

City of Cocoa Beach  
City Clerk's Office  
P.O. Box 322430  
Phone: 321-868-3286  
Fax: 321-783-5849

**City of Cocoa Beach**

# Fax

<b>To:</b> Amy Mosher	<b>From:</b> Christina Doerfeld
<b>Fax:</b> 321-504-6437	<b>Date:</b> April 27, 2009
<b>Phone:</b>	<b>Pages:</b> 7 including fax pages
<b>Re:</b> Political Sign Permit	<b>CC:</b>

**Urgent**     **For Review**     **Please Comment**     **Please Reply**     **Please Recycle**

**•Comments:** Ms. Mosher,

In looking at the City Code, The City of Cocoa Beach doesn't not consider the ASR Well signs a Political Sign since there is not Political Committee involved and the issue will not be on the ballot. We do account for this in the Chapter 6 of our Land Development Code (please see Section 6.07s below). If you wish to have signs larger than 6 square feet in area then you will need to contact the Development Services Department to obtain a temporary sign permit. Tony Caravella is the Director and their phone number is 321-868-3350.

**Section 6-07. Permit exemptions and exceptions.**

The following signs are exempt from the permit requirements of this chapter, but must comply with appropriate construction, erection, maintenance and inspection standards and setback/location requirements:

(s) Signs on a parcel of land proclaiming religious, political or other non-commercial messages that do not exceed one (1) sign per abutting street, that do not exceed six (6) square feet, that are not illuminated, and are not regulated under other sections.

If you have any questions feel free to contact the City Clerk's Office at 868-3286.

Thank you,

Christina Doerfeld

Cc: Tony Caravella

## **Exhibit A to Letter to Cocoa Beach**

Maria Kayanan, Esq.  
mkayanan@aclufl.org  
Associate Legal Director  
American Civil Liberties Union  
Foundation of Florida  
4500 Biscayne Boulevard- Suite 340  
Miami, FL 33137-3227  
T: (786) 363-2700  
F: (786) 363-3108



November 24, 2008

**Via Email and U.S. Mail**

**The Hon. Larry Schultz  
Mayor, City of Rockledge  
1820 Laurel Oak Drive S.  
Rockledge, FL 32955**

**Joseph E. Miniclier, Esq.  
City Attorney, City of Rockledge  
1037 Pathfinder Way Suite 150  
Rockledge, FL 32955**

Re: Unconstitutionality of City of Rockledge Ordinance 86.07

Dear Mayor Schultz and Mr. Miniclier:

The American Civil Liberties Union of Florida (“ACLU”) represents the organization “Save Our Aquifer.” The ACLU of Florida takes no position on the merits of the environmental controversy, but writes to urge the City to reconsider its position on the organization’s posting of signs on private property. The organization, whose stated mission regards a pending issue of public concern, has been advised by Carl Jones, “Building Official,” that it is prohibited from posting, on private property whose owners consent, 4’ x 4’ signs that read:



Similar signs in residential areas are 12 x12 inches and have been in place for a considerable time; the larger signs, though, are necessary for Save Our Aquifer to direct its protected speech to a larger audience. This sign, and the mission of Save Our Aquifer, can be found on the organization’s website at [saveouraquifer.org](http://saveouraquifer.org). We believe that the City’s position is contrary to the First Amendment.

Mr. Jones' "legal opinion," on behalf of the City, is attached to this letter as Ex. A. He concludes that (a) the sign is not a "political sign" and (b) that because the sign does not meet the definitions of *any* sign permitted by the Municipal Code of the City of Rockledge, the sign is prohibited. Specifically, Mr. Jones states in his email:

Placing a sign on US 1 would not be permitted by our ordinance. No signs may be placed on any public right-of-way in the City. See section 86.03 (a) (3) of the LDR's. *This sign does not qualify as a political sign because it does not address a referendum issue or candidate.* See section 86.07 (a) (3). This sign does not fit any of the 10 allowable cases for temporary signs as found in section 86.04. This sign does not fall into any of the "exempt" sign provisions either. See sections 86.03 (c) This sign however does fall under the category of "prohibited" "snipe" signs as defined in section 86.03 (b) (5) which reads, "Snipe sign. Any small sign, generally of a temporary nature, made of any material when such sign is tacked, nailed, posted, pasted, glued or otherwise attached to trees, poles, stakes or fences, or to other objects, when the advertising matter appearing thereon is not applicable to the present use of the premises upon which sign is located." Your sign is small, of a temporary nature and is not applicable to the present use of the premises upon which is would be located. *Therefore, it would be illegal in my opinion.*

Email of July 16, 2008 (emphases added).

Save Our Aquifer does not intend to place the signs "on US 1" but rather, on private property from which the signs are visible to those traveling on US 1. First, by the terms of your City's own ordinance, 86.07, "[p]olitical signs advertising on behalf of candidates for public officers *or issues* or referenda *are permitted* in all zones except . . ." (emphases added). The Aquifer Storage and Recovery (ASR) injection well is clearly an "issue"; it is the subject of heated public debate. Pursuant to the City's own ordinance, the signs are permissible. However, as set forth below, even if the signs are permissible political signs, as we assert, the City cannot require a cash bond from a property owner who chooses to display a "Save Our Aquifer" sign.

The ACLU believes that the City's ordinance, 86.07, which purports to regulate private property owners' displays of signs based on their content and requires a cash bond, is an unlawful prior restraint on protected speech and violates the First Amendment to the United States Constitution. Therefore, to avoid any legal action, the ACLU urges the City to immediately (1) cease any attempts to enforce this ordinance; (2) not remove political signs for which no bond was requested or obtained, and (3) not seek to fine any property owners who have not posted a cash bond before displaying a "Save Our Aquifer" sign on their property.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1258-59 (11<sup>th</sup> Cir. 2005) (striking down Neptune Beach's sign ordinance that exempted from regulation certain types of signs, including government and religious flags) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994), *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Police Dep't of the City of*

*Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid”).

Protected speech is not limited to individuals’ political campaigns for public office. Non-commercial speech urging citizens to voice their views to fellow citizens, to the City of Rockledge and to the State of Florida regarding an environmental issue is speech that is just as protected as speech urging citizens to vote for a particular candidate. *See Dimmitt v. City of Clearwater*, 985 F.2d 1565 (11<sup>th</sup> Cir. 1993). A content based restriction must be supported by a compelling governmental interest; further, the means chosen to effect such interests must be narrowly tailored to achieve that objective. *See Boos v. Barry*, 485 U.S. 312, 321 (1988). Ordinance 86.07 is not narrowly tailored to meet any compelling governmental interest.

Rockledge City Ordinance 86.07 impermissibly regulates protected speech based on content. For example, 86.07(1) allows only signs “for a bona fide candidate or campaign committee.” These criteria allow the City impermissible discretion to determine what constitutes a “bona fide candidate or campaign committee.” The ordinance is thus a permitting scheme that unlawfully places unbridled discretion in the hands of City officials, and cannot pass muster under the First Amendment. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322-24 (2002); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990).

Furthermore, the City requires a cash bond *only* for what it determines are “political signs,” but allows, with no bond, “public service street graphics,” “governmental flags or graphics,” “murals, statues, paintings, designs or other decorative features or structures designed to attract attention to any occupancy”; it also allows “subdivision” and “on-site development street graphics,” “temporary real estate” and “new business” graphics with no cash bond required. Ord. 86.04. “Garage sale” and “banner graphics” require no cash bond. Ord. 86.04. Not even permanent “ground-mounted street graphics,” “interstate highway graphics,” “balloon signs,” “twirling signs” and “inflatable air signs” require a cash bond. Ord. 86.05. The City burdens **only political signs** with a cash bond.

The City’s bond requirement for a political sign is a content based restriction that does not meet this heavy, strict scrutiny burden. *See Beaulieu v. City of Alabaster*, 454 F.3d 1219 (11<sup>th</sup> Cir. 2006) (holding that City of Alabaster, Alabama could not constitutionally limit display of political signs to residential areas); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250; *Dimmit v. City of Clearwater*, 985 F.2d 1565 (11<sup>th</sup> Cir. 1993) (striking down Clearwater’s ordinance that required property owner to obtain permit before erecting or altering most signs, but exempted certain types of signs, such as flags). Because cash bonds are required for political signs but not for any other types of signs, Ord. 86.07 treats political signs differently and is unconstitutional based on the cases we cite above. Moreover, **the time limitation** for political signage is not a reasonable regulation that would survive strict scrutiny for First Amendment purposes.

Accordingly, based on long-settled law from the United States Supreme Court and the Eleventh Circuit Court of Appeals, the ACLU of Florida on behalf of Save Our Aquifer asks

you, Mayor Schultz, as well as Mr. Miniclier, City Attorney for the City of Rockledge, not to enforce this ordinance, and to take whatever steps are necessary to rescind or revoke it.

Please inform us in writing by Wednesday December 3, 2008, whether you are willing to voluntarily take steps to cease any enforcement attempts, and to revoke or rescind the ordinance.

Your prompt attention to this matter is necessary to avoid legal action, particularly in light of the upcoming application for cycle testing being submitted by the City of Rockledge to the Florida Department of Environmental Protection. Please feel free to contact me should you have any questions.

Sincerely yours,

Maria Kayanan, Esq.  
Associate Legal Director  
ACLU of Florida

LAW OFFICES OF  
**STROMIRE, BISTLINE & MINICLIER**  
AN ASSOCIATION OF PROFESSIONAL ASSOCIATIONS

1037 PATHFINDER WAY  
SUITE #150  
ROCKLEDGE, FLORIDA 32955

HAROLD T. BISTLINE, P.A.  
JOSEPH E. MINICLIER, P.A.  
LEON STROMIRE  
1931-2001

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TO: MARIA KAYANAN FROM: JOSEPH E. MINICLIER  
PAGE: 1 OF 3  
ATTN: \_\_\_\_\_

FACSIMILE NO: 786-363-3108

DATE: 12/5/08

ORIGINAL TO FOLLOW TODAY BY U.S. MAIL: YES ( ) NO (X)

**Exhibit B-1 to Letter to Cocoa Beach**

LAW OFFICES OF  
**STROMIRE, BISTLINE & MINICLIER**  
AN ASSOCIATION OF PROFESSIONAL ASSOCIATIONS

1037 PATHFINDER WAY  
SUITE #150  
ROCKLEDGE, FLORIDA 32955

HAROLD T. BISTLINE, P.A.  
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PHONE: (321) 639-0505

December 5, 2008

VIA FACSIMILE (786-363-3108) AND U.S. MAIL

Maria Kayanan, Esquire  
Associate Legal Director  
ACLU of Florida  
4500 Biscayne Blvd., Suite 340  
Miami, FL 33137-3227

RE: Section 86.07 Rockledge Land Development Regulations

Dear Ms. Kayanan:

The matters raised by your correspondence of November 24, 2008, were brought before the City Council. After my outline of the facts in this matter, a brief summation of the viability of our ordinance under existing law and the Staff's projected response in this matter, the Staff was directed to proceed with your client's questions in the normal course of business.

Accordingly, the Staff's position is as follows:

- (1) To a point we agree that the language of §86.07 of the Rockledge Land Development Regulations (RLDR), to wit: "or issues", brings your client's desired signage under this provision.
- (2) There is a final public hearing on the issue, which should take place sometime in the summer of 2009, on the well's permitting.
- (3) This will be the last public hearing in the well process, which has covered almost three years, including numerous other public hearings.

**Exhibit B-1 to Letter to Cocoa Beach**

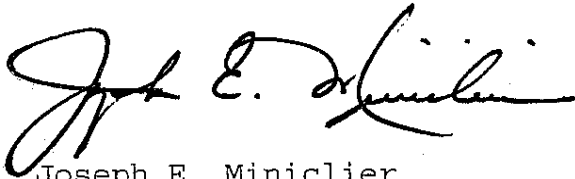
Ms. Maria Kayanan  
December 5, 2008  
Page 2

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- (4) Once the final action regarding this matter is taken after the public hearing, there will be longer be an issue cognizable under §86.07 RLDR, and your client's inclusion under this provision will be terminated and in accordance with the regulation; the signs will need to be removed within two (2) weeks of the final action.
- (5) After that time your client will need to comply with the other applicable provisions of Chapter 8 Rockledge Land Development Regulations regarding signage.

Accordingly, if your client desires to avail itself of the process, they will need to comply with the provisions contained therein through the City Staff.

Very truly yours,



Joseph E. Miniclier  
City Attorney

JEM/pc

cc: James P. McKnight, City Manager  
Carl Jones, Building Official

Only the Westlaw citation is currently available.

United States District Court, M.D. Florida,  
Tampa Division.  
The COMPLETE ANGLER, LLC, et al., Plaintiffs,  
v.  
The CITY OF CLEARWATER, FLORIDA, De-  
fendant.  
**No. 8:09-cv-346-T-27EAJ.**

April 9, 2009.

**Background:** Bait shop owners brought action against city, challenging city's sign and banner ordinances as unconstitutional on their face and as applied to marine themed mural on outside wall of their bait shop and banner reciting the First Amendment placed over the mural. Owners moved for a preliminary injunction to enjoin city from compelling them to remove mural or banner, or prosecuting ordinance violations in connection with mural or banner.

**Holdings:** The District Court, [James D. Whittemore, J.](#), adopted report and recommendation of [Elizabeth A. Jenkins](#), United States Magistrate Judge, which held that:

- (1) mural and banner were protected non-commercial speech;
- (2) city's application of sign and banner ordinances was not content-neutral; and
- (3) city's content-based application of sign and banner ordinances did not pass strict scrutiny.

Motion granted.

West Headnotes

**[1] Injunction 212** 138.1

**212 Injunction**

**212IV** Preliminary and Interlocutory Injunctions  
**212IV(A)** Grounds and Proceedings to Pro-  
cure

**212IV(A)2** Grounds and Objections

**212k138.1** k. In General. **Most Cited**

**Cases**

When seeking a preliminary injunction, a plaintiff must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

**[2] Injunction 212** 147

**212 Injunction**

**212IV** Preliminary and Interlocutory Injunctions

**212IV(A)** Grounds and Proceedings to Pro-  
cure

**212IV(A)4** Proceedings

**212k147** k. Evidence and Affidavits.

**Most Cited Cases**

Given the extraordinary and drastic nature of preliminary injunctions, they may be granted only where the plaintiff clearly satisfies the burden of persuasion as to each requirement.

**[3] Injunction 212** 145

**212 Injunction**

**212IV** Preliminary and Interlocutory Injunctions

**212IV(A)** Grounds and Proceedings to Pro-  
cure

**212IV(A)4** Proceedings

**212k145** k. Affidavits for Injunction.

**Most Cited Cases**

**Injunction 212** 147

**212 Injunction**

**212IV** Preliminary and Interlocutory Injunctions

**212IV(A)** Grounds and Proceedings to Pro-  
cure

**212IV(A)4** Proceedings

**212k147** k. Evidence and Affidavits.

**Most Cited Cases**

To meet its burden in seeking a preliminary injunction, the plaintiff may rely on affidavits and hearsay

materials that would not be admissible as evidence for the entry of a permanent injunction.

#### [4] Constitutional Law 92 ↪1576

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1576 k. Art. [Most Cited Cases](#)

#### Constitutional Law 92 ↪1600

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(C) Trade or Business

92k1600 k. In General. [Most Cited Cases](#)

#### Constitutional Law 92 ↪1670

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(E) Advertising and Signs

92XVIII(E)4 Flags, Banners, and Pennants

92k1670 k. In General. [Most Cited Cases](#)

#### Municipal Corporations 268 ↪602

268 Municipal Corporations

268X Police Power and Regulations

268X(A) Delegation, Extent, and Exercise of Power

268k602 k. Billboards, Signs, and Other Structures or Devices for Advertising Purposes. [Most Cited Cases](#)

Marine themed mural on outside wall of bait shop and banner placed over mural reciting the First Amendment were protected non-commercial speech, and, thus, city's ordinance defining paintings displayed in conjunction with a commercial enterprise as commercial speech rather than art

work was an impermissible restriction on non-commercial speech as applied to mural and banner, although mural could occasionally inspire purchase of bait, where mural reflected a local artist's impression of natural habitat and waterways surrounding the bait shop, and alerted viewers to threats posed to certain fish species it depicted. [U.S.C.A. Const.Amend. 1.](#)

#### [5] Constitutional Law 92 ↪1576

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1576 k. Art. [Most Cited Cases](#)

Like the written or spoken word, artistic expression enjoys First Amendment protections. [U.S.C.A. Const.Amend. 1.](#)

#### [6] Constitutional Law 92 ↪1537

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)2 Commercial Speech in General

92k1537 k. Difference in Protection Given to Other Speech. [Most Cited Cases](#)

First Amendment free speech protections extend to both commercial and non-commercial expression, albeit with more extensive protections afforded to the latter. [U.S.C.A. Const.Amend. 1.](#)

#### [7] Constitutional Law 92 ↪1535

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)2 Commercial Speech in General

92k1535 k. In General. [Most Cited](#)

Cases

**Constitutional Law 92 ↪1536**

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)2 Commercial Speech in General

92k1536 k. What Is “Commercial Speech”. [Most Cited Cases](#)

The fact that a speaker is a corporate entity does not render its speech per se commercial, for purposes of First Amendment protections; rather, “commercial speech” is usually defined as speech that does no more than propose a commercial transaction. [U.S.C.A. Const.Amend. 1.](#)

**[8] Constitutional Law 92 ↪1657**

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(E) Advertising and Signs

92XVIII(E)3 Signs

92k1657 k. Licenses and Permits. [Most Cited Cases](#)

**Constitutional Law 92 ↪1659**

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(E) Advertising and Signs

92XVIII(E)3 Signs

92k1659 k. Size or Height Restrictions. [Most Cited Cases](#)

**Constitutional Law 92 ↪1670**

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(E) Advertising and Signs

92XVIII(E)4 Flags, Banners, and Pennants

nant

92k1670 k. In General. [Most Cited](#)

Cases

**Municipal Corporations 268 ↪602**

268 Municipal Corporations

268X Police Power and Regulations

268X(A) Delegation, Extent, and Exercise of Power

268k602 k. Billboards, Signs, and Other Structures or Devices for Advertising Purposes. [Most Cited Cases](#)

City's application of sign and banner ordinances was not content-neutral as applied to marine themed mural on outside wall of bait shop and banner placed over mural reciting the First Amendment, despite city's claim that mural and banner were subject to ordinances' permit requirement and spatial constraints, where city examined content of mural and banner in determining that neither qualified for exemptions under the ordinances, city would have tolerated mural and banner had they contained alternate content, and other businesses and governmental entities displayed similar murals. [U.S.C.A. Const.Amend. 1.](#)

**[9] Constitutional Law 92 ↪1514**

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1511 Content-Neutral Regulations or Restrictions

92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. [Most Cited Cases](#)

**Constitutional Law 92 ↪1515**

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

[92k1511](#) Content-Neutral Regulations or Restrictions

[92k1515](#) k. Existence of Other Channels of Expression. [Most Cited Cases](#)

Content-neutral regulations of speech are justified under the intermediate scrutiny test which requires they: (1) be narrowly tailored to serve a significant governmental interest, and (2) leave open ample alternative channels of communication. [U.S.C.A. Const.Amend. 1.](#)

**[10] Constitutional Law 92 1517**

92 Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(A\)](#) In General

[92XVIII\(A\)1](#) In General

[92k1516](#) Content-Based Regulations or Restrictions

[92k1517](#) k. In General. [Most Cited Cases](#)

**Constitutional Law 92 1518**

92 Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(A\)](#) In General

[92XVIII\(A\)1](#) In General

[92k1516](#) Content-Based Regulations or Restrictions

[92k1518](#) k. Strict or Exacting Scrutiny; Compelling Interest Test. [Most Cited Cases](#)

If a regulation grants certain types of speech favorable treatment due to the content of the message, the regulation is content-based and subject to strict scrutiny on a First Amendment free speech claim. [U.S.C.A. Const.Amend. 1.](#)

**[11] Constitutional Law 92 1655**

92 Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(E\)](#) Advertising and Signs

[92XVIII\(E\)3](#) Signs

[92k1655](#) k. In General. [Most Cited Cases](#)

**Constitutional Law 92 1670**

92 Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(E\)](#) Advertising and Signs

[92XVIII\(E\)4](#) Flags, Banners, and Penants

[92k1670](#) k. In General. [Most Cited Cases](#)

**Municipal Corporations 268 602**

268 Municipal Corporations

[268X](#) Police Power and Regulations

[268X\(A\)](#) Delegation, Extent, and Exercise of Power

[268k602](#) k. Billboards, Signs, and Other Structures or Devices for Advertising Purposes. [Most Cited Cases](#)

City's content-based application of sign and banner ordinances to non-commercial marine themed mural on outside wall of bait shop and banner placed over mural reciting the First Amendment was not narrowly tailored to serve a compelling government interest, as required to pass strict scrutiny, where city failed to show how its favorable treatment of certain messages promoted its purported interests. [U.S.C.A. Const.Amend. 1.](#)

**[12] Constitutional Law 92 1518**

92 Constitutional Law

[92XVIII](#) Freedom of Speech, Expression, and Press

[92XVIII\(A\)](#) In General

[92XVIII\(A\)1](#) In General

[92k1516](#) Content-Based Regulations or Restrictions

[92k1518](#) k. Strict or Exacting Scrutiny; Compelling Interest Test. [Most Cited Cases](#)

To pass strict scrutiny, content-based regulations on

non-commercial speech must be narrowly tailored to serve a compelling government interest. [U.S.C.A. Const.Amend. 1](#).

**[13] Civil Rights 78 ↪1457(1)**

78 Civil Rights

78III Federal Remedies in General

78k1449 Injunction

78k1457 Preliminary Injunction

78k1457(1) k. In General. **Most Cited**

**Cases**

Waiving the bond requirement for a preliminary injunction is particularly appropriate when a plaintiff alleges the infringement of a fundamental constitutional right. [Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.](#)

[Bruce G. Howie](#), Bruce Howie, PA, Clearwater, FL, [James K. Green](#), Law Office of James K. Green, PA, West Palm Beach, FL, [Maria Kayanan](#), [Randall C. Marshall](#), ACLU Foundation Of Florida, Inc., Miami, FL, for Plaintiffs.

[Leslie Kathleen Dougall-Sides](#), City of Clearwater-Attorney's Office, Clearwater, FL, for Defendant.

**ORDER**

[JAMES D. WHITTEMORE](#), District Judge.

**\*1 BEFORE THE COURT** is the Report and Recommendation of the Magistrate Judge recommending that Plaintiffs' Motion for Preliminary Injunction be granted as to Plaintiffs' "as-applied" First Amendment claim (Dkt.19). Defendant filed objections to the Report and Recommendation and Plaintiffs have responded (Dkts.25,27). This Court has conducted a *de novo* review of those portions of the Report and Recommendation objected to. [28 U.S.C. § 636\(b\)\(1\)](#).

Plaintiffs allege that Defendant's sign and banner ordinances are unconstitutional on their face and "as-applied" to a marine themed mural on an outside wall of The Complete Angler, Plaintiffs' bait

and tackle shop, and as to Plaintiffs' First Amendment "protest" banner. (Dkt.1, ¶¶ 1, 53-55). On January 9, 2009, Plaintiffs pled *nolo contendere* to a March 10, 2008 Notice of Violation pertaining to the mural and paid fines and court costs totaling \$690.00. (Dkt.1, ¶¶ 27, 34). On January 12, 2009, Plaintiffs covered the mural with a banner displaying the text of the First Amendment. (Dkt.1, ¶ 35). On February 14, 2009, Plaintiffs received a Notice of Violation, which required that Plaintiffs correct alleged violations by February 27, 2009 and remove the mural and First Amendment banner. (Dkt.1, ¶¶ 37-38).

Plaintiffs' Motion for Preliminary Injunction was referred to the Magistrate Judge. (Dkt.5). In a thorough and well-reasoned Report and Recommendation, the Magistrate Judge concluded that "both the Painting and the Banner are non-commercial speech protected by the First Amendment." (Dkt. 19 at 7). The Magistrate Judge found that the application of Defendant's sign code to Plaintiffs' non-commercial speech was content-based and did not withstand strict scrutiny. (Dkt. 19 at 10). Defendant first objects to the Magistrate Judge's determination that neither the mural nor banner are commercial speech. Upon *de novo* review, this Court concludes that the Magistrate Judge correctly determined that the mural is non-commercial speech, as the evidence demonstrates that it reflects a local artist's impression of the natural habitat and waterways surrounding The Complete Angler, and also alerts viewers to threatened species of fish. (Dkt. 22 at 68-69). Accordingly, the mural does more than "propose a commercial transaction" and is properly considered non-commercial speech. [United States v. United Foods, Inc., 533 U.S. 405, 409, 121 S.Ct. 2334, 150 L.Ed.2d 438 \(2001\)](#). Likewise, the banner does not propose a commercial transaction and is properly considered non-commercial speech.

Defendant also argues that the Magistrate Judge failed to recognize that Defendant properly excluded the mural from the exempt category of "art work" in the sign code, as it was placed "in con-

junction with” a commercial enterprise. The Magistrate Judge correctly determined that notwithstanding the constitutionality of the definition of “art work,” Defendant’s application of that definition in this case impermissibly treated Plaintiff’s non-commercial speech as commercial speech, for the reasons set forth. As the Magistrate Judge noted, “[Defendant] may not skirt First Amendment protections by applying a definition of commercial speech that better suits its tastes.”(Dkt. 19 at 7).

\*2 Third, Defendant objects to the Magistrate Judge’s determination that the code, “as-applied” to the mural and banner, was not content-neutral. There is, however, ample evidence in the record, as discussed by the Magistrate Judge, that Defendant did consider the content of the mural and banner in applying the sign code, including the published statements of a City employee, the testimony of the City’s Planning Director, the presence of other non-permitted murals in the City, and the exemptions in the sign code for art work and holiday decorations.

Based on the foregoing, the Magistrate Judge correctly determined that Defendant’s application of the sign code to Plaintiffs’ mural and banner does not withstand strict scrutiny. After careful consideration of the Report and Recommendation, Defendant’s objections and Plaintiffs’ response, and in conjunction with an independent examination of the record, this Court is of the opinion that the Report and Recommendation should be adopted, confirmed, and approved in all respects. Accordingly, it is **ORDERED AND ADJUDGED:**

1) The Report and Recommendation (Dkt.19) is adopted, confirmed, and approved in all respects and is made a part of this order.

2) Plaintiffs’ Motion for Preliminary Injunction (Dkt.3) is **GRANTED** to the extent that Defendant is enjoined from: (1) compelling Plaintiffs to remove either the mural or the banner; and (2) prosecuting violations of §§ 3-1806.B.3.A., 3-1804.D., or 4-1002 in connection with the mural or banner. The security requirement in [Rule 65\(c\)](#) is waived.

**DONE AND ORDERED.**

***REPORT AND RECOMMENDATION***

[ELIZABETH A. JENKINS](#), United States Magistrate Judge.

Before the court is Plaintiffs’ **Motion for Preliminary Injunction** (Dkt.3), filed February 24, 2009, and Defendant’s **Response** (Dkt.17), filed March 9, 2009. On February 25, 2009, Plaintiffs’ motion was referred to the undersigned for a report and recommendation. On March 4, 2009, the court held a hearing on Plaintiffs’ motion at which both sides presented evidence and legal argument.<sup>FNI</sup> As stated hereafter, Plaintiffs’ motion should be granted in part as to their “as-applied” First Amendment claim.

***Findings of Fact***

1. In December 2007, Heriberto and Lorraine Quintero (“the Quinteros”) purchased and renovated the building at 705 Ft. Harrison Avenue in Clearwater, Florida.
2. They opened a bait and tackle shop called The Complete Angler, L.L.C. (“the Angler”), which is a duly registered Florida corporation owned by the Quinteros.
3. The property is zoned commercial.
4. The Angler provides drive-through access to the Seminole Street boat ramp and sells live and frozen bait, snacks and drinks, boat accessories, and custom rods and reels.
5. The Angler does not sell game fish, local or otherwise.
6. The Quinteros commissioned Matt Evanson, a local artist, to create a painting (“the Painting”) on the exterior wall of the Angler that would educate the public about the endangerment of game fish found in the local habitat.

- \*3 7. The Painting contains no text and depicts a snook, a redfish, a tarpon, a dolphin (mahi-mahi), a Nassau grouper, and a sailfish (Plaintiffs' Ex. 1).
8. The Painting spans most of the Angler's western wall.
9. On March 12, 2008, Defendant City of Clearwater ("the City") issued the Angler a Notice of Violation citing its failure to obtain a sign permit for the Painting as required by Defendant's Community Development Code ("the Code") (Plaintiffs' Ex. 2).
10. The Angler pled *nolo contendere* and on January 9, 2009, paid fines and court costs in the amount of \$690.00.
11. On January 12, 2009, Heriberto Quintero covered the Painting with a tarp and a banner ("the Banner").
12. The Banner contains the complete text of the First Amendment and the comment that: "THE SUPREME COURT REQUIRES THE GOVERNMENT TO PROVIDE SUBSTANTIAL JUSTIFICATION FOR THE INTERFERENCE WITH THE RIGHT OF FREE SPEECH WHERE IT ATTEMPTS TO REGULATE THE CONTENT OF THE SPEECH" (Plaintiffs' Ex. 6).
13. The Painting remains on the wall behind the tarp and the Banner (Plaintiffs' Ex. 6).
14. On February 12, 2009, Defendant issued the Angler a second Notice of Violation ("the Notice") regarding both the Painting and the Banner (Plaintiffs' Ex. 7).<sup>FN2</sup>
15. At the March 4, 2009 hearing, Heriberto Quintero testified that the Painting will alert viewers to the threat of extinction posed to the species of fish depicted therein.

#### *Standard of Review*

[1][2][3] When seeking a preliminary injunction, a plaintiff must establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, --- U.S. ----, ----, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008). Given the "extraordinary and drastic" nature of preliminary injunctions, they may be granted only where the plaintiff clearly satisfies the burden of persuasion as to each of these requirements. *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir.1989). To meet its burden the plaintiff may rely on affidavits and hearsay materials that would not be admissible as evidence for the entry of a permanent injunction. *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir.1995).

#### *Conclusions of Law*

Plaintiffs challenge the constitutionality of a comprehensive scheme of sign regulations intended by the City to "promote the public health, safety and general welfare." § 3-1802. Underlying these sign regulations are the following general principles:

The city is a resort community on the west coast of the state with more than five miles of beaches on the Gulf of Mexico. This city has an economic base which relies heavily on tourism. In order to preserve the city as a desirable community in which to live, vacation and do business, a pleasing, visually attractive urban environment is of foremost importance. The regulation of signs within the city is a highly contributive means by which to achieve this desired end. These sign regulations are prepared with the intent of enhancing the urban environment and promoting the continued well-being of the city.

\*4 § 3-1801.

To achieve these goals, the Code prohibits some

signs, such as balloons or inflatables; bench signs; changeable message signs; signs that reflect lighting onto public rights-of-way thereby creating a potential traffic or pedestrian hazard; signs that move, revolve, twirl, rotate, or flash, including animated signs; or signs that are placed on a tree or other vegetation. § 3-1803(B), (C), (D), (N), (O), and (R).

Section 3-1804 outlines general standards for signs not otherwise prohibited. Standards are provided regarding setbacks, neon signs, illuminated signs, banners and flags, gasoline price signs, time and temperature signs, and building/electrical codes.

Section 3-1805 identifies twenty-six categories of signs not requiring a permit or development review. One such exemption is made for “[a]rt work and/or architectural detail,” § 3-1805.B, defined as “drawings, pictures, symbols, paintings or sculpture which do not identify a product or business and which are not displayed in conjunction with a commercial, for profit or nonprofit enterprise.” § 8-102.<sup>FN3</sup> Another exemption is provided for holiday decorations, § 3-1805.D, defined as “any display during a holiday season which shall be removed within ten days of the conclusion of the holiday.” § 8-102.

Finally, Section 3-1806 governs signs requiring a permit and development review. Different regulations apply based on whether a sign is located in a residential or non-residential district. In residential districts, permits are required for subdivision signs, school and park monument identification signs, and adopt-a-park signs. In non-residential districts, permits are required for freestanding signs, monument signs, attached signs, and transit/shelter signs.

The Notice expressly cited the Angler for violations of §§ 3-1806 .B.3.A, 3-1804.D, and 4-1002.<sup>FN4</sup> Section 3-1806.B.3.A limits the number and size of attached signs<sup>FN5</sup> in non-residential districts. A business establishment with a principal exterior entrance, such as the Angler, may have one attached sign no larger than the greater of: 1) 20 square feet; or 2) 1 square foot per 100 square feet

of the building facade facing the street frontage to which the sign is to be attached.<sup>FN6</sup> Section 3-1804.D allows banners or flags to be used as attached signs subject to the district's spatial limitations. Finally, § 4-1002 requires that a permit be obtained before erecting any sign not otherwise exempted from the permit requirement.

In their complaint, Plaintiffs assert three First Amendment challenges stemming from the Notice. First, Plaintiffs argue that §§ 3-1805 and 3-1806.B.3.A are unconstitutional because the Code's definition of art work is overbroad, vague, and vests unbridled discretion in Defendant to determine whether art work is commercial or not (Dkt. 1 at 14). Second, Plaintiffs contend that §§ 3-1805 and 3-1806.B.3.A “vest unfettered discretion upon the City to restrict constitutionally expressive activities”(Id. at 15). Third, Plaintiffs submit that § 3-1804.D is unconstitutional because it sets a presumptive size limitation for banners but does not apply to banners displaying holiday-related messages (Id.). For each of these challenges, Plaintiffs assert the Code is unconstitutional both on its face and as applied to Plaintiffs.

### ***I. Whether the Painting and the Banner are Protected Speech***

\*5 [4][5][6] As a threshold matter, the court must first determine whether the Painting and/or the Banner constitute speech protected by the First Amendment. *DA Mortgage, Inc. v. City of Miami Beach*, 486 F.3d 1254, 1265 (11th Cir.2007). Like the written or spoken word, artistic expression enjoys First Amendment protections. *Kaplan v. California*, 413 U.S. 115, 119-20, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973). Moreover, these protections extend to both commercial and non-commercial expression, albeit with more extensive protections afforded to the latter. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).

[7] The fact that a speaker is a corporate entity does

not render its speech *per se* commercial. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) (noting strict scrutiny applies to corporate political speech); see e.g. *Gorran v. Atkins Nutritionals, Inc.*, 279 F. App'x 40, 41-42 (2d Cir.2008) (per curiam) (unpublished) (finding corporate entity's website contained both commercial and non-commercial speech). Rather, commercial speech is “usually defined as speech that does no more than propose a commercial transaction.” *United States v. United Foods, Inc.*, 533 U.S. 405, 409, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001). It has also been characterized as “expression related solely to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

Neither the Painting nor the Banner are commercial speech. Plaintiffs' assertion that the Painting reflects a local artist's impression of the “natural habitat and waterways” surrounding the Angler (Dkt. 1 at 3) is supported by a preponderance of the credible evidence. Moreover, Heriberto Quintero testified that the Painting will alert viewers to the threats posed to certain fish species it depicts. Although the Painting may occasionally inspire the purchase of bait and tackle from the Angler, the Painting is not limited to merely proposing commercial transactions.

Nonetheless, the City would classify the Painting as commercial speech. The Code states that paintings are not art work if they are displayed “in conjunction with” a commercial enterprise. § 8-102. The City concluded that the Painting was displayed “in conjunction with” the Angler and that it was thus not art work. Whether or not the Code's definition of art work withstands constitutional scrutiny on its face, the City's application of the definition impermissibly treated Plaintiffs' noncommercial speech as commercial speech. The City may not skirt First Amendment protections by applying a definition of commercial speech that better suits its tastes.

As for the Banner, it is even further removed from Plaintiffs' economic interests. Neither the text of the First Amendment nor the remaining text on the Banner, espousing the Quinteros' personal views on First Amendment law, is commercial speech. Therefore, both the Painting and the Banner are non-commercial speech protected by the First Amendment.

## II. Whether Defendant's Application of the Code was Content-Based or Content-Neutral

\*6 [8][9][10] Having established that, as applied to Plaintiffs, the City's enforcement of the Code was a restriction on non-commercial speech, the court must next determine whether the Notice was issued based on the content of the Painting or the Banner. Regulations “ ‘justified without reference to the content of the regulated speech’ “ are content-neutral. *DA Mortgage*, 486 F.3d at 1266 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). Such regulations are justified under the intermediate scrutiny test which requires they: 1) be narrowly tailored to serve a significant governmental interest; and 2) leave open ample alternative channels of communication. *Id.* If, however, a regulation grants certain types of speech favorable treatment due to the content of the message, the regulation is content-based and subject to strict scrutiny. *Id.*

On its face, the Notice does not suggest that Defendant considered the content of the Painting or the Banner before citing the Angler. The Notice merely states that both signs were erected without a permit and exceeded the maximum area allowed for freestanding and/or attached signs.

Yet in concluding that the Painting and the Banner were subject to the permit requirement or spatial constraints, Defendant necessarily examined their content and determined that neither was art work, a holiday decoration, or any other sign exempted under the Code. The City then declined to extend protections to Plaintiffs' First Amendment banner that

would have been extended to a banner exclaiming “Happy Holidays.” See *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1265 (11th Cir.2005) (faulting a sign ordinance's content-based holiday decorations exemption because “a homeowner could plant a giant illuminated Santa Claus or a jack-o-lantern in his front yard, but not a figure of, say, the President or the Mayor. An illuminated reindeer would be permissible, whereas a less festive animal such as a dog would not.”).

Indeed, Defendant itself has provided evidence that it would have tolerated the Painting and/or the Banner had they contained alternate content. Defendant's “spokeswoman” is quoted in a local newspaper as stating that the Painting is considered commercial “signage” but “a mural of kids playing in a park ... would be acceptable” (Plaintiffs' Ex. 4).<sup>FN7</sup>

As for the Banner, Defendant's Planning Director testified that he believed a banner of the same size and material displaying the American Flag would not have violated the Code.<sup>FN8</sup> See *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1571-72 (11th Cir.1993) (noting testimony by city's development code administrator that sign ordinance was administered based in part upon the type and content of the expression).

Finally, Plaintiffs offered several exhibits indicating that other businesses and governmental entities in the City display murals.<sup>FN9</sup> A mural completely covering one wall of a daycare center depicts children running through a green field surrounded by animals (Plaintiffs' Ex. 9). The walls of a seafood restaurant are painted with various images of marine life (Plaintiffs' Ex. 10). A building related to the administration of the fire department is covered on one side by a mural depicting first responders beneath the statement “UNITED WE STAND” (Plaintiffs' Ex. 11). A county building displays painted dolphins swimming near a ring of fire and various species of fish (Plaintiffs' Ex. 12). Finally, the outer wall of Defendant's parking garage is lined with paintings of different species of birds (Plaintiffs' Ex. 13).<sup>FN10</sup> Defendant's condoning of

these murals, coupled with statements by its own representatives and its content-based categorization of Plaintiffs' signs, indicates that Defendant's application of the Code to the Angler was not content-neutral.<sup>FN11</sup>

### III. Whether Defendant's Application of the Code Withstands Strict Scrutiny

\*7 [11][12] Because the Code was applied to the Painting and the Banner based on their content, its application must withstand strict scrutiny to be constitutional. To pass strict scrutiny, content-based regulations on non-commercial speech must be narrowly tailored to serve a compelling government interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

Defendant has failed to establish that its interests, as stated in the Code, are truly compelling for purposes of strict scrutiny. Indeed, courts have consistently recognized that while interests in aesthetics and traffic safety may be substantial, they are not *per se* so compelling as to justify content-based restrictions on signs. See *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1233-34 (11th Cir.2006); *Solantic*, 410 F.3d at 1268. Although the government is not precluded from demonstrating a compelling interest in, e.g., traffic safety, abstract notions will not suffice. *Beaulieu*, 454 F.3d at 1234; *Solantic*, 410 F.3d at 1268. Based on the current record, Defendant has failed to demonstrate that its interests are compelling in these circumstances.

Further, because the City has not shown how its favorable treatment of certain messages promotes its purported interests, the Code is not narrowly tailored. See *Beaulieu*, 454 F.3d at 1234; *Solantic*, 410 F.3d at 1268. Accordingly, Defendant's application of the Code to the Painting and the Banner fails strict scrutiny. Indeed, the City conceded at the hearing that if strict scrutiny were the standard, it would have a difficult burden.

### Conclusion

Plaintiffs have established that they are likely to succeed on the merits of their as-applied challenge to certain provisions of the Code. Plaintiffs have further met their burden of persuasion as to the remaining requirements for a preliminary injunction. Because Plaintiffs' First Amendment rights are at risk via direct penalization by the government, an injunction is the proper remedy. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271-72 (11th Cir.2006).<sup>FN12</sup> Moreover, as Defendant has no interest in enforcing a regulation which is unconstitutional as to Plaintiffs, the balance of equities tips in favor of Plaintiffs' interest in preventing infringement of their First Amendment rights. *See id.* Finally, an unconstitutional application of the Code does nothing to promote the public interest. *See id.* Accordingly, the court recommends that Defendant be preliminarily enjoined from: 1) compelling Plaintiffs to remove either the Painting or the Banner; or 2) prosecuting violations of §§ 3-1806.B.3.A, 3-1804.D, or 4-1002 in connection with the Painting or the Banner.<sup>FN13</sup>

[13] Pursuant to Rule 65(c), Fed.R.Civ.P., a court “may issue a preliminary injunction ... only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” Despite the mandatory nature of this language, “federal courts have come to recognize that the district court possesses discretion over whether to require the posting of security.” *Popular Bank of Fla. v. Banco Popular de Puerto Rico*, 180 F.R.D. 461, 463 (S.D.Fla.1998). Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right. *See e.g. All States Humane Game Fowl Org. v. City of Jacksonville, Fla.*, No. 3:08-CV-312-J-33MCR, 2008 WL 2949442, at \*13 (M.D.Fla. July 29, 2008); *Johnston v. Tampa Sports Authority*, No. 8:05-CV-2191-T-27MAP, 2006 WL 2970431, at \*1 (M.D.Fla. Oct.16, 2006). Accordingly, the court

recommends that the bond requirement be waived in this instance.

\*8 It is therefore **RECOMMENDED** that:

- (1) Pending final resolution of this action, Plaintiffs' Motion for Preliminary Injunction (Dkt.3) be **GRANTED** to the extent that the City is enjoined from: 1) compelling Plaintiffs to remove either the Painting or the Banner; or 2) prosecuting violations of §§ 3-1806.B.3.A, 3-1804.D, or 4-1002 in connection with the Painting or the Banner; and
- (2) The security requirement in Rule 65(c), Fed.R.Civ.P., be **WAIVED**.

FN1. Defendant's response was originally filed on March 3, 2009, before the hearing (Dkt.13). Defendant amended its response on March 9, 2009, to correct the date it was submitted to the court and the date it was electronically served (Dkt. 17 at 1).

FN2. In its response, Defendant suggests that the Notice applied only to the Banner (Dkt. 17 at 3). At the hearing, however, Defendant conceded that the Notice applied to both the Painting and the Banner. Because the provisions cited in the March 2008 notice regarding the Painting were re-asserted in the February 2009 notice, the court focuses on the latter and refers to it as the Notice.

FN3. Section 8-102 provides general definitions for the entire Code.

FN4. Because the Angler was expressly cited for violating these provisions, the Angler has standing to challenge them as applied to the Painting and the Banner. *See Bonita Media Enters., LLC v. Collier County Code Enforcement Bd.*, No. 2:07-CV-411-FTM-29DNF, 2008 WL 423449, at \*4 (M.D.Fla. Feb.13, 2008); *Lockridge v. City of Oldsmar, Fla.*, 475 F.Supp.2d 1240, 1246 (M.D.Fla.2007),

*aff'd*, 273 F. App'x 786 (11th Cir.2008) (per curiam) (unpublished). Although the Notice was not directed to the Quinteros personally, as owners of the Angler they also have standing to challenge these provisions. *See e.g. Solomon v. City of Gainesville*, 763 F.2d 1212, 1213 (11th Cir.1985).

FN5. An attached sign is defined as “any sign attached to, on or supported by any part of a building (e.g. walls, projecting, awning, windows, or canopy) which encloses or covers useable space.” § 8-102.

FN6. Because § 3-1806 regulates signs requiring a permit, its spatial limitations do not apply to signs exempted from the permit requirement in § 3-1805.

FN7. Presumably, this statement was premised on the City's conclusion that the Painting was commercial speech. As stated above, this conclusion was flawed. Regardless, the statement is evidence that the City looked at more than just the Painting's size.

FN8. The Planning Director testified that he thought there was a provision in the Code exempting the American Flag but not the text of the First Amendment.

FN9. Heriberto Quintero testified that he performed an electronic records search but was unable to find records indicating these other entities obtained permits for their murals or received citations for them. No contrary evidence was offered by Defendant.

FN10. The City acknowledged that the Code applies equally to City property.

FN11. As stated above, even if the Painting or the Banner exceeded the spatial limitations in § 3-1806.B.3.A, the City ex-

amined their content to decide whether they were subject to § 3-1805 or § 3-1806 to begin with.

FN12. Defendant argues that “[s]ince Plaintiff Angler has remedies under state law, no irreparable harm will occur to it prior to the resolution of this case” (Dkt. 17 at 13). Defendant overlooks that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *KH Outdoor*, 458 F.3d at 1271-72 (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion)).

FN13. Because Plaintiffs are entitled to preliminary injunctive relief regarding their as-applied challenge, the court declines to address the merits of Plaintiffs' facial challenge at this time. *See Renne v. Geary*, 501 U.S. 312, 324, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991) (noting the “better course” might have been to resolve as-applied challenge to speech regulation before considering facial challenge); *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (“It is not the usual judicial practice, ... nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.”); *see also United States v. Booker*, 543 U.S. 220, 314, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (Thomas, J., dissenting in part) (“When a litigant claims that a statute is unconstitutional as applied to him, and the statute is in fact unconstitutional as applied, we normally invalidate the statute only as applied to the litigant in question. We do not strike down the statute on its face.”); *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S.

32, 45, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999) (Stevens, J., joined by Kennedy, J., dissenting) (noting overbreadth doctrine should not be invoked where application of regulation to claimant is at issue because it is “only relevant if the challenger needs to rely on the possibility of invalid applications to third parties”); *Int’l Soc. for Krishna Consciousness of Houston, Inc. v. City of Houston, Tex.*, 689 F.2d 541, 552 (5th Cir. Unit A 1982) (“The current judicial popularity of the overbreadth doctrine does not mean that the ‘unconstitutional-as-applied’ principle has flown out the window in first amendment cases.”). Nor is it necessary to address Plaintiffs' standing to challenge provisions of the Code other than those cited in the Notice.

M.D.Fla.,2009.

Complete Angler, LLC v. City of Clearwater, Fla.

--- F.Supp.2d ----, 2009 WL 969910 (M.D.Fla.)

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