginal enforcement in the past.

B. CENTRAL RADIO'S PROTEST BANNER

Plaintiff Central Radio is a radio manufacturing and repair business located on 39th Street in Norfolk, Virginia. Central Radio's structure extends for ninety feet along 39th Street. One side of this building is adjacent to 150 feet of unimproved land. Hampton Boulevard, a major thoroughfare, runs opposite of this unimproved land. Central Radio has operated in this location for fifty years.

Several years ago, the Norfolk Redevelopment Housing Authority ("NRHA") undertook seizing Central Radio's property via eminent domain for use by Old Dominion University. The NRHA is an independent committee consisting of members appointed by the City. In February 2011, a state court approved this seizure, and the matter has been continued for a compensation trial. Central Radio intends to appeal the state court's ruling after trial proceedings are complete.

In March 2012, Plaintiffs affixed a large protest banner to the side of their building facing Hampton Boulevard. This banner is 375 square feet in area, and contains this message: "50 years on this street/ 78 years in Norfolk/ 100 Workers/ Threatened by Eminent Domain." The banner also depicts an American flag, Central Radio's company logo, and what Plaintiffs refer to as "an anti-eminent domain abuse symbol," consisting of the words "Eminent Domain Abuse" contained in a red circle with a slash across these words. The banner is intended to encourage the public to pressure the City to cancel the seizure, and was designed to be legible from Hampton Boulevard. Some drivers "honked approvingly whenever Plaintiffs were outside their building." Frommer Decl. Ex. NN 21:15–16, ECF No. 44-43 at 22.

C. THE COMPLAINT AND ITS AFTERMATH

On March 25, 2012, members of the Old Dominion University Real Estate Foundation ("ODUREF"), the intended recipient of Central Radio's property, learned of the sign. An ODUREF official complained to a city official, who notified the zoning enforcement personnel.

In late March or early April 2012, Inspector Harold Tanner visited Central Radio's property. He informed Ms. Dickinson that because the wall facing Hampton Boulevard was forty feet long, the protest banner could not exceed forty square feet. This calculation appears to treat the banner as a wall sign. *See* Norfolk Code app. A § 16-8.3(c).

On April 5, 2012, Inspector Tanner returned with City Zoning Enforcement Coordinator Leslie Garrett and determined that the banner could not exceed sixty square feet. This figure appears to be derived from the largest area allowed for temporary signs: signs for commercial sale events, new businesses, or grand openings. *Id.* § 16-8.3(a).

Central Radio was issued citations for displaying a sign that exceeded the size limitations in the Sign Code, and for erecting a sign without a permit. Plaintiffs were instructed to reduce the banner to sixty square feet.

On May 2, 2012, Plaintiffs filed this suit, seeking to enjoin the City from enforcing the Sign Code against them. Plaintiffs requested a temporary restraining order and a preliminary injunction. The request for a restraining order was denied on May 4, 2012.

Plaintiffs' filings identified several other signs that exceeded the size limitations of the Sign Code, some of which were located on the City's buildings. The City thereafter pursued enforcement of the Code against some of these signs. However, at least one oversized sign, a flashing message board at the Nauticus Museum, remains. Plaintiffs argue that the City previously failed to enforce the Sign Code against an abortion protestor and against a sign opposing President Obama. The City responds that these signs did not violate the Code.

On July 27, 2012, this Court denied Plaintiffs' request for a preliminary injunction. The City then notified Plaintiffs that noncompliance with the Code would subject them to misdemeanor charges and fines of $1,000 a day. Plaintiffs responded by covering their banner with a tarp.

In October 2012, Plaintiffs applied for a sign certificate that would allow a 60-foot portion of the banner to display the anti-eminent domain abuse symbol. The City informed them that no certificate was necessary. Accordingly, Plaintiffs removed the tarp from the portion of the banner containing the anti-eminent domain abuse symbol.

II. COMMON STANDARD OF LAW

A. SUMMARY JUDGMENT

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247–48. "Only disputes over facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment." *Id.* at 248. Factual disputes that are irrelevant or unnecessary will not be considered by a court in its determination. *Id.*

After a motion for summary judgment is advanced and supported, the opposing party has the burden of showing that a genuine dispute of fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). At that point, the Court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

In doing so, the Court must "construe the facts in the light most favorable to [the non-moving party], and may not make credibility determinations or weigh the evidence." *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 213 (4th Cir. 2007). If there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party," the motion for summary judgment should be denied. *Anderson*, 477 U.S. at 249.

B. FIRST AMENDMENT

"[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145

(1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). However, "municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984).

There are two methods by which the constitutionality of a statute can be analyzed: either via a facial challenge, or via an "as-applied" challenge. *See, e.g., Wag More Dogs, Ltd. Liab. Corp. v. Cozart*, 680 F.3d 359, 365–69 (4th Cir. 2012). A facial challenge examines the constitutionality of the statute itself, without regard to the plaintiff's particular circumstances. *See id.* An as-applied challenge argues that the statute cannot constitutionally be applied to the plaintiff. *See id.* at 369.

In determining whether a restriction on speech is permissible, courts distinguish between content-based regulations "that suppress, disadvantage, or impose differential burdens upon speech because of its content," and content-neutral regulations that merely "impose burdens on speech without reference to the ideas or views expressed." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642–43 (1994). Courts also distinguish between commercial speech and noncommercial speech. *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010).

"[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broad. Sys., Inc.*, 512 U.S. at 641. Accordingly, "a content-based speech restriction on noncommercial speech is permissible only if it satisfies strict scrutiny." *Chester*, 628 F.3d at 682 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)) (internal quotation marks omitted). "Strict scrutiny requires the law in question to be 1)

narrowly tailored to 2) promote a compelling government interest." *PSINet, Inc. v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004).

In contrast, "content-neutral time, place, and manner regulations" and "law[s] regulating commercial speech" are subject to intermediate scrutiny. *Chester*, 628 F.3d at 682. Under intermediate scrutiny, a law "is generally valid if it furthers a substantial government interest, is narrowly tailored to further that interest, and leaves open ample alternative channels of communication." *Am. Legion Post 7 v. City of Durham*, 239 F.3d 601, 609 (4th Cir. 2001).

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The purpose of a regulation is not dispositive. *See Turner Broad. Sys., Inc.*, 512 U.S. at 642–43. Instead, a regulation is content-neutral if:

> (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message [the speech] conveys; or (3) the government's interests in the regulation are unrelated to the content of the [affected] speech.

Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 432 (4th Cir. 2007) (alterations in original) (quoting *Hill v. Colorado*, 530 U.S. 703, 719–20 (2000)) (internal quotation marks omitted). "Distilling this three-part test into one succinct formulation of content neutrality, if a regulation is justified without reference to the content of regulated speech," the Fourth Circuit has "not hesitated to deem [the] regulation content neutral even if it facially differentiates between types of speech." *Brown v. Town of Cary*, 706 F.3d 294, 303 (4th Cir. 2013) (alteration provided) (quoting *Hill*, 530 U.S. at 720; *Wag More Dogs*, 680 F.3d at 366) (internal quotation marks omitted).

Speech is classified as "commercial speech" if it "propose[s] a commercial transaction." *Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 441 (4th Cir. 1999) (alteration in original) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473 (1989)) (internal quotation marks omitted). Speech is construed as commercial speech if it constitutes advertising, references a specific product, or is motivated by economic concerns. *Wag More Dogs*, 680 F.3d at 370. None of these factors is dispositive. *Adventure Commc'ns*, 191 F.3d at 440–41.

When speech contains a mixture of commercial and noncommercial elements, "the commercial or noncommercial character of the speech is determined by 'the nature of the speech taken as a whole.'" *Id.* at 441 (quoting *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)); *see also Fox*, 492 U.S. at 474–75 (holding that inserting home economics lessons into sales presentations "no more converted [those] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech"). Therefore, consideration of the full context of the speech is viewed as "critical." *Id.*

III. ANALYSIS

A. STANDARD OF SCRUTINY

"'Because the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech, [a court] must first determine the proper classification of the [banner] at issue here.'" *Bolger v. Youngs Prods. Corp.*, 463 U.S. 60, 65 (1983). This Court must also determine whether the Sign Code is content-based or content-neutral. *Brown*, 706 F.3d at 300.

Central Radio's banner displays noncommercial speech. Although the banner features Central Radio's corporate logo, that inclusion is inextricably intertwined with the banner's noncommercial speech. The logo serves to identify the sign's "speaker," not attract new customers, and the message about the company's longevity and employment bolsters Plaintiffs' assertions that the use of eminent domain procedures against Plaintiffs is unjust. The "full context" of the banner reveals a purpose to protest against governmental action, and not to "propose[] a commercial transaction." *Adventure Commc'ns*, 191 F.3d at 441 (alteration provided) (quoting *Fox*, 492 U.S. at 473) (internal quotation marks omitted).

Restrictions on noncommercial speech escape strict scrutiny only if they are content-neutral. *See Chester*, 628 F.3d at 682. Plaintiffs argue that the Sign Code is content-based because it distinguishes government or religious flags or emblems and murals or works of art, and creates different categories of temporary signs.

The Fourth Circuit has held that a regulation that "facially differentiates between types of speech" is content-neutral if the distinction "is justified without reference to the content of regulated speech." *Brown*, 706 F.3d at 303 (quoting *Hill*, 530 U.S. at 720; *Wag More Dogs*, 680 F.3d at 366) (internal quotation marks omitted). In determining whether a regulation "has distinguished *because* of content," courts examine whether the regulation's "distinctions bear a reasonable relationship to the . . . asserted content neutral purposes." *Id.* at 304.

There is no dispute that the general purpose of the Sign Code is to promote traffic safety and aesthetics. The Code's exemptions are reasonably related to these purposes. Most flags, emblems, and artwork either lack text or present text that is superfluous to the display. These images are less likely to distract drivers than signs. Flags, emblems, and artwork are commonly designed to be aesthetically pleasing, serving to "enhance rather than harm aesthetic appeal." *Id.*

Because these exemptions are justified without reference to the content of regulated speech, they are considered content-neutral. *Cf. id.* at 303–04 (upholding as content-neutral an exemption for public art and holiday decorations).

The Sign Code's system of categorizing signs, which asks city officials to "superficially evaluate a sign's content to determine the extent of applicable restrictions," is insufficient by itself to render the Sign Code content-based. *See Wag More Dogs*, 680 F.3d at 368. For a regulation with a clear content-neutral purpose to be content-based, the regulation must impose a "more searching inquiry into the content." *Covenant Media*, 493 F.3d at 434. Plaintiffs have presented no evidence that any such inquiry is required by the Norfolk Sign Code.

Plaintiffs also argue that the Sign Code is content-based because it is selectively enforced against only those speakers who are disfavored by the City. Plaintiffs cite the Ninth Circuit case of *Hoye v. City of Oakland* for the proposition that some enforcement policies will render an otherwise content-neutral regulation content-based. 653 F.3d 835 (9th Cir. 2011).

Hoye held that courts may not "rely[] on enforcement policies . . . to invalidate a statute that is valid as written but not as enforced." *Id.* at 848. The Ninth Circuit considered the plaintiff's selective enforcement claims separately. *See id.* at 849. Plaintiffs' selective enforcement claims are discussed separately below.

In sum, Central Radio's banner constitutes noncommercial speech. The Sign Code's regulation of that banner is construed as content-neutral because the regulation applies "without reference to the ideas or views expressed." *Turner Broad. Sys., Inc.*, 512 U.S. at 643. Therefore, intermediate scrutiny applies.

B. FACIAL CHALLENGE

A regulation will survive intermediate scrutiny only if the regulation "furthers a substantial government interest, is narrowly tailored to further that interest, and leaves open ample alternative channels of communication." *Am. Legion Post 7*, 239 F.3d at 609.

The City asserts that the Sign Code promotes traffic safety and aesthetics. The Fourth Circuit has held that these are substantial government interests that are furthered by sign regulations. *Wag More Dogs*, 680 F.3d at 368. Although Plaintiffs contend that the City has not submitted proof of links between sign regulation and traffic safety, "arguments based solely on logic or common sense normally are allowed." *The News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 579 (4th Cir. 2010) (holding that empirical data is needed when the interest promoted by the regulation is weak, such as a purely aesthetic interest).

This Court finds no genuine dispute that the Sign Code furthers a substantial government interest. Plaintiffs present no evidence that the Sign Code, on its face, is overbroad or fails to leave open ample alternative channels of communication. *Cf. Brown*, 706 F.3d at 305 (holding that a sign ordinance that restricted the "size, color and positioning" of signs was nevertheless narrowly tailored and left open ample alternative channels of communication). Therefore, the Court finds that the Sign Code is facially constitutional.

C. AS-APPLIED CHALLENGE

Plaintiffs also claim that the Sign Code is unconstitutional *as applied* to their protest banner. The Court disagrees. As discussed above, the Sign Code serves the substantial government interests of traffic safety and aesthetics. *Wag More Dogs*, 680 F.3d at 368. Although Plaintiffs have presented some evidence suggesting that signs like theirs pose no threat to traffic safety, this evidence is insufficient to render the City's conclusion to the contrary

unreasonable. *Brown*, 706 F.3d at 305 (holding that the relationship between the regulation and its goals must be "a reasonable, not optimal, relationship," and that these precise factual calibrations fall to the province of legislatures).

The Court also acknowledges that there is evidence that some drivers have been distracted by Central Radio's banner. Frommer Decl. Ex. NN 21:15–16, ECF No. 44-43 at 22. Under the totality of the evidence and circumstances presented, viewing the evidence in the light most favorable to Plaintiffs, this Court concludes that, as applied to Central Radio's banner, the Sign Code is narrowly tailored to serve substantial government interests.

The Court also considers whether the Sign Code leaves open "ample alternative channels of communication." A sign ordinance "leaves open ample alternative channels of communication" when it "generally permit[s] the display of all types of signs, subject only to size and location restrictions." *Wag More Dogs*, 680 F.3d at 369 (alteration provided) (quoting *Am. Legion Post 7*, 239 F.3d. at 609) (internal quotation marks omitted); *accord Brown*, 706 F.3d at 305 (contrasting such regulations to a "flat ban of residential signs invalidated by [*City of*] *Ladue* [*v. Gilleo*], 512 U.S. [43,] 56 [(1994)]"). Norfolk's Sign Code, like the ordinances at issue in *Brown* and *Wag More Dogs*, does not ban all signs, but instead sets reasonable size and location restrictions. Plaintiffs can currently display a sixty-square-foot banner. They argue that this size precludes displaying their full message in a legible manner to drivers on Hampton Boulevard (150 feet away). Plaintiffs also argue that alternative methods of communication (other than signage) would be less effective, because a sign conveys a direct connection between the proposed condemnation and the well-maintained condition of the property being condemned.

Plaintiffs have a constitutional right to use signs to express their view. Their ability to display signs up to sixty square feet provides Central Radio with "ample alternative channels of

communication." Therefore, the Court concludes that the Sign Code is constitutional as applied to Central Radio's protest banner.

D. SELECTIVE ENFORCEMENT ARGUMENT

Plaintiffs also claim that the City employs an unconstitutional practice of enforcing the Sign Code selectively. Plaintiffs argue that the City enforces the Sign Code only against speech of which the City disapproves. Plaintiffs also argue that the City's complaint-based system of enforcement favors popular speech over unpopular speech.

"It is appropriate to judge selective prosecution claims according to ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608 (1985). "[T]hese standards require [plaintiffs] to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose." *Id.* Plaintiffs have established neither.

Although there is evidence that the City's complaint-driven policy has resulted in sparse enforcement of the Sign Code, there is no evidence of *selective* enforcement. Plaintiffs assert that there have been three instances in which the City became aware of violations and took no action. One of these involves an oversized flashing message board at Norfolk's Nauticus Museum. Frommer Decl. Ex. HH 167:16–168:11, ECF No. 44-37 at 52–53.

Another involved a sign opposing President Obama, which perhaps was a campaign sign that remained on display after the presidential election. Frommer Decl. Ex. JJ, 87:25–88:10, ECF No. 44-39 at 21. The evidence presented failed to confirm whether there was an actual violation. *Id.* 88:22–89:24, 91:9–19, ECF No. 44-39 at 22–24.

Plaintiffs also claim that some signs protesting abortion were allowed to remain on display in violation of municipal law. These signs apparently violated the City Code, not the Sign Code. *Id.* 25:14–27:6, ECF No. 44-39 at 6–7.

These examples fall short of establishing a pattern of discrimination on the basis of content. Evidence that suggests that the City has been slow to enforce the Sign Code against political speech also is nondispositive. Appropriate caution does not constitute improper discrimination. *Cf. Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 345 (4th Cir. 2005) (noting that courts should be reluctant to take actions that might "chase government into overbroad restraints of speech").

Plaintiffs' contention that the Sign Code's complaint-driven enforcement system disfavors unpopular speech that is more likely to trigger complaints is unpersuasive. This theory is plausible, but Plaintiffs have presented no evidence that the City's complaint-driven enforcement system has had a discriminatory effect, or, moreover, that it was adopted for the purpose of generating such an effect.

Plaintiffs have not shown that the City's enforcement of the Sign Code is designed to discriminate on the basis of content, or that it has the effect of discriminating on the basis of content. Therefore, Defendants are entitled to summary judgment on Plaintiffs' claim of selective enforcement.

E. PERMIT REQUIREMENT

Finally, Plaintiffs argue that the requirement that they receive a sign permit prior to erecting a sign constitutes an impermissible prior restraint on speech. Plaintiffs argue that the permit requirement is unconstitutional because it exempts certain sign categories from the permit system and provides no time limit for the City to decide permit applications.

Ordinances that require permits as a prerequisite for speech sometimes are required to limit how long applications may remain pending. *See Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965). "Nevertheless, not all prior restraint permitting schemes must provide [these]

procedural safeguards." *Covenant Media*, 493 F.3d at 431 (citing *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002)). Instead, a sign regulation is required to contain such time limits only if the regulation is content-based. *Id.* at 432. As discussed above, the Sign Code is content-neutral. Therefore, the Sign Code is not constitutionally obligated to limit the length of time officials may take processing permit application.

Plaintiffs also argue that the Sign Code provides too much discretion to the officials who process permit applications. "To pass constitutional muster, a content-neutral licensing regulation must contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Wag More Dogs*, 680 F.3d at 372 (quoting *Thomas*, 534 U.S. at 323) (internal quotation marks omitted). "Adequate standards are those that channel[] the [decision maker's] discretion, forcing it to focus on concrete topics that generate palpable effects on the surrounding neighborhood." *Id.* (alterations in original) (quoting *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634, 639 (4th Cir. 1999)) (internal quotation marks omitted).

In this case, the Sign Code specifies what constitutes an acceptable sign. These standards are based on the signs' "palpable effects on the surrounding neighborhood," rather than on the City's approval of their content. Plaintiffs assert that the City failed to challenge several signs code violations promptly, but there is no evidence that it granted a permit to any of these signs. Therefore, this Court concludes the City's permit requirement does not violate the First Amendment.

IV. CONCLUSION

Plaintiffs have a fundamental right to protest the government's taking of their property. Such political protests "occup[y] the 'highest rung of the hierarchy of First Amendment values,' and [are] entitled to special protection." *Connick*, 461 U.S. at 145 (quoting *Claiborne Hardware*

Co., 458 U.S. at 913). However, when that protest takes the form of a 375-foot wall banner, it becomes subject to the same reasonable time, place, and manner regulations that are placed upon all other signs that are erected in the city. And while Plaintiffs have presented evidence that the City's enforcement of its Sign Code has been inconsistent, the evidence does not support a finding that the City has improperly discriminated on the basis of content.

The evidence presented does not raise a genuine issue of issue of material fact as to Plaintiffs' claims. Therefore, Plaintiffs' Motion for Summary Judgment (ECF No. 44) is **DENIED** and Defendants' Motion for Summary Judgment (ECF No. 45) must be **GRANTED**.

This case is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

/s/
Arenda L. Wright Allen
United States District Judge

May 15th, 2013
Norfolk, Virginia