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September 24, 2019

City of Madeira Motion for Continuance

Ordinance Repealing Chapter 159 of Sign Regulations

Ordinance Number 19-04

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOUG OPPENHEIMER,

v.

CITY OF MADEIRA, OHIO,

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Case Nos.: 1:19-CV0770

Judge Michael R. Barrett
Magistrate Judge Bowman

CITY OF MADEIRA'S MOTION FOR CONTINUANCE
OF HEARING ON PLAINTIFF'S MOTION
FOR TEMPORARY RESTRAINING ORDER

Defendant City of Madeira, Ohio ("Madeira") hereby moves, pursuant to Rule 6, to continue the Motion for Temporary Protection Order currently set for argument before this Court at 2 p.m. on September 23, 2019.

As will be set forth more fully herein, the Madeira City Manager has declared a moratorium on the enforcement of the controverted ordinance, obviating any possibility of imminent irreparable harm to Plaintiff Doug Oppenheimer ("Oppenheimer"). Moreover, Madeira City Council will be taking up a proposed ordinance which repeals portions of Chapter 159 of the Codified Ordinances in accordance with recent Sixth Circuit precedent (most specifically *Thomas v. Bright*, No. 17-6238, issued September 11, 2019) at its regularly-scheduled meeting this evening.

Given that Mr. Oppenheimer is entitled to once again erect his signs, Madeira respectfully submits that the further expenditure of judicial resources and legal fees is unnecessary at this juncture. Madeira requests a continuance of at least 48 hours so that the parties may ascertain whether City Council indeed amends its Codified Ordinances in such a

manner as to satisfy the *Thomas v. Bright* requirements and, if so, whether Mr. Oppenheimer's claims have thus been rendered moot.

MEMORANDUM IN SUPPORT

The procedural posture in this matter is mercifully straightforward.

On September 9, a Madeira police officer was dispatched to Mr. Oppenheimer's home in response to a neighbor's complaint. As his own Verified Complaint attests at Paragraphs 45-48, Mr. Oppenheimer had erected two brightly-colored, garish signs in his front yard which putatively criticized Madeira City Council. While misspelled and failing to name individual councilmembers or candidates, the sixteen-square-foot signs appeared to generally reference the upcoming November 5 election, and thus appeared to qualify as "free speech" political signs under relevant provisions of the Madeira Codified Ordinances.

It is uncontroverted that the Madeira officer measured the signs and politely informed Mr. Oppenheimer that they exceeded the six-square-foot-surface-area limit imposed by Codified Ordinance Section 159.26(D). The officer provided Mr. Oppenheimer with a copy of the ordinance but did not cite him; Mr. Oppenheimer indicated that he understood the regulations and would take the signs down.

On September 11, and as noted *supra*, the Sixth Circuit released its *Thomas v. Bright* decision. This decision further developed and applied the central holding of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which essentially renders any content-based restriction on signage subject to strict scrutiny. The Sixth Circuit's central holding was that any legislative scheme which regulates signage based upon its verbiage will face a heightened standard of review.

Shortly after the *Thomas* decision was issued, Mr. Oppenheimer filed the instant Verified Complaint (Doc. No. 1) and Motion for Temporary Restraining Order and Preliminary Injunction (Doc. No. 5). In these pleadings, Mr. Oppenheimer challenged not only the portion of Chapter 159 he had violated regarding sign size limitations in a residential district, but other provisions relating to the number of political or issue signs which can be contemporaneously displayed in one yard. He directed particular ire at the fact that the Codified Ordinances contemplate the erection of larger-than-six-square-foot-surface-area signs for charitable and church fundraisers. Mr. Oppenheimer's Complaint takes aim at churches and charitable institutions whose signs are excepted from the surface area limitation under certain circumstances (Codified Ordinance Section 159.26(G)(4)).

The undersigned Madeira Law Director was served with the Verified Complaint and Motion late in the day on September 19, and a telephone conference was held with Magistrate Judge Bowman on the morning of September 20. A hearing on Mr. Oppenheimer's Temporary Restraining Order was set for September 23.

In the interim, the Madeira City Manager reviewed both the controverted ordinances and the new Sixth Circuit precedent. The Mayor and several members of the Madeira City Council likewise made inquiries regarding the matter.

Madeira reserves all of its arguments in defense of the controverted ordinances, be they substantive or procedural. That said, the City Manager has issued a moratorium on the enforcement of the controverted sign ordinances (a complete and accurate copy of this communication is appended hereto as Exhibit A). This moratorium took the form of a written communication to the Madeira Police Chief and is effective as of this writing.

Additionally, the City Manager has directed the Law Director to prepare a proposed ordinance which addresses the purported deficiencies in the provisions of the Codified Ordinances relating to the display of political, charitable or commercial signage by Madeira citizens, churches or businesses (a true and accurate copy of this proposed legislation is appended hereto as **Exhibit B**). Upon information and belief, such ordinance will be presented as an emergency ordinance at tonight's meeting and given full and immediate consideration by the full Madeira Council without committee review. Upon information and belief, the Law Director will recommend passage of the ordinance in substantially the same form.

Given these undisputed facts, Madeira respectfully requests a short continuance to ascertain the further and expected actions of Madeira City Council. Mr. Oppenheimer will not be prejudiced by this short delay as the controverted ordinances will not be enforced in the interim; he is free to display his signs without delay. Indeed, the public interest would be served by allowing Madeira's elected representatives time to explore a legislative solution to this issue.

If this admittedly unique procedural posture gives the Court any pause, the equities of the situation should go to the City of Madeira and its taxpayers. Mr. Oppenheimer is a second-career and serial litigator *vis-a-vis* Madeira; indeed, the municipality has been forced to take the extraordinary step of seeking to have him declared a "vexatious litigator" under Ohio law (*see City of Madeira v. Oppenheimer*, Hamilton County Common Pleas Case No. 1802415). As the pleadings in that pending case set forth, Mr. Oppenheimer has accused Madeira's elected and appointed officials of numerous bizarre and calumnious acts, none of which have ever been substantiated. In the past three years alone, he has filed four separate lawsuits against the city – all of which have been dismissed at the pleadings stage. This is not a man who was not had his day in court.

While Mr. Oppenheimer's Complaint swaddles his arguments in constitutional accoutrement, the matter before the Court regards only a handful of provisions in a small community's municipal code which may have been invalidated by a weeks-old court decision. The fact that Madeira is willing, in good faith, to examine a legislative solution *sua sponte* should carry the day. There is no need for Madeira taxpayers to foot the bill for additional litigation – by either party – under these circumstances.

Accordingly, Madeira requests that the Court continue this hearing at least 48 hours so that its City Council can review the matter and take appropriate action, with the moratorium on enforcement of the controverted ordinances pending in the interim.

Respectfully submitted,

/s/ Brian W. Fox

Brian W. Fox, Esq. (0086851)

Steven P. Goodin, Esq. (0071713)

Law Director and Counsel for The City of Madeira, Ohio

GRAYDON HEAD & RITCHEY LLP

312 Walnut Street, Suite 1800

Cincinnati, OH 45202

Phone: (513) 629-2706

Fax: (513) 651-3836

Email: bfox@graydon.law

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Clerk of Courts using the CM/ECF system on September 23, 2019, which will send notification of such filing to all counsel of record.

/s/ Brian W. Fox

Brian W. Fox (0086851)

EXHIBIT B

**ORDINANCE NO. 19-__
REPEALING CERTAIN PROVISIONS FROM CHAPTER 159 OF THE CODIFIED
ORDINANCES OF THE CITY OF MADEIRA, OHIO, AND
DECLARING AN EMERGENCY**

WHEREAS, the United States Court of Appeals for the Sixth Circuit issued a decision in *Thomas v. Bright*, No. 17-6238, 2019 WL 4282488 (6th Cir. Sept. 11, 2019) that may impact the underlying constitutionality and enforceability of certain provisions contained in Chapter 159 of the Codified Ordinances of the City of Madeira, and

WHEREAS, in light of the uncertainty surrounding the enforceability of requirements pertaining to temporary signs in residential districts, the City Manager issued a moratorium on the City's enforcement of certain among the provisions of Chapter 159, and

WHEREAS, City Council desires to repeal provisions of Chapter 159 which may be inconsistent with the Sixth Circuit's holding in the *Thomas* decision referenced aforesaid, and

WHEREAS, City Council, rather than hastily replacing the repealed provisions with new regulations, desires to study, deliberate, and determine the best manner of protecting Madeira taxpayers and motorists with regulations pertaining to temporary signs in residential districts, and

WHEREAS, this ordinance is hereby declared to be an emergency measure to provide for the immediate preservation of the peace, property, health or safety, the emergency being the urgent necessity of ensuring compliance with the Sixth Circuit's holding.

NOW, THEREFORE BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MADEIRA, OHIO:

Section 1. City Council hereby repeals Sections 159.19(A)(1)-(7), 159.19(F)(4), 159.20(A), 159.20(C), 159.20(D), 159.20(G), 159.20(I), 159.24(C), and 159.26(D) of the Codified Ordinances of the City of Madeira.

Section 2. City Council for the City of Madeira, Ohio, hereby finds and determines that all formal actions relative to the adoption of this ordinance were taken in an open meeting of this Council, and that all deliberations of this Council and of its committees, if any, which resulted in formal action, were taken in meetings open to the public, in full compliance with applicable legal requirements.

Section 3. This Ordinance is hereby declared to be an emergency measure for the reasons set forth in the final preamble hereto, and shall be in effect from and after its passage.

PASSED/NOT PASSED ON THE 23rd DAY OF SEPTEMBER 2019 BY THE FOLLOWING VOTE:

	YEA:	NAY:	ABSTAIN:	ABSENT:
Traci Theis				
Nancy Spencer				
Melisa Adrien				
Chris Hilberg				
Scott Gehring				
Brian Mueller				
Doug Moormann				

ADOPTED this 23rd day of September, 2019.

Mayor

Attest:

City Clerk

Approved as to form:

City Solicitor

9766669.1

**CITY OF MADEIRA
MEMORANDUM**

TO: Chief David Schaefer

FROM: Thomas W. Moeller, City Manager *Tom*

SUBJECT: Madeira Sign Code
Temporary Signs Enforcement

DATE: September 23, 2019

CC: City Council
Lori Thompson, Assistant City Manager
Brian Fox, Law Director
Planning Commission

Chief Schaefer,

Less than two weeks ago, the United States Court of Appeals for the Sixth Circuit issued a decision in *Thomas v. Bright*, No. 17-6238, 2019 WL 4282488 (6th Cir. Sept. 11, 2019) that may well impact the underlying constitutionality and enforceability of certain provisions contained in Chapter 159 of the Codified Ordinances of the City of Madeira. Given the uncertainty surrounding the enforceability of requirements pertaining to temporary signs in residential districts, the Law Director will be introducing significant changes to Chapter 159 to City Council during this evening's meeting, including the proposed repeal of Sections 159.19(A)(1)-(7), 159.19(F)(4), 159.20(A), 159.20(C), 159.20(D), 159.20(G), 159.20(I), 159.24(C), and 159.26(D) of the Codified Ordinances of the City of Madeira.

As such, please refrain from enforcing any requirements contained in those specific Sections of Chapter 159, and instruct your officers likewise. This moratorium on enforcement of those Sections should last, at a minimum, through the election in November of this year.

Please call me if you have any questions.

Thomas W. Moeller
City Manager



ORDINANCE NO. 19-04
REPEALING CERTAIN PROVISIONS FROM CHAPTER 159 OF THE CODIFIED
ORDINANCES OF THE CITY OF MADEIRA, OHIO, AND
DECLARING AN EMERGENCY

WHEREAS, the United States Court of Appeals for the Sixth Circuit issued a decision in *Thomas v. Bright*, No. 17-6238, 2019 WL 4282488 (6th Cir. Sept. 11, 2019) that may impact the underlying constitutionality and enforceability of certain provisions contained in Chapter 159 of the Codified Ordinances of the City of Madeira, and

WHEREAS, in light of the uncertainty surrounding the enforceability of requirements pertaining to temporary signs in residential districts, the City Manager issued a moratorium on the City's enforcement of certain among the provisions of Chapter 159, and

WHEREAS, City Council desires to repeal provisions of Chapter 159 which may be inconsistent with the Sixth Circuit's holding in the *Thomas* decision referenced aforesaid, and

WHEREAS, City Council, rather than hastily replacing the repealed provisions with new regulations, desires to study, deliberate, and determine the best manner of protecting Madeira taxpayers and motorists with regulations pertaining to temporary signs in residential districts, and

WHEREAS, this ordinance is hereby declared to be an emergency measure to provide for the immediate preservation of the peace, property, health or safety, the emergency being the urgent necessity of ensuring compliance with the Sixth Circuit's holding.

NOW, THEREFORE BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MADEIRA, OHIO:

Section 1. City Council hereby repeals Sections 159.19(A)(1)-(7), 159.19(F)(4), 159.20(A), 159.20(C), 159.20(D), 159.20(G), 159.20(I), 159.24(C), and 159.26(D) of the Codified Ordinances of the City of Madeira. The subject Sections, as amended, are attached hereto as Schedule 1.

Section 2. City Council for the City of Madeira, Ohio, hereby finds and determines that all formal actions relative to the adoption of this ordinance were taken in an open meeting of this Council, and that all deliberations of this Council and of its committees, if any, which resulted in formal action, were taken in meetings open to the public, in full compliance with applicable legal requirements.

Section 3. This Ordinance is hereby declared to be an emergency measure for the reasons set forth in the final preamble hereto, and shall be in effect from and after its passage.

PASSED/NOT PASSED ON THE 23rd DAY OF SEPTEMBER 2019 BY THE FOLLOWING VOTE:

	YEA:	NAY:	ABSTAIN:	ABSENT:
Traci Theis				
Nancy Spencer				
Melisa Adrien				
Chris Hilberg				
Scott Gehring				
Brian Mueller				
Doug Moormann				

ADOPTED this 23rd day of September, 2019.

Mayor

Attest:

City Clerk

Approved as to form:

City Solicitor

9766669.1

ORDINANCE NO. 19-04
SCHEDULE 1

- **Section 159.19(A)(1)-(7)**

(A) General. Temporary signs shall include any sign, banner, pennant, valance or advertising display constructed of cloth, canvas, light fabric, cardboard, wall board or other light materials, with or without frames, intended to be displayed for a short period of time only. ~~Temporary signs may only display one of the following messages:~~

~~(1) Political Messages. These involve signs with a message endorsing candidates for public office (local, state or federal), endorsement of political issues (whether on a ballot or not) and such other messages as set forth a statement regarding a public issue;~~

~~(2) Real Estate Message. These are signs with a message that real estate is "For Sale," "For Lease" or "For Rent." Information pertaining to realtor, that the property is for sale by owner, phone numbers, "Sold," "Sale Pending" and open houses may also be included as part of the message;~~

~~(3) Garage Sale Sign. A sign displaying a message that personal household possessions are for sale. The only message on such a sign shall be either the words "garage sale" or "yard sale," the hours of such sale, and the address or direction to such sale;~~

~~(4) Commercial Message. Any display of words, logos, symbols, pictures or combination thereof which is capable and which is intended to call attention to a business, commodity, service or entertainment;~~

~~(5) Charitable Message. These include announcements of charitable events, fund raising efforts and similar announcements;~~

~~(6) Personal Messages. These include such messages as birth announcements ("It's a Girl"), "Welcome Home" and similar messages of a noncommercial nature incidental to residential use of property; and~~

~~(7) Project Message. Notice regarding a construction or a renovation project in progress on the premises.~~

- **Section 159.19(F)(4)**

(F) Commercial Signs in Office, Retail and Industrial Districts.

(1) Frequency of Permits. Each separate business on a lot or in a business center located in an office, retail or industrial district may display a temporary sign with a commercial message no more than once every 90 days for no more than 30 consecutive days.

(2) Projects Lasting Longer Than 90 Days. Project signs which concern a construction or renovation project intending to last more than 90 days must so indicate on the permit application. The City Manager shall consult with ARO and Building Inspector regarding suitable materials, anchoring, size and aesthetic factors appropriate for the duration of display and location of the project sign. A permit shall be issued only if the proposed sign is in conformity with conditions imposed by the City Manager regarding materials, anchoring, size and aesthetic factors.

(3) Advertising Permitted. The advertisement contained on any temporary sign shall pertain only to the business, industry or pursuit conducted on or within the premises on which the sign is erected or maintained. This provision shall not apply to signs of a civic, political or religious nature.

~~(4) Real Estate, Political and Charitable Message Signs. In addition to the foregoing, real estate, political and charitable message signs may be displayed in office, retail or industrial district, subject to the same restrictions as such signs in residential districts.~~

(5) Real Estate Message Signs. Real estate message signs, as described in division (A)(2) above may be displayed in office, retail and industrial districts. These signs shall not exceed 25 square feet per sign face.

- **Section 159.20(A)**

Temporary signs may be placed on private property in residential districts subject to the following limitations and restrictions.

~~(A) No temporary sign shall be larger than six square feet in area except as provided in division (G)(4) below.~~

- **Section 159.20(C)**

Temporary signs may be placed on private property in residential districts subject to the following limitations and restrictions.

~~(C) No more than one temporary sign per lot may be displayed at any one time, except for the following:~~

~~(1) One temporary sign for each street on which a lot fronts shall be permitted. Thus corner lots and through lots may have more than one sign displayed; and~~

~~(2) One single or double sided political sign per individual candidate and individual issue shall be permitted, except as to corner lots or through lots on which there may be placed one such sign facing or adjacent to each street abutting said lot.~~

- **Section 159.20(D)**

Temporary signs may be placed on private property in residential districts subject to the following limitations and restrictions.

~~(D) No temporary sign shall be displayed for more than 30 days, except signs advertising real estate for sale or lease which has not been sold or leased and except for political signs relating to an issue or candidate in an election. Such political signs may be displayed only during a time period for 60 days prior to the election. Upon application, the City Manager shall issue a permit if it is determined that the sign is in conformity with all provisions of § 159.21. The cost of the permit shall be \$5 for all signs except political, personal message, institutional and civic signs and signs advertising charitable events in which case the permit fee shall be waived. All such permits shall state the beginning and ending date during which the sign may be displayed.~~

- **Section 159.20(G)**

Temporary signs may be placed on private property in residential districts subject to the following limitations and restrictions.

~~(G) Each temporary sign which displays a message concerning or related to an event shall be removed no later than five days, or such lesser period if specified below, after the event has occurred and the message, therefore, no longer serves its intended purpose. These event-oriented signs shall include but not be limited to the following examples:~~

~~(1) Signs endorsing a candidate or issue for a particular election. Signs must be removed no later than five days after the election;~~

~~(2) Signs offering real estate for sale or lease. Signs must be removed within five days after the property is no longer being offered for sale or lease. Signs marked "Sold" may not be displayed for more than five days;~~

~~(3) Signs advertising garage or yard sales must be removed within 24 hours after the sale is completed; and~~

~~(4) Signs which announce charitable, institutional or civic events such as church bazaars, charitable fund-raising events and similar announcements shall not exceed 50 square feet in area nor be more than eight feet high and must be removed within 24 hours of the conclusion of the event.~~

- **Section 159.20(I)**

Temporary signs may be placed on private property in residential districts subject to the following limitations and restrictions.

~~(I) Only temporary signs displaying the following types of copy shall be permitted in residential districts:~~

~~(1) Political signs, either endorsing a candidate, an issue or other similar noncommercial message;~~

~~(2) Real estate signs indicating that the property on which the sign is displayed is for sale or for rent. Open house and directional signs may only be erected 72 hours prior to the scheduled real estate open house and must be removed by 9:00 p.m. the day of the open house. No more than two directional signs per each real estate open house are permitted;~~

~~(3) Yard sale, garage sale or similar signs; provided, however, that such signs may only be displayed during a time period four days prior to such sale;~~

~~(4) Signs which announce charitable or civic events;~~

~~(5) Personal message signs; and~~

~~(6) Project signs.~~

- **Section 159.24(C)**

~~(C) Political and Charitable Event Signs. One application shall be required to obtain a permit for each type of sign to be displayed in the community. The permit, once issued, shall be valid for signs erected on multiple sites throughout the city which promotes a candidate, slate of candidates, political issue or charitable event. The application shall require a minimum of information about the sign and applicant, except it shall provide the name, address and phone number of the person~~

responsible for the maintenance and removal of such signs. The application and permit shall summarize appropriate provisions of this Sign Code, such as area limitation, number of signs per lot and restrictions on placement of signs. A fee of \$5 shall be charged, whether a single or multiple signs are displayed.

- **Section 159.26(D)**

~~(D) First Amendment Safeguards. In order to safeguard the protections offered by the First Amendment, the following provisions shall apply.~~

~~(1) Every parcel in all zoning districts shall be permitted to display one two-sided or one one-sided sign containing any free speech message. Each side of the sign shall not exceed six square feet in area. Such sign shall not require a building or zoning certificate. However, such sign must be kept in good and safe condition. In no event shall such sign be erected in the right of way.~~

~~(2) At any time that the County Board of Elections has identified a candidate or issue that will be placed on the ballot at the next general or special election, one additional sign may be erected for each candidate or issue that the occupant wishes to support or oppose. Such political signs shall still be subject to the dimensional regulations set forth in division (D)(1) of this section. No such sign may be erected in the right of way. All such signs, except for one sign as permitted by division (D)(1) above, shall be removed from display not later than the first Friday immediately following the election.~~

~~(3) If the sign permitted in division (D)(1) or (D)(2) above is not maintained in good and safe condition, notice shall be sent to the property owner by regular mail. The property owner shall have seven days from the date of mailing indicated on the notice to restore or replace the sign to a good and safe condition. If the sign is not restored to good and safe condition within seven days, and the owner or occupant of the property has not filed an appeal from the notice, then the owner and/or occupant shall be in violation of this section and guilty of a minor misdemeanor. Each day that the sign remains in violation of the notice to remove is a separate violation. No additional notices shall be required after the first has been sent.~~

~~(4) Every parcel that is permitted to display a sign containing a commercial message or other permitted message pursuant to the Zoning Code shall be permitted to display a free speech message in lieu of the permitted commercial or other permitted message. However, this provision shall not apply to existing signs displaying a message necessary for public safety, such as message directing vehicular or pedestrian flow, parking restriction signs or fire lane signs. Such sign shall still be subject to the dimensional regulations imposed on each zoning district, including but not limited to size, height, area and setback. This sign shall be permitted in addition to the free speech message permitted by division (D)(1) of this section.~~