

CITY OF ANNAPOLIS,

Plaintiff

vs.

JKB, LLC.,

Defendant.

* IN THE
* DISTRICT COURT
* OF MARYLAND

* FOR
* ANNE ARUNDEL COUNTY
* CASE Nos. 3Z36100900 and 1Z41100851

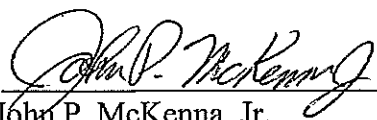
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ORDER

Having found the Defendant, JKB, LLC, in violation of Chapter 21, Section 56.040 A of the Annapolis City Code, it is thereupon this 10th day of May, 2017, by the District Court for Anne Arundel County,

ORDERED, that the Defendant, JKB, LLC, shall abate by July 29, 2017, the aforesaid violations submitting and pursuing an after-the-fact application for a Certificate of Approval for 51-53 West Street, Annapolis, or by pursuing any other lawful means of abatement, and it is further,

ORDERED, that enforcement of this Order is stayed pending any properly noted appeal.



John P. McKenna, Jr.
District Court Judge

CITY OF ANNAPOLIS,	*	IN THE
Plaintiff	*	DISTRICT COURT
vs.	*	OF MARYLAND
JKB, LLC.,	*	FOR
Defendant.	*	ANNE ARUNDEL COUNTY
	*	CASE Nos. 3Z36100900 and 1Z41100851

* * * * *

DECISION

In this action, the City of Annapolis has charged the Defendant JKB, LLC, by civil citation with violation of Section 21.56.040.A by willfully performing or allowing to be performed an alteration of a structure within a designated historic district without a certificate of approval from the Historic Preservation Commission. Defendant JKB has filed a Motion to Dismiss, and at the commencement of the trial in this case on April 21, 2017, the Court denied in part the Defendant's Motion to Dismiss based upon the arguments stated in Section II A and B of the Memorandum in support of Defendant's Motion to Dismiss; however, the Court reserved ruling upon the arguments stated in Section II C, D and E of the Defendant's Memorandum until the conclusion of trial.

The Defendant JKB owns the building located at 51-53 West Street in Annapolis and located within the building are a restaurant and offices. In May of 2015, the Defendant JKB received a Municipal Infraction Notice in regard to the peeling exterior paint on the building. In years past, the Defendant JKB had repainted the exterior of 51-53 West Street on approximately three or four occasions, and in the previous re-paintings of the building, the Defendant JKB had obtained from the City sidewalk closure permits and parking space permits as the only permits

necessary for the completion of the building painting. In May of 2015, the Defendant JKB commissioned artist Jeff Huntington to paint a mural on the exterior surface of the building at 51-53 West Street. Plaintiff's Exhibit 5 is a photograph depicting the peeling exterior paint of JKB's building prior to the creation of the mural by Mr. Huntington depicted in Plaintiff's Exhibit No. 3 admitted at trial. Prior to the painting of the building, the Defendant JKB did not apply for a Certificate of Approval from the City of Annapolis Historic Preservation Commission. Gavin Buckley, a representative of JKB, reviewed provisions of the Annapolis Historic Preservation Commission's Annapolis Historic District Design Manual, and Mr. Buckley concluded that a Certificate of Approval from the Historic Preservation Commission was not necessary for the creation of the mural. Mr. Buckley's conclusion was based upon Design Guideline D8 entitled "Exterior Colors" which states in pertinent part "The HPC (Historic Preservation Commission) does not review exterior paint color except in cases when it forms an integral part of the material proposed". Prior to the creation of the mural, the Defendant JKB therefor obtained the sidewalk closure permit and parking space permit that it had obtained in conjunction with the approximate three to four re-paintings of the exterior of the building in years past. The exterior of the Defendant JKB's building prior to the creation of the mural was covered with a gray coat of paint with black trim on the windows and ledges or awning of the building. A mural was not present on the exterior of the Defendant JKB's building prior to the creation of Mr. Huntington's mural and no testimony was offered at trial to indicate that a mural had ever existed on the exterior surface of the building. The civil infractions which are the subject of this case resulted from the Defendant JKB's failure to obtain a Certificate of Approval from the City of Annapolis Historic Preservation Commission.

In its Motion to Dismiss and at trial, the Defendant JKB asserts defenses based upon the First Amendment to the United States Constitution and also a defense based upon Design Guideline 8 of the Historic Preservation Commission's Annapolis Historic District Design Manual. The Court will first address the application of Design Guideline 8 of the Design Manual.

The purpose of Design Guideline 8 is evident from a common sense reading of that guideline. Design Guideline 8 applies to the exterior colors to be utilized in house paintings or building paintings in the Historic District of the City of Annapolis. The guideline recommends that house paintings or building paintings be based upon historical documentation research or paint analysis. The exterior colors for house paintings and building paintings should be appropriate for the architectural style and historic period of the building, and under the guideline for new buildings and additions, exterior colors should also "be compatible with other colors used along the block". Thus, Design Guideline 8 clearly states that the Historic Preservation Commission of the City of Annapolis does not review the exterior paint colors applied to house paintings or building paintings in the Historic District.

The Defendant JKB commissioned Jeff Huntington to create a mural on the exterior surface of the building at 51-53 West Street in Annapolis. Mr. Huntington is not a house painter or a building painter. Mr. Huntington is a renowned and gifted artist. The mural of his creation that adorns the exterior of 51-53 West Street in Annapolis is a work of art. Design Guideline 8 entitled "Exterior Colors" has no reference in its text to murals or other works of art. Design Guideline 8 of the Annapolis Historic District Design Manual is not controlling of the Court's decision in regard to the issues in this case.

The Defendant JKB has asserted defenses based upon the First Amendment to the United States Constitution. The First Amendment provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech.” U. S. Const. Amend. 1 The First Amendment is applied to the states through the Fourteenth Amendment to the Constitution. Virginia’s Pharmacy Board v. Virginia Citizen’s Consumer Counsel, 425 U. S. 748, 96 S. Ct. 1817 (1976). The First Amendment provides protections not only for actual speech but also for an individual’s symbolic or expressive conduct as well as artwork. Virginia v. Black, 583 U. S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 92003).

In Section 21.08.060 of the Code of the City of Annapolis, the citizens of the City of Annapolis established the Annapolis Historic Preservation Commission and declared in Section 21.56.010 that “the preservation of sites, structures, and districts of historical, cultural, archeological, or architectural significance together with their appurtenances and environmental settings is a public purpose.” Through their elected representatives, the citizens of the City of Annapolis have designated a portion of the city as the Annapolis Historic District, and the boundaries for the historic district are set forth in the city code. Section 21.56.040 A of the city code requires individuals to file “an application for a certificate of approval with the Commission for permission to construct, alter, rehabilitate, restore, reconstruct, move, or demolish” landmarks, sites or structures located within the designated Annapolis Historic District. Chapter 21.56 of the Annapolis City Code contains other provisions pertaining to the consideration of certificates of approval submitted to the Historic Preservation Commission including the form of the application, the referral of the application to the Commission, the issuance of the Commission’s decision with regard to the certificate of approval, the time for the expiration of certificates of approval, appeals from the decision of the Commission with regard to certificates

of approval, and provisions for violation of the code requiring the submission of the certificate of approval. Sections 21.56.060 A through D are particularly important to the present case as those sections of the code delineate the required standards for review of applications for certificates of approval by the Historic Preservation Commission. Section 21.56.060 A states:

“In reviewing applications, the Commission shall give consideration to the historic, cultural, archeological, or architectural significance of the landmark, site, or structure and its relationship to the historic, cultural, archeological, or architectural significance of the surrounding area; the relationship of the exterior architectural features of a landmark, site, or structure to the remainder of the landmark, site, or structure and to the surrounding area; the general compatibility of proposed exterior design, scale, proportion, arrangement, texture, and materials to the land, site, or structure and to the surrounding area; and any other factors including aesthetic factors which the Commission deems to be pertinent.”

Pursuant to Section 21.56.060 B, the Historic Preservation Commission is permitted to consider only exterior features of a landmark, site or structure in considering applications for certificates of approval, and the Commission is prohibited from considering any interior arrangements of the landmark, site, or structure. Importantly, Section 21.56.060 C limits the Commission to consideration of several specific factors in regard to the approval or disapproval of an application for certificate of approval. Section 21.56.060 C states: “The Commission shall not disapprove an application except with respect to the several factors specified in subsection A of this section.”

Section 21.56.040 of the Annapolis City Code is a licensing statute which requires individuals to obtain a license or a certificate of approval before undertaking the alteration, rehabilitation or other forms of work on structures located within the Annapolis Historic District. In the area of free expression under the First Amendment, a licensing statute that places unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. Shuttlesworth v. Birmingham, 394 U. S. 147, 89 S. Ct. 935, 22 L.

Ed. 2d 162 (1969); Cox v. Louisiana, 379 U. S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965). The First Amendment prohibits the vesting of unbridled discretion in the hands of a government official when determining whether or not to grant a license or permit that constitutes a prior restraint on speech. Forsyth County v. Nationalist Movement, 505 U. S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992). A law that subjects the exercise of First Amendment freedoms to the prior restraint of a licensing requirement “must contain narrow, objective, and definite standards to guide the licensing authority.” Forsyth, *supra*, 505 U. S. at 130-31, 112 S. Ct. 2395. Even if the government may constitutionally impose content neutral prohibitions on a particular manner of speech, the government may not condition that speech on obtaining a license or permit from a government official in that official’s boundless discretion. City of Lakewood v. Plain Dealer Publishing Co., 486 U. S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

A review of Section 21.56.060 A of the Annapolis City Code governing the review of applications for certificates of approval reveals that the Historic Preservation Commission is granted by that statute unbridled and boundless discretion in determining whether to grant a license in the form of a certificate of approval. Section 21.56.060 A contains a specific listing of factors that the Historic Preservation Commission must, pursuant to Section 21.56.060, consider in the approval or disapproval of a certificate of approval, however the last phrase of Section 21.56.060 A grants to the Historic Preservation Commission wide-reaching discretion in that the Commission may consider “any other factors including aesthetic factors which the Commission deems to be pertinent”. Aside from the consideration of aesthetic factors, the grant of authority to the Historic Preservation Commission in the last phrase of Section 21.56.060 A to consider “any other factors . . . which the Commission deems to be pertinent” permits the Commission to exercise an open-ended and limitless discretion in determining factors justifying the approval or

disapproval of a certificate of approval under the statute. This form of prior restraint resting upon the unbridled and limitless discretion of government officials, the Historic Preservation Commission, violates the First Amendment under the rules stated in City of Lakewood v. Plain Dealer Publishing Co., *supra*; Forsyth County v. Nationalist Movement, *supra*, and Freedman v. Maryland, 380 U. S. 51, 85 S. Ct. 734, 13 L. E. 2d 649 (1965). For this reason, the Court concludes that the grant of unbridled discretion to the Historic Preservation Commission in the last phrase of Section 21.56.060 A of the Annapolis City Code allowing the consideration of “any other factors. . .which the Commission deems to be pertinent” is unconstitutional, invalid, and unenforceable.

Even though the above-referenced last phrase of Section 21.56.060 A of the Annapolis City Code is deemed unconstitutional, the Court must further address the issue of whether the remaining provisions stated in that subsection of the code are nevertheless enforceable. The remaining phrases and text of Subsection 21.56.060 A contain specific and definite standards for the Historic Preservation Commission to utilize in determining whether to issue, approve or disapprove a certificate of approval. In Jackson v. Dackman, 422 Md. 357, 30 A. 3d 854 (2011), the Court considered the issue of severability. Even in the absence of a severability statute, “there is a strong presumption that if a portion of an enactment is found to be invalid, the intent is that such portion be severed” Jackson v. Dackman, *supra* at 383-384 citing Board v. Smallwood, 327 Md. 220, 245, 608 A. 2d 1222, 1234 (1992). The principal test is whether “the dominant purpose of an enactment may largely be carried out notwithstanding the enactment’s partial invalidity”. Citing Board v. Smallwood, *supra*, 327 Md. At 246, 608 A. 2d at 1235. See also Davis v. State, 294 Md. 370 (1982). The Annapolis City Code in Section 1.04.050 contains

a provision providing for severability in its statutes. Section 1.04.050 of the Annapolis City Code states:

“Should any section, subsection, paragraph, sentence, clause, phrase or word of this code be declared invalid or unconstitutional by the final judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect any of the remaining words, phrases, clauses, sentences, paragraphs, subsections or sections of this code, since the same would have been enacted without the incorporation in this code of any such invalid or unconstitutional words, phrase, clause, sentence, paragraph, subsection or section.”

In light of the severability provision found in the Annapolis City Code, the Court concludes that the unconstitutionality of the last phrase of Section 21.56.060 A of the Annapolis City Code does not render the remaining provisions of that subsection invalid but instead those provisions may be properly applied by the Historic Preservation Commission in determining whether a certificate of approval should be issued subject to further consideration of the Defendant JKB's remaining challenges to the ordinance under the First Amendment.

In FW/PBS, Inc., v. City of Dallas, 493 U. S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), the Court considered the procedural safeguards necessary to sustain a prior restraint of speech in the context of a licensing statute. Relying upon Freedman v. Maryland, 380 U. S. at 58-60, 85 S. Ct. at 738-740, the Court identified three necessary procedural safeguards in cases involving prior restraints of speech:

- (1) Any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained;
- (2) Expedient judicial review of that decision must be available; and
- (3) The censor must bear the burden of going to suppress the speech and must bear the burden of proof once in court.

A review of the provisions of Chapter 21 of the Annapolis City Code demonstrates that the necessary procedural safeguards as discussed in Freedman v. Maryland, *supra*, are available in the process for the consideration of certificates of approval. Subsection 21.56.070 A, B, and C provide for the issuance of the Commission's decision on a certificate of approval, and Section 21.56.070 C provides that the Commission must generally issue its decision within 45 days of the submission of the application. Also, Section 21.56.100 governing appeals provides that a person aggrieved by a decision of the Historic Preservation Commission has a right of appeal to the Anne Arundel County Circuit Court and possibly to the Court of Special Appeals. Relying upon the reasoning of the Court in FW/PBS, Inc., v. City of Dallas, *supra*, the Court concludes that the limitation on the time within which the Commission must act on the application for the certificate of approval as well as the availability of prompt judicial review dispenses with the third procedural safeguard under Freedman v. Maryland, *supra*, requiring the censor to bear the burden of going to Court to suppress the speech and also bearing the burden of proof once in court. For these reasons, the Court concludes that the provisions of Section 21.56.060 A absent the severed last phrase of the subsection discussed above are not an unconstitutional prior restraint of speech in violation of the First Amendment.

When conducting First Amendment analyses, the level of scrutiny that the court gives to statutes restricting speech depends on whether the regulation of speech is content neutral or content based. Metromedia, Inc. v. City of San Diego, 453 U. S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981). Where the court determines that a challenged law restricts speech on the basis of the content or message of the speech, the law is deemed content based; and the court must apply a level of strict scrutiny to the law such that the law will only be upheld as constitutional if the government shows that it is necessary to serve a compelling state interest and that it is narrowly

drawn to achieve that purpose. Boos v. Barry, 485 U. S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988). Content neutral laws regulate speech without reference to the ideas or views expressed in the speech and only incidentally affect First Amendment speech rights. Turner Broadcasting, Inc., v. FCC, 520 U. S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997). An intermediate scrutiny is applied to content neutral laws, and the law will withstand constitutional challenge if it is found to further some important or substantial government interest unrelated to the suppression of free speech, provided the incidental restrictions do not burden substantially more speech than is necessary to further those interests. Turner Broadcasting, Inc., v. FCC, *supra*.

The principal inquiry in determining content neutrality is whether the government has adopted the regulation of speech because the government agrees or disagrees with the message conveyed by the speech; government regulation of speech and expressive activity is content neutral so long as the law is justified without reference to the content or message of the regulated speech. Clark v. Community for Creative Non-Violence, 468 U. S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984). The government may impose reasonable time, place, and manner restrictions on speech or expression as long as the restrictions in the law are content neutral, narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication. Ward v. Rock Against Racism, 491 U. S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

In this case, the Court must begin by deciding whether the Annapolis Historic Preservation Commission's factors for review of certificates of approval as set forth in Subsection 21.56.060 A of the Annapolis City Code are content based or content neutral in their effect upon First Amendment speech rights. The Court finds that the regulations contained in Section 21.56.060 A are content neutral. The provisions of the Annapolis City Code authorizing

the Historic Preservation Commission to consider certificates of approval were clearly enacted for purposes wholly unrelated to speech. Subsection 21.56.010 B states that the “preservation of sites, structures, and districts of historical, cultural, archaeological or architectural significance . . . is a public purpose”. Subsection 21.56.010 C states that the purpose of the code provisions is “to preserve and enhance the quality of life and to safeguard the historical and cultural heritage of Annapolis”. . . “to strengthen the local economy; to stabilize and improve property values in and around . . . historic areas; to foster civic beauty; and to preserve and promote the appreciation of historic sites . . . for the education and welfare of the citizens of the city”. These provisions of the Annapolis City Code do not target or focus on speech or expressive activity, and the code’s restrictions on First Amendment rights are merely incidental. None of the subject Annapolis City Code provisions refer directly to speech or expressive activity, and nothing in the law indicates that it exists or was enacted to regulate First Amendment speech.

Further, the Annapolis City Code provisions do not distinguish among various types of alterations or improvements. Any alteration or improvement that affects the historic, archaeological, architectural, or cultural significance of a site or structure in the Historic District requires a certificate of approval. Mr. Huntington, the artist who created the mural at 51–53 West Street testified at trial as to the message that he intended to express through his art work. Nothing in Section 21.56.060 A-D authorizes the Historic Preservation Commission to render its decision based on the content or message of Mr. Huntington’s mural. Since the subject provisions of the Annapolis City Code are content neutral, the Court must apply the intermediate level of scrutiny under the rule of Turner Broadcasting, Inc., v. FCC, *supra*.

Historic preservation laws similar to that contained in the Annapolis City Code have been examined under a First Amendment analysis by other courts including cases concerning the

expressive work of artists within designated historical districts. In Board of Managers of SoHo International Arts Condominium v. City of New York, 2004 WL 1982520, the court considered the application of New York City's historic preservation laws to a prominent work of art, architectural sculpture, in the SoHo Cast Iron Historic District of the city. In that case, the city's Landmark's Preservation Commission had concluded that the art work in that case was "aesthetically evocative of an important era in the district's history and contribute(d) to the general welfare purpose of the landmarks law." Relying on Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U. S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984), the court in Board of Managers of SoHo International Arts Condominium v. City of New York, *supra*, noted that aesthetics is a substantial governmental interest within the police power of the state to regulate. In Burke v. City of Charleston, 893 F. Supp. 589 (D.S.C. 1995), the court considered the application of a content neutral regulation in regard to a mural created on the exterior of a building in Charleston's Historic District, and the court concluded that in addition to other specifically identified objectives of the city's historic preservation ordinance, the city possessed a significant governmental interest in the aesthetics of the designated historic areas.

In Horton v. City of St. Augustine, Florida, 272 F. 3d 1318 (11th Cir. 2001), the court held that the government had a significant governmental interest in enforcing a content neutral law restricting performances of street performers and artists, musicians, vocalists and dancers in the city's historic district. In Lusk v. Village of Cold Spring, 418 F. Supp. 314 (S.D.N.Y. 2005), the court held that a municipal ordinance restricting the posting of signs in the village's historic district served a significant governmental interest in enhancing the aesthetic appeal and value of property and fostering a health community spirit. In Globe Newspaper Company v. Beacon Hill Architectural Commission, 100 F. 3d 175 (1996), an ordinance restricting the placement of

sidewalk news racks in the Historic Beacon Hill District of Boston served the city's legitimate governmental interest in maintaining aesthetics of the historic area. Based on the foregoing authority, this Court concludes that the factors including aesthetic factors set forth in Subsection 21.56.060 A of the Annapolis City Code constitute a legitimate and significant governmental interest.

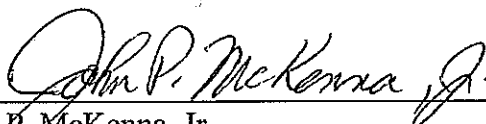
In order to survive the intermediate level of scrutiny applicable to content neutral regulations, the statutes must be narrowly drawn to achieve the significant governmental interest. As noted by the court in Lusk v. Village of Cold Spring, *supra*, without the type of review process utilized by preservation commissions such as the Annapolis Preservation Commission, residents would "be free to remodel or tear down their historic homes, or erect two hundred-foot signs that would completely block the historic structures of the District from view" . . . ; "the historic character of the District court be entirely wiped away". Further, the requirement for the application of a certificate of approval does not mean that the approval will not be granted. The Court concludes that Section 21.56.060 A is narrowly tailored to achieve significant governmental interest.

Further, the subject Annapolis City Code Provisions leave open ample alternative channels for communication as required by the rule of Ward v. Rock Against Racism, *supra*. The city code specifically prohibits the Historic Commission from considering approval of any works of art including murals that are located either within the interior of structures in the Historic District or on the exterior of any structures situated outside the limited area of the Historic District but still within city limits.

Finally, the Court finds that the subject provisions of the Annapolis City Code are not void for vagueness under the standard stated in Hill v. Colorado, 530 U. S. 703, 120 S. Ct. 2480

(2000). Subsection 21.56.020 of the city code defines an "alteration" as "any exterior changes that would affect the historic, cultural or architectural significance of a designated site or structure, any portion of which is visible or intended to be visible from a public way including, but not limited to, construction, reconstruction, moving or demolition. The meaning of this provision is clear and unambiguous. The Court concludes that a reasonable person, of ordinary intelligence and experience, will understand that an application for a certificate of approval is necessary for an alteration in the form of a mural created on an entire side of a building in the Annapolis Historic District. The subject provisions of the Annapolis City Code are not void for vagueness.

In conclusion, and for the reasons stated, the Court finds that the Defendant JKB, LLC, is in violation as alleged in the citations filed in this case and the Plaintiff City of Annapolis is entitled to an Order of Abatement. An appropriate Order will be entered.



John P. McKenna, Jr.
District Court Judge

Date: 5/10/2017