STATE OF MICHIGAN

COURT OF APPEALS

SACKLLAH INVESTMENTS, L.L.C., Plaintiff-Appellant,	UNPUBLISHED August 9, 2011
v	No. 293709 Wayne Circuit Court
CHARTER TOWNSHIP OF NORTHVILLE, Defendant-Appellee.	LC No. 08-111756-CH

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Essam Sackllah, the sole owner of Sackllah Investments, is an aggrieved landowner in Northville Township. Sackllah developed a strip mall in a rural area of the Township. He attributes his lack of financial success in this venture to the Township's stringent restrictions on outdoor signs and the Township's refusal to make exceptions for him. Sackllah filed a circuit court action challenging the constitutional validity of the Township's sign ordinance and the Township's actions in enforcing that ordinance, which the circuit court summarily dismissed. We affirm the circuit court's judgment that the Township's sign ordinance is a constitutional land use restriction. The Township's intent is not to restrict Sackllah's freedom of speech, but to limit the proliferation of outdoor signs, especially in its more scenic rural areas. Further, Sackllah has presented no evidence, beyond his personal beliefs, that the Township has singled him out for negative treatment.

I. NORTHVILLE TOWNSHIP'S SIGN ORDINANCE

As part of its existing zoning ordinance, the Township adopted a comprehensive scheme to regulate all outdoor signs within its borders. The stated intent of the ordinance "is to regulate outdoor advertising and all signs within the Township . . . to enhance the physical appearance of the Township, to preserve scenic and natural beauty, and to create an attractive economic and business climate." Northville Twp Zoning Ordinance, § 145-2. Through the sign ordinance, the Township seeks to accomplish certain "objectives," including the promotion of "uniform traffic flow" and reducing the "potential for accidents" by limiting "the proliferation of signs." *Id.*, § 145-2.A. Similarly, the Township intended to "[p]rohibit certain types of signs," such as inflatable signs and signs with moving lights or parts, "due to the negative impact on traffic safety and aesthetics." *Id.*, § 145-2.J; § 145-4. Further, the Township aims or expects to "[m]aintain and improve the image of the Township by encouraging signs of consistent size

which are complementary to related buildings and uses, and are harmonious with their surroundings." *Id.*, § 145-2.H. The Township desires to limit the overall number of signs by allowing their use only for their necessary purposes: identifying "an establishment on the premises" and enabling "the public to locate goods, services and facilities" while still protecting the public's right to exchange "religious, political, economic, social, [and] philosophical" messages through this medium of speech. *Id.*, § 145-2.C, D, F.

The ordinance proscribes the alteration, erection or construction of outdoor signs without a permit. *Id.*, § 145-9.A. The Township's Planning Department is tasked with reviewing all sign permits "for conformity with the requirements of [the sign] ordinance," and may condition approval on "compliance with reasonable regulations or limitations having regard to the character of the sign, the surroundings in which it is to be displayed, and the purposes of this ordinance." *Id.*, § 145-9.C. The Township exempts various types of "non-illuminated" signs from the permit requirements and allows their installation "in all sign districts" without preapproval, limited to (A) "regulatory and street signs;" (B) displays for "holidays, public demonstrations, promotions, civic welfare or charitable purposes;" (C) tenant directories positioned outside a building; (D) "municipal signs," such as "legal notices, emergency signs, special events or other signs sanctioned by the Township;" (E) "flags bearing the official design of the United States, State of Michigan, a public educational institution, or official design of a corporation or award flags;" (F) real estate flags marketing new developments; (G) "memorial signs or tablets, names of buildings and date of erection when signs are cut into a masonry surface or constructed of bronze or other noncombustible material;" (H) bulletin boards placed outside civic and religious buildings; (I) real estate "For Sale" signs; (J) "informational signs, attached to a building and of a size and scale intended to be viewed by pedestrians, such as but not limited to menus, hours of operation, etc.;" (K) garage sale signs; (L) "now hiring" signs; and (M) "temporary signs related to an election, to identify seasonal events or civic functions." *Id.*, § 145-5.

The ordinance includes general standards for all signs, including the level of illumination, placement, and size. The ordinance provides more specific standards for various ground, wall and permanent window signs. *Id.*, § 145-6. The Township is divided into six sign districts (A, B, C, D, E, and All Other Areas), each with its own quantity and size limitations for wall, ground, and permanent window signs. *Id.*, § 145-7. The sign districts are differentiated by the character and density of the surrounding community. The Township allows a petitioner to seek a variance from the Township's Zoning Board of Appeals (ZBA) for uses that are inconsistent with the sign ordinance when the petitioner can establish "alleged hardships or practical difficulties, or both, [that] are exceptional and peculiar to the property." *Id.*, § 145-10.B.

II. FACTUAL BACKGROUND

In 2005, Sackllah purchased property at the corner of Napier and Seven Mile roads in Northville Township and constructed a strip mall. The property is located in a rural/low-density

residential area, is zoned "B-1-Local Business"[1] and is located in the "All Other Areas" sign district. The Township requires land owners to submit site plans for official approval before construction as authorized by MCL 125.3501(1) of the Zoning Enabling Act. MCL 125.3101 *et seq.* In 2005, the Township approved Sackllah's site plan, which included blueprints for the proposed building, landscaping and parking schematics, and various other details describing the exact characteristics of the development. Relevant to this appeal, the approved site plan indicated that the tenant's "wall signs"[2] would identify the business by name, be wooden with routed lettering and be illuminated by external "gooseneck lighting." The sign and lighting design was specifically chosen to meld into the rural character of the neighborhood and to limit the nuisance of commercial lighting. In granting final approval of the site plan, the PC noted that Sackllah would be required to pull a "sign permit" from the Township's Building Department before installation as required by Northville Twp Zoning Ordinance, § 145-9.

Sackllah's development was unusual in that the rear of the building abutted the road, while the store fronts faced "inside," toward the neighboring residential parcel with the parking lot nestled between as a buffer. Because of this unusual design, Sackllah's tenants required signs on both the front and the back of the building—one to lure drivers into the parking lot and one to direct customers from the lot into the businesses. The ordinance permits only one wall sign for each business. *Id.*, § 145-6.G(10). Accordingly, in October 2006, Sackllah applied for a variance from the Township's ZBA, which was granted.

Sackllah soon discovered that his wooden wall signs could not withstand a Michigan winter. By 2007, Sackllah sought to replace these signs with "internally illuminated signs," i.e. signs with internal LED lights to illuminate a plastic or glass front. The Township specifically allows "internally illuminated" wall signs in the "All Other Areas" sign district. *Id.*, § 145-6.E. Even so, the Building Department denied Sackllah's sign permit because the proposed sign did not conform to Sackllah's site plan. Sackllah then applied to the PC to amend the site plan. The PC denied Sackllah's request, stating "the type of signage and the type of lighting that were offered were integral to the other issues with the site plan and . . . changing those would have an adverse impact on the other considerations for site plan approval." The PC believed that Sackllah used inferior materials to construct the wooden signs and, therefore, encouraged Sackllah to "do his homework" and remedy the issues himself. Sackllah appealed the PC's

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[1] Northville Twp Zoning Ordinance, § 170-12.1 provides that the B-1 district "is intended to permit those uses necessary to satisfy the basic day-to-day convenience shopping and/or service needs of persons residing in nearby residential areas served by common vehicular parking areas and integrated pedestrian access." The district principally allows retail market stores, personal on-site service establishments, dry-cleaners, banks, medical offices, restaurants without drive-through amenities and health clubs. *Id.*, § 170-12.2. The Township Planning Commission (PC) may also grant a special land use for "open-front restaurants and restaurants with outdoor seating," such as provided in Sackllah's site plan. *Id.*, § 170-12.3.D.

[2] A "wall sign" is defined as "[a] sign erected or fastened to the wall of a building and having the exposed face of the sign parallel to the plane of the wall. . . ." *Id.*, § 145-3.

decision to the ZBA. The ZBA rejected Sackllah's appeal, finding that the PC's decision was not arbitrary or capricious given the PC's statement that the lighting and signage elements "were integral to the entire site plan." While the ZBA appeal was pending, Sackllah installed an internally illuminated wall sign without a permit. The Township issued a civil infraction against Sackllah as a result.

During this same period of time, Sackllah sought to install various "window signs."[3] The Township allows businesses to install a small permanent window sign to inform customers that a business is open. *Id.*, § 145-6.H. Permanent window signs, however, are prohibited in the "All Other Areas" signage district. Section 145-5 allows a business in any sign district to post *temporary* window signs without a permit limited to "now hiring" signs and signs "related to an election, to identify seasonal events or civic functions." Sackllah sought a variance from the ZBA to install otherwise prohibited permanent window signs, but was rejected. Sackllah installed a permanent window sign anyway, and the Township issued a civil infraction. Sackllah's tenants also displayed various prohibited signs during this period, which the Township simply removed without issuing a citation. Sackllah subsequently filed an amended variance request seeking to use the window sign requirements applicable to the other sign districts—a maximum of two permanent signs for each business not to exceed 25-percent of the window surface. The ZBA compromised and granted Sackllah a variance to permit one unlit window sign "stating the hours of operation and whether they were open or closed" for each tenant.[4]

As previously noted, the Township issued a civil infraction against Sackllah for erecting an internally illuminated wall sign without a permit. In an action separate from the appeal now before this Court, Sackllah fought the citation before 35th District Court Judge John E. MacDonald. The district court determined that Sackllah clearly violated the sign ordinance by erecting a sign without a permit. Sackllah excused his violation by contending that the Township denied him due process of law when it rejected his request to modify the site plan to include internally illuminated signs that were otherwise allowed under the zoning ordinance. Judge MacDonald disagreed, ruling that the Township PC's decision was not arbitrary or capricious:

> From this record it is very apparent that the [PC] had legitimate concerns with the lighting that would affect neighbors and the overall consistency of the signage. Specifically, the [PC] wanted to know why the signs and lighting suffered problems that similar signs and lighting in the area did not suffer. From what this court can gather, [Sackllah] failed to explain why his lighting and signs were different from the others, and so the [PC] had no basis of reasoning to allow the proposed modifications.

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[3] A "window sign" is "[a]ny sign or display that is visible from the exterior of any building window." *Id.*, § 145-3

[4] Pursuant to the sign ordinance, Sackllah could have installed this type of informational sign on the building's wall, but not window, without a permit. *Id.*, § 145-5.J.

Sackllah did not appeal the district court's ruling.

Ultimately, Sackllah alleges that the Township acted favorably toward his development plans until October 2006. At that time, Sackllah instigated a Michigan State Police investigation against then-Township Trustee Bradley Werner for extortion. The investigation was eventually closed for lack of substantiating evidence. Sackllah alleges that the Township began taking adverse action against him following the investigation. In addition to denying his requests to amend the site plan and for variances to utilize window signs, Sackllah points to the Township's refusal to return his landscaping bond, revocation of the certificate of occupancy of two tenants, issuance of two civil infractions against him, and issuance of an order requiring him to test the development's sewer water discharge rate.

III. CURRENT CIRCUIT COURT PROCEEDINGS

In the matter underlying this appeal, Sackllah initially filed two separate circuit court actions against the Township, one appealing the ZBA's denial of his variance requests and the other raising various constitutional and tort claims. After the circuit court dismissed the variance-related action as untimely, the court allowed Sackllah to file an amended complaint that basically merged Sackllah's complaints against the ZBA into the constitutional claims. Ultimately, Sackllah challenged the Township's sign ordinance on exclusionary zoning, equal protection, substantive due process, and free speech grounds. Sackllah also asserted that the Township committed the intentional torts of abuse of process by failing to follow its own zoning ordinance and tortious interference with a business relationship.

Near the close of discovery, the Township moved for summary disposition on several grounds. Sackllah filed a cross-motion for summary disposition and subsequently agreed to dismiss his exclusionary zoning claim. The circuit court ultimately ruled that the Township was immune from tort liability and dismissed the abuse of process and tortious interference claims. The court further ruled that Sackllah's constitutional claims were not viable. The circuit court rejected Sackllah's substantive due process claim because he did not have a vested interest in the right to install internally illuminated wall signs or any window signs absent a permit. The court further found that the Township cited clearly articulated reasons for denying Sackllah's requests and therefore did not act in an arbitrary or capricious manner. The court rejected Sackllah's equal protection claim because he failed to produce evidence of truly comparable properties that were given preferential treatment. Finally, the circuit court dismissed Sackllah's First Amendment claim, but based on equal protection grounds. Specifically, the court found that Sackllah failed to present any evidence that the Township selectively enforced the zoning ordinance against him to restrict speech on his property.

IV. STANDARD OF REVIEW

The Township sought summary disposition under MCR 2.116(C)(7) (governmental immunity and res judicata/collateral estoppel) and (10) (failure to present a genuine issue of

material fact).[5] We review a trial court's grant of summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). To succeed on a motion under MCR 2.116(C)(7), the moving party must establish through admissible "affidavits, depositions, admissions, or other documentary evidence," that the plaintiff's claims are barred by "immunity granted by law" or by operation of a prior judgment. This Court accepts the statements made in the plaintiff's complaint as true unless contradicted by the evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (internal citations omitted).]

We review the underlying issues regarding the interpretation and application of the Township's ordinance de novo as a question of law. *Great Lakes Society v Georgetown Twp*, 281 Mich App 396, 407-408; 761 NW2d 371 (2008). We also review plaintiff's constitutional challenges de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010).

V. SUMMARY DISPOSITION ON INCOMPLETE DISCOVERY

Sackllah argues that the circuit court prematurely dismissed his claims before the close of discovery. "[S]ummary disposition is generally premature if granted before completing discovery regarding a disputed issue." *Davis v Detroit*, 269 Mich App 376, 379; 711 NW2d 462 (2006). The court may grant such a motion, however, where "there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). The nonmoving party may not rely on "mere conjecture" to overcome summary disposition. *Davis*, 269 Mich App at 380. Rather, it must come forward with independent evidence to support its allegations and show the existence of a genuine factual dispute. *VanVorous v Burmeister*, 262 Mich App 467, 477-478; 687 NW2d 132 (2004). If the nonmoving party claims that it cannot obtain information necessary to its challenge absent a witness deposition or affidavit, the party must comply with the requirements of MCR 2.116(H) to describe the nature of the missing evidence. *Coblentz*, 475 Mich at 570-571.

While Sackllah contested the Township's motion for summary disposition as premature, he actually filed his own motion for summary disposition based on the evidence then before the

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[5] The Township also sought dismissal of Sackllah's exclusionary zoning claim under MCR 2.116(C)(8) (failure to state a claim), but Sackllah voluntarily dismissed that count.

court. Sackllah contends that he should have been allowed to depose several expert witnesses and to review the Township's answers to interrogatories before summary disposition was granted. Yet, Sackllah has never filed an affidavit naming these witnesses and describing their probable testimony as required by MCR 2.116(H) nor has he produced affidavits from the witnesses themselves. In any event, we discern no "fair likelihood" that additional discovery would have assisted Sackllah's cause. *Liparoto Constr*, 284 Mich App at 33-34. As we discuss *infra*, Sackllah's claims lack merit and the additionally proposed evidence would not change that result.

VI. FIRST AMENDMENT

Sackllah challenges the validity of the Township's sign ordinance on First Amendment grounds. He contends that the ordinance is unconstitutional, both facially and as applied to his property. Specifically, Sackllah asserts that the ordinance pervasively restricts both commercial and noncommercial protected speech in the "All Other Areas" sign district by prohibiting all permanent window signs and by severely limiting the use of temporary signs based on content. Sackllah exhaustively analyzes the ordinance under the standards applicable to content-based restrictions of both commercial and noncommercial speech before concluding that the ordinance fails all tests of constitutionality. Sackllah adapts the same arguments to his claim that the ordinance violates his right to free speech as applied.[6]

First and foremost, we reject the Township's claim that Sackllah lacked standing to raise a First Amendment challenge. The Township raised the issue of standing in its motion for summary disposition, but the circuit court rejected it. A party has standing where it "has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Sackllah has standing as the owner and landlord of a strip mall open to the public who has been denied the right to post various signs. Sackllah has suffered economic injury through the loss of tenants and his tenants' inability to attract customers through the use of signs. The Township has issued two civil infractions against Sackllah personally based on the installation of signs without a permit. The Township's actions "detrimentally affected" Sackllah's property interests "in a manner different from the citizenry at large." *Id.* Accordingly, Sackllah has standing to raise this claim.[7]

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[6] It appears that Sackllah has only ever sought to convey commercial messages through the use of signs on his property. The record shows that Sackllah and his tenants wanted to use various large signs to advertise the grand opening of the strip mall and smaller signs for everyday advertising purposes. Sackllah now raises a theoretical challenge that he is unconstitutionally precluded from displaying noncommercial signs, such as a sign stating "Support Our Troops."

[7] The parties spend considerable time discussing the relaxed standards for standing in First Amendment cases. We need not resort to such an inquiry as Sackllah has suffered a personal injury in this regard and, therefore, has standing under Michigan law.

Sackllah raises both facial and as applied attacks to the sign ordinance.

> A facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. An "as applied" challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution. [*Paragon Props Co v Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996).]

Both the Michigan and federal constitutions protect the freedom of speech. US Const, Am I ("Congress shall make no law . . . abridging the freedom of speech."); Mich Const 1963, art 1, § 5 ("[N]o law shall be enacted to restrain or abridge the liberty of speech."). Moreover, the United States Supreme Court has found that "signs are a form of expression protected by the Free Speech Clause." *City of Ladue v Gilleo*, 512 US 43, 48; 114 S Ct 2038; 129 L Ed 2d 36 (1994). But signs, regardless of their content, pose special problems that are properly subject to regulation under the state's police powers. *Id.*; *Members of the City Council of the City of Los Angeles v Taxpayers for Vincent*, 466 US 789, 805; 104 S Ct 2118; 80 L Ed 2d 772 (1984). As noted in *City of Ladue*, 512 US at 48, "signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." In Michigan, the Legislature permits local governments to enact such regulations through the Zoning Enabling Act:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare. [MCL 125.3201(1).]

In general, an ordinance governing the use of land "comes to us clothed with every presumption of validity." *Delta Charter Twp v Dinolfo*, 419 Mich 253, 268; 351 NW2d 831 (1984) (internal quotations omitted). The challenging party has the burden to show "that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property" and that the "restrictions on his property preclude its use for any purpose to which it is reasonably adapted." *Id.* First Amendment challenges to a zoning ordinance are reviewed under more specific standards depending on the nature of the restriction and the type of speech affected. At its most basic, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v Stevens*, ___ US ___; 130 S Ct 1577, 1584; 176 L Ed 2d 435 (2010) (internal quotations omitted). Accordingly, when a party challenges the government's restriction of his speech, we must first determine whether the restriction is "content-based" or "content-neutral."

In determining whether a regulation is content-neutral, we focus on the government's intent:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech. [*Ward v Rock Against Racism*, 491 US 781, 791; 109 S Ct 2746; 105 L Ed 2d 661 (1989).]

Once we categorize the restriction on speech, we can determine the level of review we must employ. If the restriction is content-neutral, we review it to determine if it is "narrowly tailored to serve a significant governmental interest" and if the government has left "open ample alternative channels for communication of the information." *Ward*, 491 US at 791. We presume that content-neutral regulations are valid and constitutional. *Truckor v Erie Twp*, 283 Mich App 154, 162-163; 771 NW2d 1 (2009).

We presume that content-based restrictions, however, are invalid and unconstitutional. *Stevens*, 130 S Ct at 1584. Not all speech is created equal, however, and a government's restriction of noncommercial speech is reviewed more closely than a restriction of commercial speech. *Rochester Hills v Schultz*, 459 Mich 486, 490; 592 NW2d 69 (1999). A content-based restriction of *noncommercial* speech must withstand "strict scrutiny" review; "it must be narrowly tailored to promote a compelling Government interest" and must be the least restrictive alternative to accomplish the government's purposes. *United States v Playboy Entertainment Group, Inc*, 529 US 803, 813; 120 S Ct 1878; 146 L Ed 2d 865 (2000). Commercial speech (speech proposing a commercial transaction or disseminating information relevant to the marketplace), *Posadas De Puerto Rico Assocs v Tourism Co of Puerto Rico*, 478 US 328, 340; 106 S Ct 2968; 92 L Ed 2d 266 (1986); *Central Hudson Gas & Electric Corp v Pub Service Comm of New York*, 447 US 557, 561-562; 100 S Ct 2343; 65 L Ed 2d 341 (1980), "occurs in an area traditionally subject to government regulation." *Id.* at 562. In recognition of the government's interest in regulation, we employ an "intermediate standard of review" to consider whether the restriction directly advances a substantial government interest. *Edenfield v Fane*, 507 US 761, 767; 113 S Ct 1792; 123 L Ed 2d 543 (1993); *Central Hudson*, 447 US at 563-565.

Portions of the Township's sign ordinance are clearly content-neutral and Sackllah does not challenge their validity as permissible regulations on the placement and design of signs. Those provisions governing the size, physical placement, illumination, and other design elements of signs have no relation to the message conveyed. See, e.g., *King Enterprises, Inc v Thomas Twp*, 215 F Supp 2d 891, 909 (ED Mich 2002) (finding similar ordinance provisions to be content-neutral). Moreover, these types of regulations impose merely "reasonable time, place, and manner restrictions," are narrowly tailored to serve the Township's interests in traffic safety and aesthetics, and leave open ample channels of communication as the speaker may erect signs within allowable size, design and location limits.

We are given pause, however, by the ordinance provisions exempting certain signs from the ordinance's prohibitions and permit requirements.[8]

> [A]n exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people. Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the permissible subjects for public debate and thereby to control the search for political truth. [*City of Ladue*, 512 US at 51 (internal quotations omitted).]

Our concern stems from the fact that no clear standards guide our determination of whether such exemptions impermissibly favor the topic or viewpoint of speech, thereby qualifying as "content-based." Our analytic challenge originates with the highly splintered United States Supreme Court opinion in *Metromedia, Inc v City of San Diego*, 453 US 490; 101 S Ct 2882; 69 L Ed 2d 800 (1981). The San Diego ordinance generally prohibited billboards in order to improve traffic safety and aesthetics. *Id.* at 493. The ordinance permitted onsite billboards identifying onsite businesses but banned offsite billboards advertising messages unrelated to their location. *Id.* at 494. Similar to the ordinance in this case, the San Diego ordinance exempted 12 specific categories of signs from the offsite billboard prohibition, similar to the ordinance in this case. *Id.* at 494-495. Basically, the San Diego ordinance allowed "onsite commercial advertising" while prohibiting offsite commercial and noncommercial billboards "unless permitted by one of the specific exceptions." *Id.* at 495-496.

Justice White, writing for the plurality, noted that the city had a legitimate interest in regulating the secondary effects of this large-sized medium of speech, but that interest had to be carefully weighed against First Amendment rights. *Id.* at 502.

> Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government's regulatory interests with the individual's right to

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[8] The exempted signs under Northville Township Zoning Ordinance, § 145-5 include: (A) "regulatory and street signs;" (B) displays for "holidays, public demonstrations, promotions, civic welfare or charitable purposes;" (C) tenant directories positioned outside a building; (D) "municipal signs," such as "legal notices, emergency signs, special events or other signs sanctioned by the Township;" (E) "flags bearing the official design of the United States, State of Michigan, a public educational institution, or official design of a corporation or award flags;" (F) real estate flags marketing new developments; (G) "memorial signs or tablets, names of buildings and date of erection;" (H) bulletin boards placed outside civic and religious buildings; (I) real estate "For Sale" signs; (J) "informational signs, attached to a building and of a size and scale intended to be viewed by pedestrians, such as but not limited to menus, hours of operation, etc.;" (K) garage sale signs; (L) "now hiring" signs; and (M) "temporary signs related to an election, to identify seasonal events or civic functions."

> expression. A court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. [*Id.* (internal quotation omitted).]

The plurality determined that the San Diego ordinance "reaches too far into the realm of protected speech," *id.* at 521, by allowing commercial onsite billboards while banning "all noncommercial signs except those specifically excepted." *Id.* at 520.[9]

Even though the ordinance discriminated against offsite commercial speech in favor of onsite commercial speech, the plurality accepted that the ordinance directly advanced a substantial governmental interest. The plurality rejected the city's justification, however, for favoring commercial speech over noncommercial speech. Noncommercial speech enjoys greater constitutional protection than commercial speech, and the city could not justify its inversion of that principle. *Id.* at 513.

Writing for the two-Justice concurrence, Justice Brennan opined that the San Diego ordinance was a "content-neutral" prohibition of all billboards and "the exceptions [did] not alter the overall character of the ban." *Id.* at 525-526. The concurrence believed that the city had not supplied a significant government interest to prohibit billboards because the city failed to establish that billboards actually impact traffic safety, *id.* at 528, and allowed too much speech to sincerely justify its concern with aesthetics. *Id.* at 529-531. The concurrence also rejected the plurality's insinuation that a city could constitutionally preview speech to categorize its content and then discriminate in favor of noncommercial speech over commercial speech. *Id.* at 536-537.

The Supreme Court reached no majority standard for classifying such regulatory ordinances as content-based or content-neutral. Neither did the Court reach a majority standard regarding the disparate treatment allowed between commercial and noncommercial speech or between messages within the categories of commercial and noncommercial speech. Accordingly, lower courts were left with no direction on how to analyze broad prohibitions of certain methods of communication containing specific exemptions. As noted by this Court, "[a] plurality opinion of the United States Supreme Court . . . is not binding precedent."[10] Following the nonbinding plurality opinion in *Metromedia*, lower courts have reached highly divergent results in analyzing such ordinances.

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[9] The San Diego ordinance generally disallowed offsite billboards, yet created 12 exceptions for "various kinds of noncommercial signs, whether on property where goods and services are offered or not, that would otherwise be within the general ban." *Id.* at 514. The Supreme Court held that the ordinance's distinctions failed to pass constitutional muster, as "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse[.]" *Id.* at 515.

[10] *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

In *HDV-Greektown, LLC v Detroit*, 568 F3d 609 (CA 6, 2009), for example, the Sixth Circuit determined that a zoning ordinance could be content-neutral even if it categorized signs according to content. In that case, the plaintiff challenged a city ordinance that separately defined advertising, business, and political signs and imposed different size and design regulations on each. *Id.* at 622. The *HDV-Greektown* Court defined content-neutrality consistent with various United States Supreme Court precedents:

> An ordinance is not a content-based regulation of speech if (1) the regulation controls only the places where the speech may occur, (2) the regulation was not adopted because of disagreement with the message that the speech conveys, or (3) the government's interests in the regulation are unrelated to the content of the affected speech. [*HDV-Greektown*, 568 F3d at 621, citing *Hill v Colorado*, 530 US 703, 719-720; 120 S Ct 2480; 147 L Ed 2d 597 (2000).]

The Sixth Circuit rejected that the distinctions between the types of speech listed in the ordinance amounted to a content-based regulation. Rather, the court held, "[t]here is simply nothing in the record to indicate that the distinctions between the various types of signs reflect a meaningful preference for one type of speech over another." *Id.* at 622. In doing so, the Sixth Circuit expressly rejected the Eleventh Circuit's approach to analyzing such cases.

In *Solantic, LLC v City of Neptune Beach*, 410 F3d 1250 (CA 11, 2005), the Eleventh Circuit held that an ordinance distinguishing between flags of "'government, religious, charitable, fraternal, or other organization[s]'" and any other type of flag amounted to a content-based restriction on speech "'because some types of signs are extensively regulated while others are exempt from regulation based on the nature of the messages they seek to convey.'" *HDV-Greektown*, 568 F3d at 622, quoting *Solantic*, 410 F3d at 1263, 1266. The Sixth Circuit held that the *Solantic* analysis "reflect[ed] an overly narrow conception of the definition of content-neutral speech." *HDV-Greektown*, 568 F3d at 622. The Sixth Circuit indicated that it would have found the *Solantic* ordinance to be content-neutral because it controlled "only the places where the speech may occur," "was not adopted because of disagreement with the message" conveyed, and the government's interests were unrelated to content. *Id.* at 622-623. Given the overly narrow definition given in *Solantic*, the Sixth Circuit Court doubted that any municipal sign ordinance could be deemed content-neutral within the Eleventh Circuit. *Id.* at 623.

We choose to follow the lead of the Sixth Circuit.[11] Pursuant to the standard advanced in *HDV-Greektown*, we hold that the Township's sign ordinance is content-neutral. The ordinance broadly prohibits certain types of signs regardless of content, such as banners, temporary window signs, inflatable signs and sandwich boards. Northville Twp Zoning Ordinance, § 145-4.E. The ordinance permits ground and permanent window signs, also without regard to content. *Id.*, § 145-6.F and H. The ordinance controls the location of the permitted styles of signs, but not

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[11] The opinions of lower federal courts are not binding precedent on our state courts; however, they may be persuasive and instructive to our review. *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

the speech itself. In the more congested commercial areas of the Township, landowners may employ larger and more numerous signs. In the rural area of the Township, where Sackllah's property is located, landowners may employ only nonintrusive signage, both in style and amount. The Township's purpose in distinguishing between sign districts has no relation to the messages conveyed. Rather, the Township's interest is based solely on eliminating visual clutter to promote aesthetics, which is most important in its rural areas, and to promote traffic safety.

The exemptions allowing a landowner in the "All Other Areas" sign district to display certain temporary signs related to an election, seasonal event or civic function, *id.*, § 145-5.M, or seeking employees, *id.*, § 145-5.G, do not change the overall character of the ordinance. As noted by our Supreme Court in *Rochester Hills v Schultz*, 459 Mich at 494, the Township "is not required to remove all signs from [rural] areas in order to further its goal of preserving the character of [rural] neighborhoods . . . . [E]ven if some visual blight remains, a partial, content-neutral ban on signs may nevertheless enhance the City's appearance." The exemptions do not support that the Township's interest in limiting outdoor signs was related to any disagreement with the messages conveyed.

As a content-neutral ban on certain styles of signs within the Township, we must determine if the ordinance is "narrowly tailored to serve a significant governmental interest" and leaves "open ample alternative channels for communication." *Ward*, 491 US at 791. The Township identified two general interests served by the ordinance-aesthetics and traffic safety. It is well established that a township may enact content-neutral regulations to reduce or eliminate the visual clutter caused by signs and thereby advance its interest in aesthetics. *Taxpayers for Vincent*, 466 US at 805-807; *Gannett Outdoor Co of Michigan v City of Troy*, 156 Mich App 126, 134; 409 NW2d 719 (1987). The confusion, distraction, and obstruction caused by signs, and their potential impact on traffic safety, are also significant governmental concerns. *Metromedia*, 453 US at 507-508 (plurality opinion of White, J.); *Wheeler v Comm of Highways, Commonwealth of Kentucky*, 822 F2d 586 (CA 6, 1987).

The Township's sign ordinance is narrowly tailored to achieve its stated significant government interests. Taken as a whole, the Township permits larger and more numerous signs in congested commercial areas where the sign's presence will have little effect on the aesthetics of the surrounding area or an impact on traffic safety. In the rural area in which Sackllah's property is located, however, signage must be more severely restricted to accomplish the government's goals. The differentiation between districts based on the character of the area is narrowly tailored to achieve the Township's more specific cited goal to "[m]aintain and improve the image of the Township by encouraging signs of consistent size which are complementary to related buildings and uses, and are harmonious with their surroundings." Northville Township Zoning Ordinance, § 145-2.H.

The Township's ordinance also leaves open ample channels of communication. "[T]he First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." *Taxpayers for Vincent*, 466 US at 812. While window and other onsite advertising signs may have "advantages over" other mediums of communication, *id.*, Sackllah and his tenants can and have used other mediums. Sackllah and his tenants could employ a personal mass mailing, advertise in the numerous coupon packets sent to residents in our metropolitan area, personally distribute coupons at other area businesses, or hire

a person to dress in a chicken suit and dance on the curb. Ultimately, the Township's content-neutral restriction on outdoor signs is constitutional, both facially and as applied, and additional evidence could not affect our judgment of the ordinance's classification.

VI. SUBSTANTIVE DUE PROCESS

Sackllah next challenges the circuit court's dismissal of his substantive due process claim despite evidence that the Township denied his request to erect internally illuminated signs that were otherwise permitted by the sign ordinance. We need not reach the merits of this challenge, however, as the Township was entitled to summary disposition on other grounds.

The Township contends that Sackllah's substantive due process challenge is barred by principles of res judicata or collateral estoppel because the issue was raised before and decided by the district court in the civil infraction case and Sackllah failed to appeal that ruling. The Township raised this issue in the circuit court, which implicitly rejected this defense when it decided the issue on the merits.

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. [*Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (internal citations omitted).]

Collateral estoppel bars a second litigation of a particular issue when "(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008).

The current circuit court lawsuit involves the same parties as the prior district court action. As noted by Sackllah, however, the district court issued its ruling after Sackllah filed his circuit court action. Sackllah argued in the district court that the Township violated his right to due process of law by rejecting his request to amend the site plan to include internally illuminated wall signs, which are expressly allowed in Northville Twp Zoning Ordinance, § 145-6.E. Both parties had an opportunity to verbally argue their positions before the district court and to submit supplemental briefing on the issue before that court made a ruling. The district court reached a final judgment on the issue—it explicitly rejected Sackllah's contention that the Township violated his right to due process of law, because the Township cited valid reasons to support its decision and therefore did not act in an arbitrary or capricious manner. Sackllah could have appealed the district court judgment to the circuit court and the two cases likely would have been consolidated. As the circuit court action was filed during the pendency of the district court, we will not treat the circuit court action as a "subsequent" suit for purposes of res judicata. However, the Township established the elements to dismiss Sackllah's substantive due process claims under the doctrine of collateral estoppel. The circuit court should not have considered the merits of this claim and neither should this Court.

Although the circuit court erred in rejecting the Township's challenge based on res judicata and collateral estoppel grounds, we need not reverse where the lower court reaches the right result but for the wrong reason. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989). The circuit court dismissed Sackllah's substantive due process challenge, albeit on the merits, and we affirm that result.

VII. EQUAL PROTECTION

Sackllah next challenges the circuit court's dismissal of his equal protection claim. Sackllah asserts that the Township singled him out and treated him differently from other land owners in the "All Other Areas" sign district given that the Township had allowed another development to use internally illuminated signs. This type of equal protection challenge is called a "class of one" claim. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 319-320; 783 NW2d 695 (2010).

The equal protection clauses of the federal and state constitutions require "that all persons similarly situated be treated alike under the law." *Id.* at 318. Generally, an equal protection challenge is raised when the government draws distinctions between groups based on "suspect" factors. *Id.* at 318-319. When an ordinance is facially neutral and applicable to everyone equally, the plaintiff may show that he, as a "class of one," "was actually treated differently from others similarly situated and that no rational basis exists for the dissimilar treatment." *Shepherd Montessori*, 486 Mich at 319-320.

Sackllah claims that another landowner within the "All Other Areas" sign district was allowed to install an internally illuminated sign. We do not doubt that this fact is true; the Township explicitly allows such signs in the "All Other Areas" sign district and so we assume there are many internally illuminated wall signs within that district. However, that is not the correct inquiry in this case. Sackllah sought to install internally illuminated wall signs after he designed a site plan, based on negotiations with the Township and neighboring residents, which included less invasive externally illuminated signs. The correct inquiry therefore is whether the Township treated Sackllah disparately by allowing another landowner to amend its site plan to alter integral characteristics while rejecting Sackllah's request. Sackllah still has not presented any evidence relevant to that inquiry or made an offer of proof in this regard. Accordingly, Sackllah did not create a genuine issue of material fact and the circuit court properly dismissed his equal protection claim.

VIII. TORT CLAIMS

Finally, Sackllah argues that the circuit court erroneously dismissed its claims for abuse of process and tortious interference with advantageous business relationships based on governmental immunity. The governmental tort liability act provides that a "governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The act defines "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). Under this definition, the appropriate focus is on the general activity, not the specific conduct engaged in at the time of the

alleged tort. *Ward v Mich State Univ (On Remand)*, 287 Mich App 76, 84; 782 NW2d 514 (2010); *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003).

Sackllah challenges the method by which the Township applied and enforced its zoning ordinance. These are basic police powers delegated to the Township by statute. See MCL 125.3201 (local government has power to regulate land development through zoning); MCL 125.3501 (local government has power to approve or reject site plans for land development). The Township engaged in "an activity that is expressly . . . mandated or authorized . . . by statute . . . or ordinance," MCL 691.1401(f), and is immune from tort liability. Accordingly, the circuit court properly dismissed Sackllah's tort claims.

Affirmed.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher