

signs do not vary depending on what words are written on them. A resident who wishes to express the view, "War is not the answer," can erect the same number and the same size signs as a resident whose signs caution the reader to "Repent or burn in hell." All residents can erect signs, regardless of the message communicated by these signs, as long as the signs are not higher than three feet, as long as the total square feet of the signs, collectively, do not exceed 12 square feet, and as long as no one sign exceeds four square feet in its dimensions.

Because the restrictions concerning signs are content-neutral, the Court utilizes intermediate scrutiny to review these rules. To survive a review based on intermediate scrutiny, the government must show a reasonable basis for believing its policy will further a "substantial government interest and that the policy is the least restriction possible which would further that interest." *Artistic Entm't, Inc.*, 331 F.3d at 1205. The asserted governmental interest must be unrelated to the suppression of free speech. See *U.S. v. O'Brien*, 391 U.S. at 377. The government's purpose in enacting the regulation is the controlling consideration. See *Ward*, 491 U.S. at 791. In addition, because the challenged height, size, number, and setback provisions are content-neutral, the Court must inquire whether these provisions are reasonable time, place, or manner restrictions. In the end, for a viewpoint neutral regulation to be

upheld, the "government must show that: (1) it has the constitutional power to make the regulation (2) an important or substantial government interest unrelated to the suppression of free speech is at stake, and (3) the ordinance is narrowly drawn to achieve its desired ends, leaving other channels for the communication of information." *Messer*, 975 F.2d at 1510.

Because the ordinance's height, size, and number restrictions are interdependent, the Court will begin its inquiry with these provisions of the ordinance. The Court will then address the setback provisions separately.

**a. Height, Size, and Number Restrictions**

Plaintiffs have objected to § 5-375(a)(2) limiting signs to three feet in height and § 5-380(a) limiting signs to four square feet per sign and twelve square feet per lot. (Pls.' Filing at 1.) The effect of the per sign size restriction is an implicit limit on the number of signs that can be posted, and plaintiffs object to this as well.

For these content-neutral restrictions to be upheld, first, the government must show it has the constitutional power to make the regulations. Here, the City has proscribed limits on the height, size, and number of residential signs in order "to protect the public safety, including traffic safety" and to "assure aesthetic harmony." (Sign Ordinance at § 5-361(a), attach. as Ex.

A to Notice of Amendment to Sign Ordinance [65].) The government's power to regulate for such interests is well established, and traffic safety and aesthetics are substantial government goals. See *Messer*, 975 F.2d at 1510. Indeed, "[w]hile signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers." *Ladue v. Gilleo*, 512 U.S. 42, 48 (1994). Consequently, the City easily satisfies the constitutional power requirement. At the same time, the City demonstrates that an important or substantial government interest is at stake. The focus of the Court's inquiry thus becomes, whether the ordinance's provisions on height, size, and number of signs are narrowly drawn to achieve the desired ends of public safety and aesthetic harmony while leaving open alternative channels of communication.

The Constitution does not set out guidelines for the practical implementation of its provisions. Instead, courts are left to wander through an often undispositive labyrinth of case precedent<sup>12</sup> in search of answers to very mundane kinds of questions, such as

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<sup>12</sup> Judge Moody aptly noted, "It is truly a Herculean task to wade through the mire of First Amendment opinions to ascertain the state of the law relating to sign regulations, beginning with the Supreme Court's leading decision on billboard regulations in *Metromedia* [Rehnquist, J., dissenting, who referred to the plurality decision as a 'virtual Tower of Babel, from which no definitive principles can be clearly drawn']." *Granite State (Clearwater)*, 213 F. Supp. 2d at 1327 (internal citation omitted).

those now before this Court. Indeed, the dissonance between the lofty rhetoric of First Amendment analysis and the tedious line-drawing of actual implementation is quite striking. Namely, in the area of sign regulations, how many signs does the Constitution entitle the typical residential lot to display? If it is not an unlimited number, then is the correct number three? Four? Ten? Is a square footage restriction of four square feet per sign too restrictive? If so, what will pass constitutional muster? Will six square feet do it? Or is ten feet the right number? Ultimately, these types of discussions sometimes sound more like the talk of an interior decorator or landscape architect than like the language typically used by judges in other types of legal analyses.

In the end, although courts strive to do their best to properly apply abstract constitutional standards, their final determinations along these lines are necessarily arbitrary. A sign that might seem unconstitutionally small to one reviewer could seem ample to a different observer. At oral argument, upon the Court's inquiry of what dimensions would satisfy the plaintiffs, plaintiffs' counsel indicated that fifteen or sixteen square feet of total sign allotment, without the four square feet per sign limit, would probably, "get rid of everybody's problems." (Tr. of Oral Argument, Sept. 15, 2003, at 26.) In other words, if Avondale

would allow four (4) signs that are four square feet in size, instead of three (3) such signs, or if it would allow one gigantic sign in a lot, instead of four smaller signs, then much of plaintiff's constitutional concerns would dissipate.

In *Granite State Outdoor Adver., Inc. v. City of St. Petersburg, Florida*, 348 F.3d 1278, 1280 (11th Cir. 2003), the Eleventh Circuit, without discussion, affirmed the district court's severance of a provision limiting the maximum size of a "free speech" sign to four square feet, where the same ordinance had permitted political signs to be six square feet. (See *Granite State Outdoor Adver., Inc. v. City of St. Petersburg, Florida*, 8:01-CV-2250-T-30MSS (M.D. Fla.) (Moody, J.), attach. as Ex. C to Defs.' Cross Mot. for Summ. J. [74].) As it was this differentiation between the permitted sizes of different signs, based on their content, that prompted the ordinance to lose its content-neutral status, the *St. Petersburg* decision does not answer the question of how large a sign a regulation must permit to be deemed constitutional. (*Id.* at 36.) In contrast to *St. Petersburg*, the City here treats free speech and political signs equally.

The Court does note that *St Petersburg's* allowance of a six square feet limit on signs was upheld by the Eleventh Circuit.

Indeed, *St. Petersburg* held that a six square feet per sign area limitation is rationally related to a city's stated purpose of preserving safety and visual harmony, and constitutionally permissible. (See *id.* at pp. 34, 36.)

As to whether four square feet is too restrictive, plaintiffs cite to *Verrilli v. Concord*, 548 F.2d 262 (9th Cir. 1977). In *Verrilli*, the municipality in question had permitted only one political sign, not to exceed four square feet, in any one residential lot. *Id.* at 265. The Ninth Circuit struck down this provision, among others, of the ordinance, noting that the city had not justified this restriction. *Id.* at 266. Nevertheless, one member of the panel dissented, quoting from another Ninth Circuit case to the effect that while the City's "legitimate interest might be served as well by slightly less restrictive size limitations, ... [s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 267, citation omitted (Kilkenny, concurring and dissenting). The dissenter went on to state: "The Constitution should not be used as a tool to create distinctions where none exist.... Surely, the majority here has not given 'general allowance ... (to the) municipal preferences' expressed by the [city]." *Id.*

With the sparse case authority cited by the parties in mind and with the Court's recognition of the unique and important role

that residential signs play in allowing individuals to convey religious, political, and other personal messages, see *Ladue*, 512 U.S. at 54-55, the Court considers whether the ordinance's restrictions on height, size, and number of signs are narrowly drawn to achieve the desired ends of public safety and aesthetic harmony, while leaving open alternative channels of communication.

In determining the constitutionality of the restrictions, the Court is mindful that it should try to avoid mistaking its own personal judgment of the proper sign size as being synonymous with the standards that are imposed by the Constitution. To avoid that temptation, the Court searches for some objective measure.<sup>13</sup> Although the parties brought into oral argument, at the Court's request, some hand-made signs to show how big different sized signs are, the parties offered no further visual demonstration of the impact of the sign ordinance on lawn signs. The Court has obtained what it considers to be a campaign sign typical in size to campaign signs displayed in many residents' yards during election season.

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<sup>13</sup> Defendants argue that the size limitations on signs are permissible because street signs in the city have lettering of three inches or less in height and still serve their intended function. (Defs.' Resp. at 8.) Given the setback requirements of the ordinance, the Court is not persuaded that the City's analogy to street signs is apt, however.

See Court's Exhibit 1. This sign is three square feet in size,<sup>14</sup> meaning that a resident could post four such campaign or four such "free speech" signs in his yard at any one time.

Certainly, limiting the number, size, and height of signs serves the desired ends of aesthetic harmony and public safety. Yards that are less littered with signs will look neater than yards that are more cluttered. A gigantic sign can be an eyesore that diminishes the tranquil, residential quality of a neighborhood and that tends to undermine the consistency and aesthetics of the area. Large signs can also be a distraction for passing traffic.

Is the restriction drawn narrowly enough, however? This is another way of asking whether the ordinance should allow more, or bigger, or taller signs. Again, trying to tie this question to some more objective measure, the Court notes that the ordinance allows four "typical" sized campaign signs. Is that enough? The Court is unsure. Certainly, a resident might wish to support more than four candidates in a given election. Yet, if one determined that a resident should be allowed an unlimited number of campaign signs, one then would have to allow an unlimited number of "free speech" signs, as an ordinance cannot make a distinction between different kinds of noncommercial speech. Thus, a rule that

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<sup>14</sup> The sign is two feet by one and a half feet in size, or three square feet.

requires an unlimited number of campaign signs is a rule that effectively means there can be no valid restriction on the number of signs in a residential yard.<sup>15</sup> Thus, were one to say that an ordinance must allow an unlimited number of campaign signs, one would also be saying that there could be no valid ordinance restricting the number of signs in a residential yard. The parties have cited no case authority that categorically forbids such ordinances.

If, then, one can envision a proper ordinance restricting the number of signs, that means that there must be some limitation on the number of signs that would be a constitutionally acceptable restriction. Were the Court drafting its own legislation, it might have allowed more than four signs--plaintiffs effectively seek only five--but it cannot offer any particularly persuasive reason why one number is allowed by the Constitution and the other is not. Residents who support more than four candidates have the option of rotating their signs to show their support. Just as a television advertisement can only advocate one candidate at a time, a sequential expression of First Amendment political speech, via rotating yard signs, does not seem constitutionally out of line.

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<sup>15</sup> An ordinance could conceivably provide for an unlimited number of signs, of any type, during a campaign season. As the Avondale ordinance does not so provide, the parties have not briefed the legitimacy of such an ordinance.

As to the size and height limitations, it is true that these restrictions prevent a resident from displaying a large sign.<sup>16</sup> It is also true that occasionally a resident may want to "shout" his message, via a large sign. Yet, just as the First Amendment permits speech, but allows restrictions on excess noise, *Kovacs v. Cooper*, 336 U.S. 77, 78 (1949), the Court assumes that a resident can be restricted in his ability to visually shout his message. That is, the First Amendment may allow one to have a party; it does not permit one to disturb his neighbors with loud music.

For all the above reasons, the Court concludes that the ordinance's size and height restrictions on signs (§ 5-375(a)(2) and § 5-380(a)) is not unconstitutional. Therefore, with respect to this part of plaintiffs' argument, Plaintiffs' Fourth Motion for Summary Judgment [71] is **DENIED** and Defendants' Cross Motion for Summary Judgment [74] is **GRANTED**. In reaching these conclusions of law, the Court has had cause to evaluate and consider the ordinance's definition of "sign" and, in doing so, has found no constitutional error in the ordinance's definition of "sign."

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<sup>16</sup> Actually, only the height restriction imposes a substantial limit and this limit is a vertical limit. The Court does not read the ordinance to forbid a resident from lining four signs close to each other, so that a longer message could be spelled out horizontally, notwithstanding the limitation of four square feet per sign. The Court sincerely hopes that its mention of this potential "loophole," however, does not prompt Avondale to again amend its ordinance for a sixth time.

Accordingly, Plaintiffs' Fourth Motion for Summary Judgment [73] is **DENIED** and Defendants' Cross Motion for Summary Judgment [74] is **GRANTED** as to the definition of "sign."

**b. Setback Provision**

Currently, per § 5-374(a), signs must be set back ten feet from the back of the sidewalk or, where a sidewalk does not exist, fifteen feet from the edge of the road nearest to the sign. In this case, the City established the setback provision because the width of the city's right of way varies from street to street. Cities clearly have the right to prohibit the erection of private signs on their right of way.<sup>17</sup> See *Members of the City Council of the City of Los Angeles*, 466 U.S. at 814-815. By creating the standardized setback provisions in the face of varying public right of ways, the City hoped to create a quick and efficient means for residents to determine how far back from the road they need to go before posting their signs. (See Defs.' Resp. at 8.) The distance is sufficiently long enough to ensure that signs do not block the

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<sup>17</sup> The Court's conclusion that cities have the right to prohibit the erection of signs on their right of way directly addresses plaintiffs' challenge to § 5-372(e). (See Pls.' Filing at 2 (challenging § 5-372(e)'s ban on signs on the public right of way).) To the extent this challenge forms part of the parties' cross-motions for summary judgment, Plaintiffs' Fourth Motion for Summary Judgment [71] is **DENIED** as to the ban on posting signs on the public right of way and Defendants' Cross Motion for Summary Judgment [74] is **GRANTED** as to the same issue.

view of traffic or otherwise obstruct intersections, but short enough for those passing or driving by to still be able to read yard signs. Once an individual has complied with the applicable ten or fifteen feet setback provision, he is free to post anywhere else in the yard. Accordingly, the Court is satisfied that the setback provision is narrowly drawn to achieve its desired end, with one exception.

Currently, under § 5-363(f), seasonal displays and decorations are exempt from the setback provisions. See discussion *infra*. While the Court upholds this exemption to the extent that a seasonal display might exceed the height and size restrictions of signs, see *infra*, the Court find nothing in the record to justify or explain the setback exemption for seasonal items. That is, if the City does not wish a sign near its right of way, because of traffic and visibility concerns, allowing a large Santa near the sidewalk would seem to pose the same problems. Accordingly, the Court holds the City's ordinance's exempting seasonal displays and decorations from the setback provision to be unconstitutional. The City is enjoined from enforcing the setback provision against any sign until such time as the unconstitutional exemption for seasonal displays and decorations is removed from the ordinance.

Plaintiffs' Fourth Motion for Summary Judgment [71] is therefore **GRANTED** as to the seasonal display exemption from the

setback provision and **DENIED** as to the general setback provision of § 5-374(a) and Defendants' Cross Motion for Summary Judgment [74] is **DENIED** as to the seasonal display exemption from the setback provision and **GRANTED** as to the general setback provision of § 5-374(a).

## 2. Exemption of Seasonal Displays and Decorations

### a. Seasonal Display Exemption

Even if defendants' restriction on the number and size of signs is otherwise constitutional, plaintiffs argue that it cannot stand because it makes no similar restriction on the number and size of seasonal displays. As plaintiffs colorfully note, while a resident is limited to a set number of signs, depending on the size of the signs, he is allowed an unlimited number of Easter bunnies on his yard. (Pls.' Br. in Supp. of Am. Mot. for Summ. J. [51] at 13.) In essence, plaintiff is contending that the City is treating two different kind of noncommercial speech differently, depending on the content of the message.

Section 5-363(f) defines "seasonal displays and decorations" as "including but not limited to Halloween, July 4th, Christmas, Hanukkah, Kwanzaa, and Easter...." (Sign Ordinance at § 5-363(f), attach. as Ex. A to Notice of Amendment to Sign Ordinance [65].) The seasonal display or decoration cannot contain "commercial messages," however. *Id.* This section effectively exempts these

seasonal displays and decorations from the height, size, and numerosity restrictions applicable to signs.<sup>18</sup> *Id.* Further, while these decorations cannot be on the right of way, they are also implicitly exempted from the setback provision of § 5-374(a) applicable to traditional signs. *Id.* See discussion *supra* at 16.

Clearly, the City's exemption of holiday decorations does not discriminate based on the holiday being celebrated; any holiday or seasonal celebration will do. Plaintiffs argue, however, that by failing to subject seasonal displays and decorations to the same height, number, size, and setback restrictions as other more traditional "signs," the Ordinance gives preferences to these decorations over other noncommercial signs and thereby engages in content-based discrimination. (Pls.' Fourth at 9.) In plaintiffs' view, the fact that an object must be viewed to determine if it is a seasonal decoration subject to no size or numerosity requirements, as opposed to a traditional sign that is subject to these restrictions, indicates that the ordinance engages in content based discrimination. (*Id.* (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)).) Defendants disagree that the

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<sup>18</sup> Section 5-363(f) also provides that, like other noncommercial messages, "seasonal displays and decorations" do not require a permit.

seasonal display exemption should be construed as a content-based exception.

The decision in *Granite State Outdoor Adver., Inc. v. City of Clearwater, Florida*, 213 F. Supp. 2d 1312 (M.D. Fla. 2002), *aff'd in part and rev'd in part on other grounds*, 351 F.3d 1112 (11th Cir. 2003), touched very briefly on whether a sign ordinance had engaged in content-based regulation when it exempted holiday decorations from requirements imposed on other types of signs. The district court determined that any incongruence arising from such an exemption was *de minimus*. *Id.* at 1334 n.36. Here too, there is no indication that the City has provided exemptions for seasonal decorations because it hopes to suppress, disadvantage, or impose differential burdens on any kind of speech. There is likewise no indication that the City will allow St. Patrick's Day decorations, but disallow Cinco de Mayo displays. Indeed, in earlier motions, the plaintiffs had complained, and properly so, that defendants' ordinance was so broad as to cover seasonal decorations within its ambit; in these pleadings, plaintiffs had made clear their support for holiday decorations. (See, e.g., Pls.' Br. in Supp. of Pls.' Mot. for Summ. J. [11] at 10.)

Instead, with its exemption, the City has simply recognized that seasonal decorations are a different animal than traditional signs and that such three-dimensional decorations resist being

subject to the standardized height, number, and size limitations placed on two-dimensional signs. The Court likewise views seasonal decorations differently than traditional signs. In the first place, a "free speech" or political sign has a "content" that can be discerned by reading its words. Not so, holiday decorations. For decades, Americans have placed sparkling lights outside their homes, spread cobwebs in their shrubbery, displayed bats and witches in their yards and doorways, and hidden Easter eggs in their yards. While a black cat, a reindeer with a red nose, a leprechaun, or an Easter bunny may certainly evoke feelings--usually, positive, warm feelings in all but the most grumpy--it would be difficult to ascribe "content" to such decorations. Typically, such decorations communicate nothing more about the homeowner's opinion than that he or she has a sense of whimsy, a communal spirit, and a desire to reconnect with traditions that bind the generations. In exempting holiday decorations, the City appears to have recognized this reality. Moreover, in allowing holiday decorations, the City is not prohibiting or restricting any viewpoint or subject matter from being discussed. A content-neutral regulation applies equally to all. *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1254 (11th Cir. 2004). Thus, all seasonal and holiday displays of any kind--whether a sukkah or

Santa's sleigh--are exempt from the size restrictions of the ordinance.

In short, the Court concludes that the exemption of seasonal displays and decorations from the other restrictions of the ordinance, save the set-back provision, *supra*, does not undermine the ordinance's status as a content-neutral regulation or trigger more than intermediate scrutiny of the height, number, and size restrictions on signs. Typically, holiday decorations enhance the aesthetics of a community, not diminish it; allowing such displays does not suppress expression, but instead encourages it. Yet, to the extent that not everyone appreciates such decorations, "[t]he Constitution does not require the City to choose between curing all of its aesthetic problems or curing none at all." *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053 (11th Cir. 1987). Therefore, as to the argument that the seasonal display exemption dooms the other restrictions of the sign ordinance, with the exception of the setback requirement, Plaintiffs' Fourth Motion for Summary Judgment [71] is **DENIED** and Defendants' Cross Motion for Summary Judgment [74] is **GRANTED**.

### 3. Flags

With respect to § 5-376 governing flags, plaintiffs argue that flags count against a homeowner's twelve square feet total sign allotment so that a homeowner who displays a 3x5 foot flag would

not be entitled to display any additional signage. (Pls.' Fourth at 8.) Plaintiffs' argument is based on the flag provision's silence as to whether flag square footage counts against the twelve square feet total sign allotment. (Pls.' Reply Br. in Support of Pls.' Fourth Motion for Summ. J. and Resp. to Defs.' Cross Mot. for Summ. J. [75] ("Pls.' Reply") at 16.) Defendants argue that § 5-376(i) allows property owners to display flags as noncommercial signage, but does not require that flags be counted toward the twelve square feet sign limit. (Defs.' Resp. to Pls.' Statement of Material Facts Not in Dispute [73] at ¶ 14.)

Plaintiffs are correct in their assertion that § 5-376 does not specify whether a flag's square footage counts against a residential lot's twelve square feet allotment. However, § 5-376(a) does state that flagpoles in residential lots may be as high as twenty-five feet. At the same time, § 5-376(b) indicates that, on pole heights up to twenty-five feet (the maximum for a residential lot), flags may be up to twenty-four square feet. Given this language of § 5-376, it is clear that flags were not intended to count against the twelve square feet allotment. If flags were intended to count against the twelve square feet allotment then, presumably, the ordinance would have stated that no flag displayed on residential property may be larger than twelve square feet. Having resolved the debate over whether flags do or

do not count against the twelve square feet sign allotment, the Court must still address concerns associated with the enforcement of the flag provision.

Under § 5-376(e) of the ordinance, "[f]lags displaying a logo, message, statement or expression relating to commercial interests, and banners not meeting the definition of flag contained in Section 5-362 must conform to all applicable ordinances pertaining to signs." (Sign Ordinance at § 5-376(e), attach. as Ex. A to Notice of Amendment to Sign Ordinance [65].) These "applicable ordinances" state that, with the exception of real estate and yard sale signs, no sign containing a commercial message shall be allowed on any residential property in the city. (*Id.* at § 5-380(a).) Despite this ban on commercial flags in residential areas, plaintiffs have allowed flags displaying the Atlanta Braves logo and flags of other professional sports teams to fly undisturbed. (Defs.' Resp. at 19.)

In defense of their failure to enforce § 5-376(e), defendants argue that:

merely expressing support for a profit-making organization as matter of civic pride, a major motivation for expressions of support for professional sports teams, is not the same as displaying an emblem for a company, such as a real estate firm, with the intent of enticing the public to use that company's services or to buy their products.

(*Id.*)

Defendants' argument is undermined by the ordinance's definition of a commercial message as, "any message that promotes a business or attempts to generate good will for a business; any message that advertises a product or service for sale; and any message that proposes a commercial transaction." (Sign Ordinance at § 5-362, attach. as Ex. A to Notice of Amendment to Sign Ordinance [65].)

Given the City's choice of definitions, it cannot extricate an Atlanta Braves flag, or the flag of any other professional sports team, from the ambit of a commercial message. Team spirit aside, professional sports teams are money-making enterprises.<sup>19</sup> Sports merchandise is designed to promote these money-making enterprises. Defendants' failure to enforce the ban on the posting of commercial messages in residential areas against the flags of professional sports teams constitutes content-based discrimination. By neglecting to enforce the ordinance against the flags of professional sports teams while at the same time enforcing the ordinance against other commercial flags, the City has imposed a differential burden upon speech because of its content. Non-sports team commercial messages are at a disadvantage, and thus such content-based restrictions are presumptively invalid. *R.A.V.*, 505 U.S. at 382.

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<sup>19</sup> Arguably, there is a strong commercial side to college sports as well.

Normally, government restrictions on commercial speech are evaluated using the *Central Hudson* four-part test. However here, in its enforcement practices, the City is not differentiating between commercial and noncommercial speech, it is arbitrarily discriminating between two kinds of commercial speech solely because of its content. The City clearly has the right to ban all offsite commercial messages. See *Metromedia, Inc.*, 453 U.S. at 498. But, now that it has done so, it cannot, by virtue of its enforcement practices, simply elect to give the flags of some commercial ventures special status. Consequently, the Court applies the strict scrutiny standard of review to the City's arbitrary enforcement practice.<sup>20</sup> To survive such a review the City must show that its regulation is, "necessary to serve a compelling state interest and is narrowly draw to achieve that end." *Simon & Schuster, Inc.*, 502 U.S. at 118. The City has failed to demonstrate how failing to enforce the ordinance against the flags

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<sup>20</sup> Were the Court to apply the more permissive *Central Hudson* standard of review, the outcome would be the same. Under *Central Hudson* the ultimate question would become, "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566. Allowing the flags of professional sports teams to be flown on residential lots while not allowing other commercial flags to be flown does not directly advance the City's goal of maintaining public safety and advancing aesthetic interests. Such differentiation between various types of commercial flags is more extensive than necessary, and impermissible under the Constitution.

of professional sports teams is necessary, or even related, to the City's goals of preserving safety and aesthetic harmony. At bottom, as an aesthetic matter, a flag is a flag. Therefore, Plaintiffs' Fourth Motion for Summary Judgment [71] is **GRANTED** as to the arbitrary enforcement of § 5-376(e) and Defendants' Cross Motion for Summary Judgment [74] is **DENIED** as to the same issue. In reaching this decision, the Court has had cause to evaluate and consider the ordinance's definition of "commercial" and, in doing so, has found no constitutional error in the ordinance's definition of "commercial." Accordingly, Plaintiffs' Fourth Motion for Summary Judgment [73] is **DENIED** and Defendants' Cross Motion for Summary Judgment [74] is **GRANTED** as to the definition of "commercial."

Because the constitutional violation lies in the enforcement of this provision, and not its language, the City must be prepared to enforce the commercial flag ban in a non-arbitrary manner. Alternatively, if the City wishes to allow for the display of the flags of professional sports teams, then the ordinance must be amended to allow all types of commercial flags to be flown on residential lots.

#### 4. Grandfathering Provision

Section 5-370 of the ordinance provides that, "[s]igns lawfully existing on the effective date of the ordinance, January 26, 1987, from which this article is derived which do not conform to the provisions of this article shall be deemed to be non-conforming signs and may remain." This grandfathering provision has caused great debate among the parties to this case. The grandfathering conflicts center around a historical marker, a sign marking the entrance to the "Condominium of Avondale Estates," and the decision of City enforcement officials not to enforce the sign ordinance against any sign in place before their jobs began. (Pls.' Fourth at 34-37.)

The historical marker at issue in this case was funded by a private group around 1997 and placed, by the City, on the right of way in front of the Gutzon Borglum house.<sup>21</sup> (PSMF at ¶ 46.) After the March 2004 amendments, § 5-372(e) of the ordinance provides an exception from the ban on posting signs on the public right of way for "signs exempt under the Ordinance of the City of Avondale Estates and/or placed upon the right of way by governmental authority." (Sign Ordinance at Section 6, attach. as Ex. A to

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<sup>21</sup> Gutzon Borglum began the carving at Stone Mountain and later went on to carve Mount Rushmore. According to Ms. Martin-Hert's book, *Images of America: Avondale Estates*, *supra* at n. 1, Mr. Borglum lived in Avondale. The Court assumes that the marker is in front of his former home.

Notice of Amendment to Sign Ordinance [79].) The version of the ordinance in effect in 1997 exempted from the ordinance, "[s]igns of a noncommercial nature and in the public interest, erected by, or on the order of, a public officer in the performance of such officer's duty such as public notices, safety signs, traffic and street signs, memorial plaques, signs of historical interest and the like." (See Sign Ordinance at § 5-374(2), attach. as Ex. B to Defs.' Resp. to Pls.' Summ. J. Mot. [12].)

At the time it was erected, the Gutzon Borglum historical marker appears to have fallen under this exemption. Defendants therefore argue that the historical marker is exempt from the ordinance under the general grandfathering provision of § 5-370, and, second, that the historical marker is exempt under § 5-363(b) which exempts from the ordinance, "[s]igns erected on behalf of a governmental authority in the exercise of its proper jurisdiction." (Sign Ordinance, attach. as Ex. A to Notice of Amendment to Sign Ordinance [65].)

As plaintiffs argue, however, there is no way that a sign erected circa 1997 could fall under the broad grandfathering provision for signs existing on January 26, 1987. The City also correctly notes that the ordinance in effect when the marker was erected allowed historical markers. This argument makes good common sense, but the current ordinance does not carve out an

exception for "signs" that were lawful when erected. The Court notes that were the ordinance to include such a provision, it could be a dangerous exception, given Avondale's past spotty and, at times, allegedly arbitrary enforcement.

Nevertheless, even without the grandfathering provision, the historical marker can constitutionally stand. The historical marker here was authorized and erected by the City, and therefore qualifies for the exemption now found in § 5-363(b) (signs are exempt from size/set back restrictions if placed upon the right of way by governmental authority). Plaintiffs suggest that, by allowing the historical marker in the right of way, while at the same time prohibiting other signs from the same right of way, the City has engaged in content-based discrimination and it denies plaintiffs equal protection of the laws. The Court disagrees. Like a street or road sign, a historical marker falls within the ambit of local government authority. Necessarily, there will be few historical markers; apparently, Avondale has only one. Just as a municipality has an interest in posting signs for the public's benefit, such as traffic signs, it has an interest in educating the citizenry about the history of its community. That it does so does not mean that it has abandoned its concern for, or undermined the aesthetics of, the area. There is a qualitative difference between a City marking a historical building with a single historical

marker, and its allowing its citizenry to create a bazaar-like effect on the public right of way. Moreover, the City only has the power to erect its signs on rights of way; it cannot commandeer someone's front yard for that purpose.

Accordingly, the Court does not conclude that there is content-based discrimination, as a result of Avondale's erection of a historical marker on a right of way. Given plaintiffs' anecdotes about Avondale's past inconsistent administration of ordinances, however, the Court notes a possible concern that the current ordinance not give Avondale officials too much discretion in deciding when otherwise noncompliant signs can be erected. The Court believes that the language limiting such exempt signs to "[s]igns erected on behalf of a governmental authority in the exercise of its proper jurisdiction," should provide enough restrictions to prevent, for example, Avondale from allowing its officials to post large yard sale signs for their own homes on the public right of way.<sup>22</sup> If there is substantial inconsistency in

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<sup>22</sup> The language in the 1997 ordinance was actually pretty specific and could be used again if any allegations of inconsistent enforcement arise. That language, again, exempted "[s]igns of a noncommercial nature and in the public interest, erected by, or on the order of, a public officer in the performance of such officer's duty such as public notices, safety signs, traffic and street signs, memorial plaques, signs of historical interest and the like." (See Sign Ordinance at § 5-374(2), attach. as Ex. B to Defs.' Resp. to Pls.' Summ. J. Mot. [12].)

enforcement in this area, the plaintiffs can bring an "as applied" challenge in the future.

For the above reasons, Plaintiffs' Fourth Motion for Summary Judgment [71] challenging the constitutionality of the historical marker is **DENIED** and Defendants' Cross Motion for Summary Judgment [74] is **GRANTED** as to the same issue.

In addition to the historical marker, plaintiffs object to a sign marking the planned development known as the "Condominium of Avondale Estates" because it is a commercial sign that was approved at a time when the City banned anything other than house numbers, historic markers, original house designations, or street identification numbers from residential districts. (Pls.' Fourth at 34-35; Pls.' Reply at 11.) Unlike the City's standard street signs with lettering three inches or less in height, (Defs.' Resp. at 8), the sign marking the condominium development measures 10 X 4.5 feet. (PSMF at ¶ 47.) Defendants argue that the sign was approved along with the plans for the development and is "grandfathered" pursuant to § 5-370. (Defs.' Resp. at 10.) The difficulty here is that the grandfathering provision only applies to non-conforming signs in existence prior to January 26, 1987. In this case, neither party has provided the Court with evidence of when exactly the condominium sign was approved or constructed. Instead, the parties have both made vague general references

indicating that the condominium sign was approved during the "total ban" on residential signs and before the 2002 version of the ordinance. (Pls.' Am. Mot. for Summ. J. and Statement of Material Facts Not in Dispute [51] at ¶ 17.) Without this evidence the Court cannot definitively decide whether or not the grandfathering provision applies, so the grandfathering provision cannot resolve the condominium sign issue for purposes of this motion.

Defendants also argue that the condominium marker is a "subdivision sign" typically provided for in jurisdictions where new residential developments are the norm. That may be true, but as plaintiffs correctly point out, as far back as 1989, the City has banned all subdivision signs. (Pls.' Reply at 12.) Defendants counter with the argument that the sign was approved with the plans for the development at a time prior to the enactment of the current sign ordinance. (Defs.' Resp. at 10.) City approval may, in fact, have brought the sign in compliance with the ordinance in effect at the time, but that does not mean that the sign was or is constitutional. Plaintiffs argue that the City's approval of the condominium sign during a time that the City was otherwise banning such residential signs constitutes content-based discrimination. The Court agrees.

The City gave the condominium development approval for its sign at a time when other residents were banned from displaying any

sign or message. There is no evidence in the record explaining or justifying the City's decision to approve the disproportionately large, in comparison to other street signs erected by the City, condominium sign. The favoritism shown the condominium development sign at the time it was approved had the effect of imposing differential burdens upon speech based on its content. Such content-based restrictions on speech are presumptively invalid. See *R.A.V.*, 505 U.S. at 382. Consequently, to defend its content-based speech restriction, the City must show that its restriction is, "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc.*, 502 U.S. at 118. The City has failed to show the Court the necessity of approving the condominium development sign during the near total ban on residential signs. Therefore, Plaintiffs' Fourth Motion for Summary Judgment [71] challenging the constitutionality of the condominium sign is **GRANTED** and Defendants' Cross Motion for Summary Judgment [74] is **DENIED** as to the same issue. The Court having found the "Condominium of Avondale Estates" sign not to be permissible under the ordinance, the City must either direct the removal of this sign, or else cause this Court to reexamine the constitutionality of other parts of its ordinance.

This brings the Court to the last of the three grandfathering issues. Namely, the decision of City sign ordinance enforcement

officials to not enforce the sign ordinance against any sign in place before their jobs began. (Pls.' Fourth at 37.) In deposition testimony, City Code Enforcement Officer Craig Mims and City Manager/Chief of Police John Parker indicated their intention not to enforce the sign ordinance against any sign in place prior to their tenure. (PSMF at 52.) This practice translates into a "free pass" for those non-compliant signs that were erected prior to the current enforcement officials' tenure. While this policy may be an easy way for enforcement officials to determine which non-compliant signs that they will actively seek to bring into compliance with the sign ordinance, it is not constitutional. Having decided to enact a rigorous sign ordinance, the City cannot selectively apply its provisions for the sake of convenience. Moreover, if aesthetics are a concern, that concern is not promoted by allowing non-compliant signs, no matter when they may have been erected. Therefore, Plaintiffs' Fourth Motion for Summary Judgment [71] challenging the constitutionality of the decision not to enforce the sign ordinance against non-compliant signs in place prior to the start date of City Code Enforcement Officer Mims and City Manager/Chief of Police Parker is **GRANTED** and Defendants' Cross Motion for Summary Judgment [74] is **DENIED** as to the same issue. Henceforth, the City is ordered to apply the provisions of its sign ordinance equally without regard to the start date of any

sign ordinance enforcement officer or other City official. Having so decided federal First Amendment claims, the Court will now discuss state constitutional considerations.

#### **V. Analysis Under the Georgia Constitution**

The Georgia constitution provides that "[n]o law shall be passed to curtail or restrain the freedom of speech or of the press." Ga. Const. art. I, § 1, ¶ V. The Georgia Supreme Court has indicated that the Georgia Constitution, "provides even broader protection of speech than the first amendment." *Statesboro Publ'g Co. v. City of Sylvania*, 271 Ga. 92, 95, 516 S.E.2d 296, 299 (1999). This Court is not sure why this would be so as the language of the Georgia constitutional provision--no law shall be passed to curtail or restrain the freedom of speech--does not appear substantively different or more onerous than the language of the First Amendment, which prohibits laws that abridge freedom of speech. At any rate, distinguishing itself from federal constitutional requirements for content-neutral speech, the *Statesboro* court indicated that the Georgia Constitution requires the government to adopt the least restrictive means possible even for content-neutral speech regulations. *Id.* Nevertheless, the Georgia Supreme Court's general characterization of its jurisprudence notwithstanding, when analyzing sign ordinances, "Georgia courts have consistently applied United States Supreme

Court precedent, drawing no analytical distinction between the state and federal constitutions." *Lamar Adver. Co.*, 254 F. Supp. 2d at 1334 (citing *State v. Café Erotica, Inc.*, 270 Ga. 97, 507 S.E.2d 732 (1998); *Union City Board. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 467 S.E.2d 875 (1996); *H&H Operations, Inc. v. City of Peachtree City*, 248 Ga. 500, 283 S.E.2d 867 (1981)). Moreover, were Georgia's standards truly more rigid than federal standards, one would have expected plaintiffs to have brought their action in a Georgia court, not a federal court.

In summary, the Court concludes that analysis of the sign ordinance is the same under both the Georgia constitution and under the federal constitution. See *Lamar Adver. Co.*, 254 F. Supp. 2d at 1334.

## **VI. Voting Rights Act**

In addition to their other claims, plaintiffs have alleged violations of Section 5 of the Voting Rights Act. (Pls.' Fourth at 38.) The Voting Rights Act of 1965 provides:

[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...

42 U.S.C. § 1973(a).

To facilitate compliance with this provision, the Voting Rights Act requires covered jurisdictions to get clearance from the Attorney

General of the United States or the United States District Court for the District of Columbia before enacting, "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964."<sup>23</sup> 42 U.S.C. § 1973c. Under Section 5, and in accordance with 28 U.S.C. § 2284, any action for violations of this provision must be heard and determined by a three-judge district court. See *id.* Though single district judges may not determine the merits of claims alleging a failure to comply with the provision of Section 5, if a plaintiff's challenge is "wholly insubstantial" or "completely without merit" the district judge may determine that a three-judge panel is not required. *United States v. Saint Landry Parish Sch. Board.*, 601 F.2d 859, 863 (5th Cir. 1979);<sup>24</sup> *LaRouche v. Fowler*, 152 F.3d 974, 981-82 (D.C. Cir. 1998) (internal citations omitted).

Plaintiffs argue that the Avondale sign ordinance is a voting practice or procedure that should have been cleared prior to its implementation. (Pls.' Fourth at 39; Pl.'s Br. in Supp. of Pls.'

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<sup>23</sup> Georgia is a "covered jurisdiction" subject to the pre-clearance requirements of 42 U.S.C. § 1973c. See *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

<sup>24</sup> Decisions of the Fifth Circuit handed down before the close of business on September 30, 1981, are binding in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Second Mot. for Summ. J. [42] at 23-25.) According to plaintiffs, the City sign ordinance in effect on November 1, 1964, did not limit or regulate residential signs unless they extended over highways, streets, or alleys. (*Id.* at 23 n.13.) The City first adopted a sign ordinance that banned all signs in residential areas in 1967. (*Id.* at 23.) Plaintiffs argue that this post-1964 change, and all subsequent changes in the ordinance have affected the usage of political signs and thus are changes in voting practices or procedures that are subject to the preclearance requirement of Section 5. (*Id.* at 24.)

The Court begins its examination of the Section 5 preclearance requirement "where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *United States v. McNab*, 331 F.3d 1228, 1236 (11th Cir. 2003) (internal citations omitted). "[W]hen the words of a statute are unambiguous ... [the] judicial inquiry is complete." *Id.* Only where the legislative language is ambiguous or would lead to absurd results may a court consult legislative history to attempt to discern the "true intent" of Congress. *Id.*

Here, the plain language of the statute offers no indication that a municipal sign ordinance, even one regulating political signs, would be subject to the preclearance requirement. The sign

ordinance does not fit into any of the types of regulations that are enumerated as being subject to the preclearance requirement. It deals with neither voting qualifications nor prerequisites to voting, and it sets no "standard, practice, or procedure with respect to voting." See 42 U.S.C. § 1973c. Quite simply, the plain language of the statute offers nothing to support plaintiffs' argument that the sign ordinance was or is subject to the preclearance requirement of the Voting Rights Act.

Even if the plain language of the statute indicated some ambiguity, the Court's interpretation is supported by congressional intent in enacting the Voting Rights Act. The Act was aimed at both obvious and subtle regulations which would have the effect of denying citizens their right to vote because of their race. *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). In doing so, the Act gives a broad interpretation to the right to vote, including "all action necessary to make a vote effective." *Id.* at 565-66 (citing 42 U.S.C. § 19731(c)(1)).<sup>25</sup> Plaintiffs have never

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<sup>25</sup> Indeed, the Act's definition of "vote" or "voting" gives no indication that a regulation directed even squarely at political signs could be considered a standard, practice, or procedure with respect to voting.

The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting,

alleged, however, that the sign ordinance in question here has the effect of denying citizens their right to vote because of their race.<sup>26</sup> Giving even the broadest interpretation to the right to vote, it is not apparent how posting a sign of certain dimensions or a certain number of signs would be "necessary" to make a vote effective. Political signs and advertisements certainly contribute to a healthy political discourse, but their presence or absence does not directly affect a person's ability to vote.

The goal of Section 5 is to insure that no changes in voting procedure are made "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Guided by the Supreme Court's instruction that Section 5 is to have the "broadest possible scope," *Allen*, 393 U.S. at 566, the Court is still unable to find how Section 5 applies to the sign

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casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election. 42 U.S.C. § 19731(c)(1).

<sup>26</sup> Nor have plaintiffs given any indication as to how the sign ordinance could negatively impact racial minorities in their voting. The ordinance applies to all residents of the City, not just to minorities.

ordinance at issue in this case, let alone a violation of the section.

In sum, both the plain language of Section 5 and the congressional intent behind it convince this Court that the preclearance requirement does not apply to the City's sign ordinance. Plaintiffs have been unable to point to any authority that would contradict this conclusion. Because the Court finds that plaintiffs' claims are wholly insubstantial and obviously without merit, a three-judge court is not required in this case. Plaintiffs' Fourth Motion for Summary Judgment [71] is **DENIED** as to the Voting Rights claims, and Defendants' Cross Motion for Summary Judgment [74] is **GRANTED** as to the same issue.

#### **VII. Equal Protection Claims**

Plaintiffs also challenge the sign ordinance under the Equal Protection Clause of the United States Constitution. (Pls.' Fourth at 9.) The Equal Protection Clause requires that the government treat similarly situated persons in a similar manner.<sup>27</sup> U.S. Const. amend. XIV, § 1. When people are classified in such a way that they receive different treatment under the law, the degree of scrutiny the court applies depends upon the basis of the

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<sup>27</sup> The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

classification. *Gary v. City of Warner Robins, Georgia*, 311 F.3d 1334, 1337 (11th Cir. 2002)(internal citations omitted). If a fundamental right or a suspect class is involved, the court reviews the classification using strict scrutiny. *Lamar Adver. Co.*, 254 F. Supp. 2d. at 1339 (internal citations omitted). In contrast, "[i]f an ordinance does not infringe upon a fundamental right or target a protected class, equal protection claims relating to it are judged under the rational basis test; specifically, the ordinance must be rationally related to the achievement of a legitimate government purpose." *Id.*

The Avondale sign ordinance does not classify persons based upon any suspect classification. Therefore, unless the ordinance infringes upon a fundamental right, it will be scrutinized using the rational basis test. Here, plaintiffs are asserting their right to erect certain types of signs on their property and the property of others without the restrictions that have been put in place by the ordinance. As prior sign ordinance case law demonstrates, there is no fundamental right to display any and all signs without restriction. See *Metromedia*, 453 U.S. 490; *Members of the City Council of Los Angeles*, 466 U.S. 789; *Harnish v. Manatee County, Florida*, 783 F.2d 1535, 1539-40 (11th Cir. 1986).

Consequently, the City sign ordinance is subject to only a

rational basis level of review. See *Lamar Adver. Co.*, 254 F. Supp. 2d. at 1339.

The Court has already found that much of the sign ordinance is permissible under the more stringent requirements of the First Amendment, and, as to these provisions, there is no need to conduct an independent equal protection analysis. *Lamar Adver. Co.*, 254 F. Supp.2d at 1339 (citing *Outdoor Sys., Inc. v. City of Atlanta*, 885 F. Supp. 1572, 1582 (N.D. Ga. 1995) (O'Kelley, J.)). As to those provisions found unconstitutional under the First Amendment, holding them to be also violative of the Equal Protection Clause does not seem to accomplish much.<sup>28</sup> Therefore, Plaintiffs' Fourth Motion for Summary Judgment [71] is **DENIED without prejudice** on the equal protection challenge and Defendants' Cross Motion for Summary Judgment [74] is also **DENIED** as to the same issue. The Court simply **DISMISSES without prejudice** the Equal Protection claims as being subsumed in the First Amendment claims.

#### **VIII. Severability of Unconstitutional Provisions**

Because the Court has held some of the provisions of the City's sign ordinance unconstitutional, the Court must verify that the unconstitutional provisions can be severed from those found to

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<sup>28</sup> Arguably, those ordinance sections that failed the First Amendment test might meet the likely more lenient rational basis test.

be constitutional. In arguing that the Court can sever those provisions found to be unconstitutional from the remainder of the ordinance and still leave the constitutional provisions of the ordinance intact, defendants rely on the severability clause found in § 5-382(a). (Defs.' Resp. at 23.) This provision provides:

the sections, paragraphs, sentences, clauses and phrases of the Sign Ordinance are severable, and if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional or invalid by any judgment or decree of any court of competent jurisdiction, the unconstitutional or invalid phrase, clause, sentence, [or] paragraph shall be struck and the remaining phrases, clauses, sentences, paragraphs, and sections shall be effective as if the unconstitutional or invalid portion had not existed.

(Sign Ordinance at § 5-382(a), attach. as Ex. A to Notice of Amendment to Sign Ordinance [65].)

In contrast, plaintiffs argue that the ordinance is so rife with constitutional deficiencies that "it is not capable of being modified to comport with the Constitution." (Pls.' Br. in Supp. of Am. Mot. for Summ. J. [51] at 24.)

When a portion of any ordinance is judicially invalidated, the Court must apply Georgia law to determine what portion of the ordinance, if any, survives under a severability clause. *Artistic Entm't, Inc.*, 331 F.3d at 1204. Under Georgia law, the existence of a severability clause creates a presumption in favor of severance. *Id.* However, the Court must not, "give to the statute an effect altogether different from that sought by it when

considered as a whole." *City Council of Augusta v. Mangelly*, 243 Ga. 358, 363, 254 S.E.2d 315, 320 (1979). "[I]n order for one part of a statute to be upheld as severable when another is stricken as unconstitutional, they must not be mutually dependent on one another." *Id.* at 363-64, 254 S.E.2d at 320 (internal citations omitted). Accordingly, the Court must determine whether the invalid provisions of the City sign ordinance are mutually dependent upon any other portions of the sign ordinance, while at the same time preserving the original purpose of the ordinance. See *Artistic Entm't, Inc.*, 331 F.3d at 1204.

In *Union City Board. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 396-99, 467 S.E.2d 875, 879-81 (1996), the Georgia Supreme Court invalidated significant portions of a sign ordinance as unconstitutional under both the First Amendment and the free speech guarantee of the Georgia constitution. Nevertheless, the court held that severance was appropriate. *Id.* at 404, 467 S.E.2d at 884-85. The court found that the stated purpose of the act, to provide for the public safety and welfare, was still served after these provisions were removed. *Id.*

In the instant case, none of the provisions declared unconstitutional by the Court are so mutually dependent upon any of the remaining provisions of the ordinance that they cannot be severed from the sign ordinance as a whole without impeding the

purpose of the ordinance, namely, the promotion of aesthetic harmony and public safety. Even after the objectionable parts of the ordinance have been stricken, more than enough of it remains to accomplish the purposes of the City in passing the ordinance in the first place. Accordingly, the Court holds that severance is appropriate.

#### CONCLUSION

For the foregoing reasons, the Court **GRANTS** in part and **DENIES** in part Plaintiffs' Fourth Motion for Summary Judgment [71]; **GRANTS** in part and **DENIES** in part Defendants' Cross Motion for Summary Judgment [74]; and **GRANTS** Plaintiffs' Motion for Leave to File Supplemental Material Regarding Occurrence Subsequent to Summary Judgment Filings [81].<sup>29</sup>

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<sup>29</sup> In today's Order the Court has attempted to address all of the issues raised in plaintiffs' four separate motions for summary judgment and defendants' two cross motions for summary judgment. The fact that defendants have amended their ordinance five times since the commencement of this case has not made this task any easier. Indeed, as a consequence of the moving-target nature of this litigation, the Court may have inadvertently failed to address one or more claim. For example, the Court is unclear as to whether plaintiffs even continue to challenge the ordinance overall as arbitrarily enforced in violation of the Equal Protection Clause of the Fourteenth Amendment and the First Amendment. (See Pls.' Am. Mot. for Summ. J. and Statement of Material Facts Not in Dispute [51] at 7 n.1; Pls.' Fourth Mot. for Summ. J. and Statement of Material Facts Not in Dispute [71] at 6.) See discussion *supra*.

On a related note, in part because plaintiffs have failed to cite to any case law in support, the Court is not clear as to whether, and on what grounds, plaintiffs intended to challenge the

In sum, today the Court orders that:

1. All claims against defendants John Parker, Lyda Steadman, and Craig A. Mims be **DISMISSED**, and that summary judgment be **GRANTED** as to these defendants.
2. Plaintiffs have standing, and that Defendants' Cross Motion for Summary Judgment [74] be **DENIED** as to this issue.
3. The size and height restrictions on real estate signs, as well as the definition of "real estate sign", are constitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **DENIED** and Defendants' Cross Motion for Summary Judgment [74] be **GRANTED** as to these issues.
4. The number and location restrictions on yard sale signs is constitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **DENIED** and Defendants' Cross Motion for Summary Judgment [74] be **GRANTED** as to this issue.
5. The size and height restrictions on signs, as well as the definition of "sign", are constitutional, and that Plaintiff's

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ordinance based on the possibility that a violation of defendants' ordinance could be punished by six months imprisonment. (See *id.*)

In sum, if either party believes there is an issue raised that has not been addressed by the Court in today's Order, that party may file a motion for reconsideration on that issue with the Court. Pursuant to Local Rule 7.2E, such motion must be filed with the Clerk of Court within ten (10) days after the entry of this Order.

Fourth Motion for Summary Judgment [73] be **DENIED** and Defendants' Cross Motion for Summary Judgment [74] be **GRANTED** as to these issues.

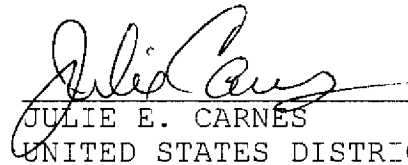
6. The ban on posting signs on the public rights of way is constitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **DENIED** and Defendants' Cross Motion for Summary Judgment [74] be **GRANTED** as to this issue.
7. The general setback provision is constitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **DENIED** and Defendants' Cross Motion for Summary Judgment [74] be **GRANTED** as to this issue.
8. The exemption for seasonal displays and decorations from the general setback provision is, however, unconstitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **GRANTED** and Defendants' Cross Motion for Summary Judgment [74] be **DENIED** as to this issue.
9. The general exemption for seasonal displays from the ordinance's height, number, and size restrictions is constitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **DENIED** and Defendants' Cross Motion for Summary Judgment [74] be **GRANTED** as to this issue.

10. The inconsistent enforcement of the ordinance provision concerned with flags which display a logo, message, statement, or expression relating to commercial interests, § 5-376(e), is unconstitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **GRANTED** and Defendants' Cross Motion for Summary Judgment [74] be **DENIED** as to this issue.
11. The definition of "commercial" is constitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **DENIED** and Defendants' Cross Motion for Summary Judgment [74] be **GRANTED** as to this issue.
12. The Gutzon Borglum historical marker is constitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **DENIED** and Defendants' Cross Motion for Summary Judgment [74] be **GRANTED** as to this issue.
13. The sign marking the planned development known as the "Condominium of Avondale Estates" is unconstitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **GRANTED** and Defendants' Cross Motion for Summary Judgment [74] be **DENIED** as to this issue.
14. The decision not to enforce the sign ordinance against non-compliant signs in place prior to the start date of City Code Enforcement Officer Mims and City Manager/Chief of Police

Parker is unconstitutional, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **GRANTED** and Defendants' Cross Motion for Summary Judgment [74] be **DENIED** as to this issue.

15. A three-judge panel is not required on the Voting Rights Act claim, and that Plaintiff's Fourth Motion for Summary Judgment [73] be **DENIED** and Defendants' Cross Motion for Summary Judgment [74] be **GRANTED** as to this issue.

SO ORDERED, this 31 day of March, 2005.

  
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JULIE E. CARNES  
UNITED STATES DISTRICT JUDGE