BEFORE THE HEARING APPEALS OFFICER

for the

SALT LAKE CITY PLANNING & ZONING DEPARTMENT

Sugarmill Lofts, LLC, a Utah limited liability company,)	
Appellant)	REPLY BRIEF OF APPELLANT
)	No. PLNAPP2018-00054

Appellant submits this Reply Brief in response to the Staff Report lodged by the City Planning Staff (Doug Dansie), and the attachments thereto, including the legal position statement attributed to Senior City Attorney, Paul Nielson.

CLARIFICATION

The first order of business of this Reply is to clarify the precise conduct for which Appellant received the zoning citation at issue. In its "Project Description" section the City states: "the underlying CN zoning district requires forty percent of the façade to be of glass (window) and allows up to twenty-five percent of the window to be obstructed by signage. The signs cover near one hundred percent of the window; therefore, the signs cover too much window space to be permitted." This gratuitous statement has nothing to do with this appeal. It is not the reason for issuance of the Citation that was communicated to Appellant. Rather, Appellant was cited because, "The window signs either require a permit or to be removed." [See, Notice and Order-Civil" dated Jan. 2, 2018 and signed by Julie Lepore, Housing Zoning Officer.] Thus, the alleged offense is the failure to obtain a permit for a window sign, not whether too much of the window was obscured by an interior sign as posited by the City.

ARGUMENT

TWO REQUIREMENTS MUST BE MET FOR THE ENFORCEMENT OF AN ORDINANCE TO BE CONSTITUTIONAL AND THEREFORE LEGAL: 1) THE ORDINANCE ITSELF MUST EXPRESSLY DESCRIBE THE ENFORCEMENT MECHANISM WHICH MUST BE FAIR, NEUTRAL AND NON-DISCRIMINATORY; and 2) THE ENFORCEMENT MECHANISM ACTUALLY APPLIED MUST BE FAIR AND REASONABLE AND NOT ARBITRARY OR CAPRICIOUS.

Facial Enforcement Mechanism. With respect to the first requirement, the United States Supreme Court stated in the case of *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), a case involving the enforcement of a noise ordinance based only on citizen complaints or the subjective opinion of the person issuing a citation, that:

"[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."

The high Court then went on to void the ordinance because there was no non-subjective enforcement standard in the Ordinance. <u>Id.</u> See also, Hill v. Colorado, 530 U.S. 703, 732 (2000); State v. Perea, 2013 UT 68, ¶110, 322 P.3d 624.

Likewise, in a case before the Supreme Court of Mississippi involving a challenge to a noise ordinance where enforcement was triggered by a citizen complaint, the court held that:

"A statute is unconstitutionally vague when the standard of conduct it specifies is dependent upon the individualized sensitivity of each complainant." *Nichols v. Gulfport*, 589 So. 2d 1280, 1284 (Miss. 1991). ¹

It is admitted by the City here that, as a general proposition all enforcement of the City's sign ordinance is initiated by citizen complaints, and in this case an anonymous citizen complaint initiated this enforcement action. The City seems to think that is just fine so long as "they do not play favorites." [Staff Report, Attachment C.] The ordinance under which Appellant was charged contains no direction to either enforcement personnel or citizens respecting how it will be enforced or for what offending conduct, save this vague language:

"21A.46.030: GENERAL SIGN PERMIT REQUIREMENTS:

A. Sign Permit Required: Except where exempted by the provisions of this chapter, it is unlawful for any person to erect, construct, enlarge, locate or alter any sign or change the text of any on or off premises sign within the city contrary to any provisions of this chapter without first obtaining a sign permit from the building official. No sign shall be erected, constructed, reconstructed, located or altered until the site plan for such sign has been approved and a sign permit issued by the building official. Such permits shall be issued only to state licensed contractors unless specifically exempted by the state.

21A.20.020: COMPLAINTS REGARDING VIOLATIONS:

The supervisor of zoning enforcement or designee may investigate any complaint alleging a violation of this title and take such action as is warranted in accordance with the procedures set forth in this chapter."

¹ Utah law is in accord. See, *State v. Green, 2004 UT 76,* ¶50 where the court stated: "The United States Supreme Court has stated that to avoid unconstitutional vagueness, a statute must "establish minimal guidelines to govern law enforcement" such that it avoids entrusting "lawmaking to the moment-to-moment judgment of the policeman on his beat."

The Ordinance language essentially admits that enforcement is initiated by "any complaint alleging a violation of this title." By definition such an enforcement initiator is dependent upon "the individualized sensitivity of each complainant," a standard found to be unconstitutional by the court in the *Gulfport* case, *supra*. So, what is the explicit standard that was violated here? What was the "sign" that required a permit? Presumptively, signs inside of the building envelope such as window displays are exempted from the purview of the Sign Ordinance altogether. SLC Ordinance 21A-46-040. G. (Attached.) We are thus left to wonder and speculate. Neither the Ordinance nor the Citation give us any clue as to the specific conduct for which Appellant is being cited.

The lack of specificity in the ordinance and the fact that enforcement is initiated by the subjective complaint of an individual citizen render this ordinance so vague that, on its face, it is unconstitutional.

"As applied" Enforcement Mechanism. The "as applied" argument is the logical result that occurs when the ordinance being applied has insufficient internal controls to guide the enforcement process. The instant case is a classic example. The "respond to citizen complaints" enforcement model the City relies upon leads to reliance on the subjective view of one person respecting a given situation in order to initiate the enforcement process. In this case, that person remains anonymous and nobody knows whether the reporting person has a bias or a score to settle or any training or anything. The process by definition is random and arbitrary. The City argues that once it receives a complaint and starts the process it acts in an even-handed manner, but the fact remains that without the arbitrary initiation of the process by a random citizen complaint, nothing happens; there is no enforcement. The City cannot detach itself from the initiation process in an attempt to distance itself from the arbitrary act because the act of initiation is integral to and a sine qua non of the enforcement process. Because the enforcement process as applied in this case is arbitrary and capricious, it is unconstitutional and therefore illegal. State v. Gallegos, 2009 UT 42¶¶14,15,220 P. 3d 136. The citation and enforcement order against Appellant must be dismissed.

CONCLUSION

This case presents the "poster child" for a vague zoning/sign ordinance compounded by an arbitrary and capricious enforcement mechanism that leaves the Appellant subject to the whim of an anonymous aggrieved citizen who, one day in a post-Christmas funk, decides to make a complaint. All that must be done to see the unfairness of this process is to place oneself in the shoes of the Appellant: what sign was it to acquire a permit for, the banner inside the window that is exempt from the sign permit ordinance? What fair and rational process did the City follow to initiate its investigation, respond to the anonymous complaint of a citizen? These questions answer themselves. The process the City has in its zoning/sign ordinance is too vague to pass muster. The citation and enforcement order the City issued against Appellant is unconstitutionally vague, illegal and must thus be dismissed.

Dated this 7th day of June, 2018.

George A. Hunt

Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of June, 2018, he served a copy of this Reply Brief of Appellant upon The Appeals Hearing Officer, The City and its Attorney, Paul Nielson, by emailing copies to them at the following email addresses: deborah.severson@slcgov.com; doug.dansie@slcgov.com; paul.nielson@slcgov.com.

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Attorney for Appellant

1A.46.040: EXEMPT SIGNS: 1

The following signs and sign related activities are exempt from all regulations in this chapter, subject to the following provisions:

- A. Building Or House Numbers Sign: One building or house numbers sign per street address as long as the sign is not more than two (2) square feet in area.
- B. Building Plaque Sign: One building plaque sign per address.
- C. Building Security Sign: Building security signs whose sign faces are no more than one square foot in area and limited to no more than four (4) building security signs per lot.
- D. Flag, Official: An official flag which does not project over a property line.
- E. Gas Pump Sign: Gas pump sign.
- F. Gasoline Price Signs: Gasoline price signs not exceeding fifty (50) square feet as long as they comply with all other applicable provisions of this title. These are permitted in addition to the maximum size limits listed in the sign regulations tables for each zoning district.
- G. Interior Sign: Interior sign.
- H. Political Sign: Political signs with a face of sixteen (16) square feet or less subject to maintaining a five foot (5') setback.
- I. Public Event Banner¹: Public event banner.
- J. Public Safety Signs: As long as they are no more than six (6) square feet in area.
- K. Routine Maintenance Of Sign: Routine sign maintenance or changing of lettering or parts of signs designed to be regularly changed.
- L. Vending Machine Sign: Vending machine sign.
- M. Murals: All or any portion of painted artwork which would not constitute a sign under this chapter.

N. Portable Signs: Portable signs as authorized pursuant to section $\underline{21A.46.055}$ of this chapter. (Ord. 5-05 § 2, 2005: Ord. 78-03 § 2, 2003: Ord. 53-00 § 2, 2000: Ord. 88-95 § 1 (Exh. A), 1995)