

18-002883-CV-272

CAUSE NO. _____

AUSPRO ENTERPRISES, LP,	§	IN THE DISTRICT COURT OF
	§	
<i>Petitioner,</i>	§	
	§	
VS.	§	BRAZOS COUNTY, TEXAS
	§	
THE CITY OF BRYAN and THE CITY	§	
OF BRYAN ZONING BOARD OF	§	
ADJUSTMENT,	§	
	§	
<i>Respondents.</i>	§	_____ JUDICIAL DISTRICT

**VERIFIED PETITION FOR WRIT OF CERTIORARI AND ORIGINAL
PETITION FOR DECLARATORY JUDGMENT**

Petitioner AusPro Enterprises LP (“AusPro”) files this petition for writ of certiorari pursuant to Texas Local Government Code § 211.011. Petitioner respectfully requests that this Court issue a writ of certiorari, issue a temporary restraining order to prevent enforcement of an unlawful decision, and reverse the City of Bryan Zoning Board of Adjustment’s (“ZBA” or “Board”) decision to deny a sign size variance to AusPro.

Petitioner also separately seeks declaratory judgment that the City of Bryan’s (“the City”) sign code violates the free speech guarantees in the United States and Texas Constitutions.

DISCOVERY CONTROL PLAN

1. To the extent any discovery is necessary or appropriate in this action, Petitioner intends for the parties to conduct discovery under a Level 3 discovery control plan. Tex. R. Civ. P. 190.3.

RULE 47(C) DISCLOSURE

2. Pursuant to Tex. R. Civ. P. 47(c), Petitioner seeks non-monetary relief as well as attorneys’ fees and costs of court.

PARTIES AND SERVICE

3. Petitioner AusPro Enterprises, LP is a Texas Limited Partnership with its principal place of business in Austin, Travis County, Texas.

4. Defendant/Respondent City of Bryan is a municipal corporation existing under the laws of the State of Texas with its principal office in Brazos County. The City may be served with process by serving the City Secretary, Mary Lynne Stratta, at 300 South Texas Ave., Bryan, Texas 77803.

5. Defendant/Respondent City of Bryan Zoning Board of Adjustment is an established board of the City of Bryan and may be served with process by serving the City Secretary, Mary Lynne Stratta, at 300 South Texas Ave., Bryan, Texas 77803.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this Petition pursuant to section 211.011(a) of the Texas Local Government Code and because the Petition was filed within 10 days of the Board's decision, *id.* § 211.011(b). Petitioner is aggrieved by the Board's denial and thus has standing to initiate this action. *Id.* § 211.011(a)(1). This Court also has jurisdiction over the declaratory judgment sought by Petitioner pursuant to the Uniform Declaratory Judgments Act, Texas Civil Practice and Remedies Code § 37.001, *et seq.*

7. This Court has venue over this petition because all or a substantial part of the events or omissions occurred in Brazos County, Tex. Civ. Prac. & Rem. Code § 15.002(a)(1); the Respondents/Defendants have their principal office in Brazos County, *id.* § 15.002(a)(3); and the decision of the Board affects an interest in real property that is located wholly within Brazos County, *id.* § 15.011.

FACTS

8. Petitioner files this Verified Petition for Writ of Certiorari and Original Petition for Declaratory Judgment in connection with the Board's denial of a sign variance for the property owned by the Petitioner at 3218 South Texas Avenue, between Elm Avenue and Sulphur Springs Road, occupying part of Lot 1 in Block 1 of A.D. Doerge Subdivision in Bryan, Brazos County, Texas ("the Property").

9. AusPro is a business that owns and manages properties in Texas, many of which contain Planet K retail stores. AusPro purchased the Property in Bryan to open the newest Planet K store. On July 12, 2018, AusPro's agent, Chase Lancaster, applied to the City of Bryan for a permit to install a sign advertising the Planet K store located on the Property (the "Sign"). The application was for a freestanding sign with an area of 128 square feet and height of 20 feet.

10. Gregory S. Cox, Chief Building Official for the City, sent Lancaster a notice of denial of the permit on July 18, 2018. The notice denied the sign permit application stating that "[t]he reasons for denial of the application is [sic] generally that the proposed sign is not in compliance with the requirements of The City of Bryan Code of Ordinances, Chapter 98-Signs and other applicable city ordinances." The notice specifically stated that the Sign exceeded the maximum area and height for signs allowed on property zoned Retail District (C-2). The notice also stated that the Sign was in violation of the City's code of ordinances and failure to remove it would result in an enforcement action that will include the issuance of a citation to appear in Municipal Court. The notice advised that any concerns regarding should be directed to Cody Cravatt, the Development Manager for the City.

11. Michael Kleinman, the Managing Director of AusPro, submitted a ZBA Variance Application to the City on August 31, 2018 seeking a variance for AusPro's Sign and to allow it

to remain in its current location. The application stated the variance was necessary for AusPro to enjoy and preserve its substantial property rights in the South Texas Avenue property to be able to run a successful business. It noted that the Sign is its marketing lifeblood and that it is surrounded by others that are even larger and of greater height. The application also gave a corrected measurement of the sign's height as 22 feet tall.

12. Cox, the City's Chief Building Official, denied AusPro's request of a variance by letter on September 12, 2018, stating that "[a] free standing sign for this zone with approximately 145 linear feet of frontage would be limited to 75' square feet maximum, 11' in height maximum, and a minimum of 20' back from the edge of curb per the sign ordinance." The notice also stated that any concerns regarding it were to be directed to Cody Cravatt.

13. Counsel for AusPro sent a letter to Cody Cravatt on September 17, 2018, advising the City that its sign ordinance violates the First Amendment on its face because it impermissibly regulates signs based on their content. The letter cited the United States Supreme Court's opinion in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), which held that a municipal sign ordinance violated the First Amendment because it made content-based distinctions between different categories of signs, including ideological signs, political signs, and temporary directional signs. *Id.* at 2224-25. As the Court explained in *Reed*, "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230. It held that the ordinance was content based, and thus subject to strict scrutiny, because it "singles out specific subject matter for differential treatment." *Id.* The Court held that the sign ordinance could not satisfy strict scrutiny, rejecting the town's proffered interests of aesthetic appeal and traffic safety as "hopelessly underinclusive." *Id.* at 2231.

14. AusPro’s counsel also noted AusPro’s own recent successful challenge to the Texas Highway Beautification Act, in which the Austin Court of Appeals applied *Reed* to strike down the Act and its implementing regulations because they were impermissibly content-based and could not satisfy strict scrutiny. *See AusPro Enters., LP v. Tex. Dep’t of Transp.*, 506 S.W.3d 688 (Tex. App. –Austin 2016, pet. granted, judgment vacated w.r.m.). AusPro’s counsel explained that the Texas Legislature repealed and replaced the Act in 2017 to remove the content-based provisions struck down by the court in *AusPro*. *See* Act of May 20, 2017, ch. 964, §§ 2, 33, 2017 Tex. Gen. Laws 3901 (codified at Tex. Transp. Code § 391.001(1-a)(A)). AusPro further explained that the City’s content-based regulatory scheme may be challenged on its face. Kleinman also provided a copy of the letter to the Bryan City Council. City officials never responded to the letter, however.

15. The Board held a hearing on the Chief Building Official’s denial of AusPro’s sign variance request at its meeting of October 26, 2018. The Board voted to deny AusPro’s appeal of the Chief Building Official’s denial of a request for a sign variance. The notification of this action gave no reasoning for the Board’s decision.

16. The City refuses to approve AusPro’s pending building permit applications for the Property while the Sign remains on the property, despite AusPro’s expressed concerns about the constitutionality of the City’s sign code. The City informed AusPro by letters sent by Gregory Cox on July 20, 2018 and August 19, 2018 that the City will not approve AusPro’s building permit applications for the Property until the sign is removed. Thus, AusPro has been unable to obtain the building permits necessary to open its building to its customers and has been forced to operate its business from a tent located on the Property. This subjects AusPro to repeated monetary fines under the City’s Peddler’s and Solicitors Ordinance, which prohibits “itinerant

vendors”—broadly defined to include “[o]utdoor sales booths” and “tent sales”—from “locat[ing] for more than three consecutive days or 21 cumulative days per year in an area.” Bryan, Tex., Code of Ordinances ch. 90, art. II, §§ 90-19, 90-22(a) (2018). AusPro has also received multiple citations under the City’s sign code. As a result, AusPro has suffered financially from the loss of potential business and the repeated incursion of fines, while the City continues to hold its building permits hostage to an unconstitutional sign ordinance.

WRIT OF CERTIORARI

17. Petitioner realleges and incorporates Paragraphs 1 – 16 as though fully set forth herein.

18. Pursuant to Section 211.011 of the Texas Local Government Code and Bryan, Texas Code of Ordinances § 130-41(g)(5), Petitioner files this Petition for Writ of Certiorari in order to appeal the Board’s decision in its case number AA 18-03. Petitioner requests this Court grant Petitioner’s request for a writ of certiorari and execute an order, in the form of the proposed order accompanying this filing, directing the Board to prepare the records and transcript relating to its Case No. AA 18-03.

19. All conditions precedent to this Petition for Writ of Certiorari have occurred or been performed.

The Board’s Decision Was Illegal and a Clear Abuse of Discretion.

20. The Court should hold that the Board’s decision was illegal because it enforced an unconstitutional regulation of speech in violation of the U.S. and Texas Constitutions. As AusPro explained in its letter to the City, the Bryan sign ordinance suffers from the same constitutional flaws as the since-repealed portions of the Texas Highway Beautification Act and the ordinance struck down in *Reed*. The ordinance contains multiple provisions that treat certain signs differently based on their content, including, “Off-premises signs,” “On-premises signs,” “On-

premises signs setting forth the location of or directions to parking or buildings located on the premises, or regulating the flow of on-premises traffic,” ”construction signs,” and “real estate signs.” *See* Bryan, Tex., Code of Ordinances ch. 98, art. I, §§ 98-5(6), 98-7(1), (4) (2018).

21. AusPro’s Sign is an “On-premises sign[],” which the sign code defines as “a sign which pertains to the use of the premises on which it is located.” *Id.* § 98-3. Thus, in order to determine whether the Sign is an on- or off-premises sign, a city official must look at the content of the Sign to determine whether it relates to an activity taking place on the premises. Courts applying *Reed*, including the Third Court of Appeals in *AusPro*, have held that such distinctions are impermissibly content based. *See, e.g., AusPro*, 506 S.W.3d at 698-701 (striking down exemption for “advertising . . . activities conducted on the property on which it is located”); *Thomas v. Schroer*, 248 F.Supp.3d 868, 879 (W.D. Tenn. 2017) (holding sign law distinguishing between on-premise and off-premise signs was impermissibly content based because it hinged on the content of the sign and whether it sufficiently related to on-premises activities).

22. The Bryan sign ordinance also defines “Advertising” to exclude “(1) Signs protesting against any person, business, organization, property or commercial activity; and (2) Signs promoting or denouncing political, ideological, social or religious issues or beliefs of any person or group.” Bryan, Tex., Code of Ordinances ch.98, art. I, § 98-3 (2018). Those signs receive preferred treatment based on the content of the signs and city officials must likewise assess the content of the sign to determine whether it is exempt.

23. By favoring some signs over other signs based on the content of the signs, the sign code is unconstitutional on its face and as applied to AusPro under the First Amendment to the U.S. Constitution, as well as the Texas Constitution, which is even more protective of free speech rights. *See* U.S. Const. amend. I; Tex. Const. art. I, § 8 (“Every person shall be at liberty

to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.”).

24. Although the Supreme Court decided *Reed* over three years ago, in June of 2015, and the City is, on information and belief, well aware of the decision, it has failed to revise its sign code to remove its content-based distinctions. AusPro informed the City of its objections to the sign code on September 17, 2018, but nevertheless, the Board applied this unconstitutional ordinance to AusPro’s sign. The Board’s decision was illegal because it violated AusPro’s free speech rights under both the United States and Texas Constitutions, failed to analyze or apply the law correctly, and was made arbitrarily and unreasonably without reference to such guiding principles. Accordingly, it constituted a clear abuse of discretion.

**REQUEST FOR TEMPORARY RESTRAINING ORDER PURSUANT TO
TEX. LOC. GOV’T CODE § 211.011**

25. Pursuant to Texas Local Government Code § 211.011(c), Petitioner requests a temporary restraining order staying the Board’s decision denying Petitioner’s appeal of the Chief Building Official’s denial of Petitioner’s application for a sign variance until this Petition has been fully adjudicated. The Court may grant a temporary restraining order under this section if “due cause is shown.” *Id.* There is due cause to grant a temporary restraining order in this case because the City’s illegal enforcement of an unconstitutional sign code is causing serious harm to AusPro.

26. Violations of the Bryan sign code are misdemeanor offenses punishable by a fine between \$50 and \$500 for each day on which a violation occurs. Bryan, Tex., Code of Ordinances ch. 98, art. V, § 98-132 (2018). Moreover, the City’s chief building official may order the sign removed, and the costs of removal are to be paid by the sign owner within 30 days or a lien will be filed against the property. *Id.* § 98-130(a), (b). If the City begins enforcing a

\$500 per day fine or removes AusPro’s sign and places a lien on its property, it would immediately harm AusPro’s protected rights. “Injunctions protecting First Amendment freedoms are always in the public interest.” *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012).

27. Due cause is also shown because the City refuses to approve AusPro’s pending building permit applications for the Property while the Sign remains on the property. The City informed AusPro by letters sent by Gregory Cox on July 20, 2018 and August 19, 2018 that the City will not approve AusPro’s building permit applications for the Property until the sign is removed. Thus, AusPro has been unable to obtain the building permits necessary to open its store to its customers and has been forced to operate its business from a tent located on the Property. This subjects AusPro to repeated monetary fines under the City’s Peddler’s and Solicitors Ordinance, which prohibits “itinerant vendors”—broadly defined to include “[o]utdoor sales booths” and “tent sales”—from “locat[ing] for more than three consecutive days or 21 cumulative days per year in an area.” Bryan, Tex., Code of Ordinances ch. 90, art. II, §§ 90-19, 90-22(a) (2018). AusPro has also received multiple citations under the City’s sign code. As a result, AusPro has suffered financially from the loss of potential business and the repeated incursion of fines, while the City continues to hold its building permits hostage to an unconstitutional sign ordinance.

28. Accordingly, this Court should grant a temporary restraining order to stay the Board’s October 26, 2018 decision and further enforcement of the Bryan sign code against AusPro’s Sign pending full resolution of this Petition.

PETITION FOR DECLARATORY JUDGMENT

29. Separate from the petition for writ of certiorari, Petitioner requests declaratory judgment that chapter 98 of the Bryan Code of Ordinances is unconstitutional under the U.S. and Texas Constitutions.

COUNT ONE – THE BOARD’S DECISION VIOLATES THE FREE SPEECH CLAUSE TO THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

30. Petitioner incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

31. The Supreme Court of the United States held in *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2230 (2015), that a municipal sign ordinance violated the First Amendment because it made content-based distinctions between different categories of signs, including ideological signs, political signs, and temporary directional signs. The Court explained that “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.” *Id.* at 2230. It held that the ordinance was content based, and thus subject to strict scrutiny, because it “singles out specific subject matter for differential treatment.” *Id.* The Court held that the sign ordinance could not satisfy strict scrutiny, rejecting the town’s proffered interests of aesthetic appeal and traffic safety as “hopelessly underinclusive.” *Id.* at 2231.

32. Applying *Reed*, the Austin Court of Appeals struck down the Texas Highway Beautification Act and its implementing regulations because they were impermissibly content-based and could not satisfy strict scrutiny. *See AusPro Enters., LP v. Tex. Dep’t of Transp.*, 506 S.W.3d 688 (Tex. App.—Austin 2016, pet. granted, judgm’t vacated w.r.m.). The Texas Legislature repealed and replaced the Act in 2017 to remove the content-based provisions struck

down by the court in *AusPro*. See Act of May 20, 2017, ch. 964, §§ 2, 33, 2017 Tex. Gen. Laws 3901 (codified at Tex. Transp. Code § 391.001(1-a)(A)).

33. The Bryan sign code suffers from the same constitutional flaws as the Act and the ordinance struck down in *Reed* and *AusPro* because it contains multiple provisions that treat certain signs differently based on their content.

34. Despite being aware of *Reed* for over three years, the City has failed to amend its sign code to remove its content-based distinctions. AusPro raised its concerns with the City about the sign code's unconstitutionality, but the City and the Board continue to enforce its code.

35. Petitioner is entitled to a declaration that the City's sign ordinance violates the Free Speech Clause of the First Amendment to the United States Constitution, made applicable to the States under the Fourteenth Amendment, on its face and as applied to the Petitioner.

**COUNT TWO – THE BOARD’S DECISION VIOLATES THE FREE SPEECH
CLAUSE OF THE TEXAS CONSTITUTION, (Article I, § 8)**

36. Petitioner incorporates and adopts by reference for all purposes each and every allegation in the preceding paragraphs and sections.

37. Petitioner is also entitled to a declaration that the City's sign ordinance violates article I, §8 of the Texas Constitution, on its face and as applied to the Petitioner.

ATTORNEYS’ FEES AND COSTS

38. Pursuant to Section 211.011(f) of the Texas Local Government Code, Petitioner seeks costs and attorneys' fees against the City and the Board because the Board acted with gross negligence, in bad faith, or with malice.

39. Petitioner is also entitled to recover reasonable and necessary attorneys' fees that are equitable and just under Texas Civil Practice & Remedies Code § 37.009 because this is a suit for declaratory relief.

PRAYER FOR RELIEF

40. For these reasons, Petitioner prays that the Court order a writ of certiorari be issued to the City of Bryan Zoning Board of Adjustment; that the writ order a review of the decision of the Board and prescribe a time within which return and service upon the undersigned attorneys must be made; that such writ direct the Board to return certified sworn copies of all papers acted upon in its Case No. AA 18-03, together with transcripts of all testimony and discussion at all meetings in such case; that the Court issue a temporary restraining order pursuant to Texas Local Government Code § 211.011 pending the final resolution of this Petition; that upon hearing, the Court take testimony and evidence with respect to Petitioner's appeal from the decision of the Board; and upon final hearing on such matters, the Court enter judgment determining the rights of the parties and declare that the Bryan sign code is unconstitutional; enter a final declaratory judgment; award attorneys' fees and costs, and grant such further relief, both special and general, to which the Petitioner may be entitled at law and equity.

Respectfully submitted,

PARENTI LAW PLLC

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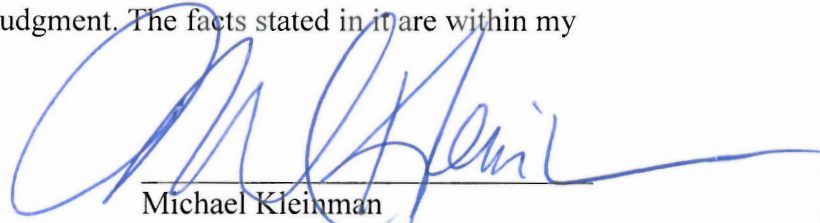
**ATTORNEYS FOR PETITIONER
AUSPRO ENTERPRISES, LP**

VERIFICATION

STATE OF TEXAS §
TRAVIS COUNTY §

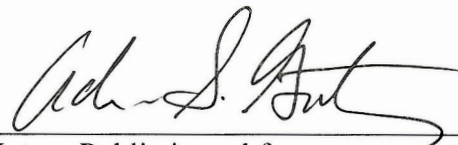
Before me, the undersigned notary, on this day personally appeared Michael Kleinman, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

“My name is Michael Kleinman. I am capable of making this verification. I am Managing Director of AusPro Enterprises, LP. I have read the forgoing Verified Petition for Writ of Certiorari and Original Petition for Declaratory Judgment. The facts stated in it are within my personal knowledge and are true and correct.”



Michael Kleinman

Sworn to and subscribed before me by Michael Kleinman on this 2nd day of November, 2018.



Notary Public in and for
the State of Texas

