SC 96215

IN THE SUPREME COURT OF MISSOURI

ANTIOCH COMMUNITY CHURCH,

Plaintiff-Respondent,

vs.

BOARD OF ZONING ADJUSTMENT OF THE CITY OF KANSAS CITY, MISSOURI,

Defendant-Appellant,

and

CITY OF KANSAS CITY, MISSOURI,

Defendant.

Appeal from the Circuit Court of Clay County, Missouri
Case No. 12CY-CV02727
The Honorable Janet Sutton

SUBSTITUTE BRIEF OF ANTIOCH COMMUNITY CHURCH
(Appellant's Brief per Rule 84.05(e))

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JURISDICTIONAL STATEMENT

This is an appeal by Appellant Board of Zoning Adjustment of the City of Kansas City, Missouri ("BZA") from a judgment of the Clay County Circuit Court reversing the BZA's denial of Respondent Antioch Community Church's request for a variance of the City's Sign Code so as to allow the church to install and use a small (36" x 42") digital display on the church's existing brick monument sign, and directing the BZA to grant the requested variance. (A 1-12; LF 36-47).[1]

After the Missouri Court of Appeals for the Western District unanimously affirmed the Circuit Court's judgment, this Court accepted the BZA's application for transfer. Accordingly, this Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

The original Antioch Church

In 1853, eight years before the start of the Civil War, the Reverend Moses Lard founded the Antioch Church in southern Clay County, Missouri. (LF 559). The site he picked for the Church was roughly midway between Liberty, the county seat of Clay County (which is located on the north side of the Missouri River), and the "City of Kansas," then a small town on the other (south) side of the Missouri River which, coincidentally, was incorporated that very same year.

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[1] References in the form "A" are to the Appendix to this Brief, while references in the form "LF" are to the Legal File.

For more than a hundred years, the Antioch Church held services in its original white clapboard building, which is still standing and which is on the National Register of Historic Sites. (LF 559). The influence of the church on the development of the surrounding area is undisputed.

Most obvious is the fact Antioch Church sits on Antioch Road, now a major thoroughfare in the Northland.[2] (LF 559). Just up Antioch Road from the church was the Antioch Center—the first shopping center in the Northland—and which is now Antioch Crossing, a redeveloped shopping center. (LF 559). And just up Antioch Road from the shopping center is Antioch Middle School. (LF 559).

The "new" church building and the original church sign

More than 100 years after it built its first church building, the church (which had changed its name to Antioch Community Church) built a "new" brick church building in 1956, adjacent to the original building. (LF 559). The church still uses that "new" building." (LF 21). At that same time the church built the "new" building, it also erected a sign in front of the church building. (LF 559). The sign—which is perpendicular to Antioch Road—originally consisted of back-to-back 36" tall x 42" wide plywood and glass display cases surrounded by a brick frame, which matched the brick used to construct the "new" building. (A 24-25;

[2] In fact, the City's own "Kansas City North Community Center" is located at 3930 N.E. Antioch Road, less than ten blocks from the church at 4805 N.E. Antioch Road.

LF 1038-39). Rows of cup hooks were then screwed into the back of each case and individual letters were hung on the cup hooks to spell out a message. (LF 559).

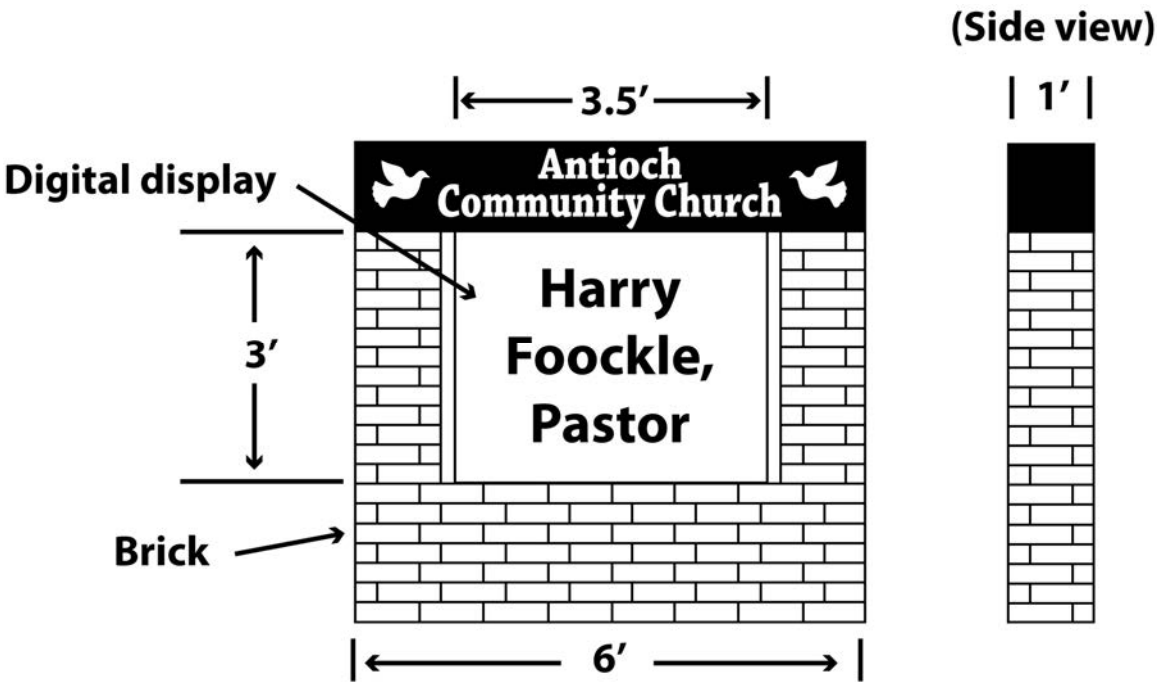
A parishioner's gift to the community

In 2003, a prominent member of the church died and, in his memory, his wife donated money to the neighboring city of Gladstone, Missouri to help pay for a new sign at Gladstone's Oak Grove Park. (LF 559). The sign, which features a digital display, is used (among other things) to promote Gladstone's Theatre in the Park program, which played a prominent role in the lives of the couple's 16 grandchildren. (LF 559).

A short time later, the church received an unexpected bequeath from another parishioner's estate. (LF 559). A suggestion was made to spend the bequest on replacing the two display cases in the 1956 brick sign with a digital display—like the digital display used in the sign at Gladstone's Oak Grove Park. (LF 559). Because the church members were familiar with the digital display on the sign at Oak Grove Park—which sits in the middle of a residential area—no one at the church ever thought there might be a zoning issue. (LF 559).

The bequest is used to purchase a digital display

The digital display was obtained, and installed, by a church member and his sons in 2010. (LF 559). The installation was accomplished by removing the two display cases and placing the double-sided digital display inside the hole left behind in the original brick frame. (LF 559). Here is an engineering drawing of the sign, which the church prepared as part of the BZA proceeding. (A 25; LF 1039).



Under the City's Sign Code, this sign is known as a "monument sign," which the Code defines as "[a] sign placed upon a base that rests upon the ground where the width of the base of the sign is a minimum of 75 percent of the width of the longest part of the sign." (A 23; LF 435). The church's sign meets this definition because its base is 100 percent of the width of the longest part of the sign. (*See* LF 1039) (excerpted above).

The benefits of the new digital display

Following the installation of the new display—which cost $11,426, a substantial sum for a church which had only 150 members (LF 107; 559)—the church received numerous compliments on it. (LF 559). For example, one person noted the display was "an attractive addition for the whole neighborhood." (LF 559). Another person, who recently joined the church, said he was first attracted to the church by the display. (LF 559). Other new members also said they joined because

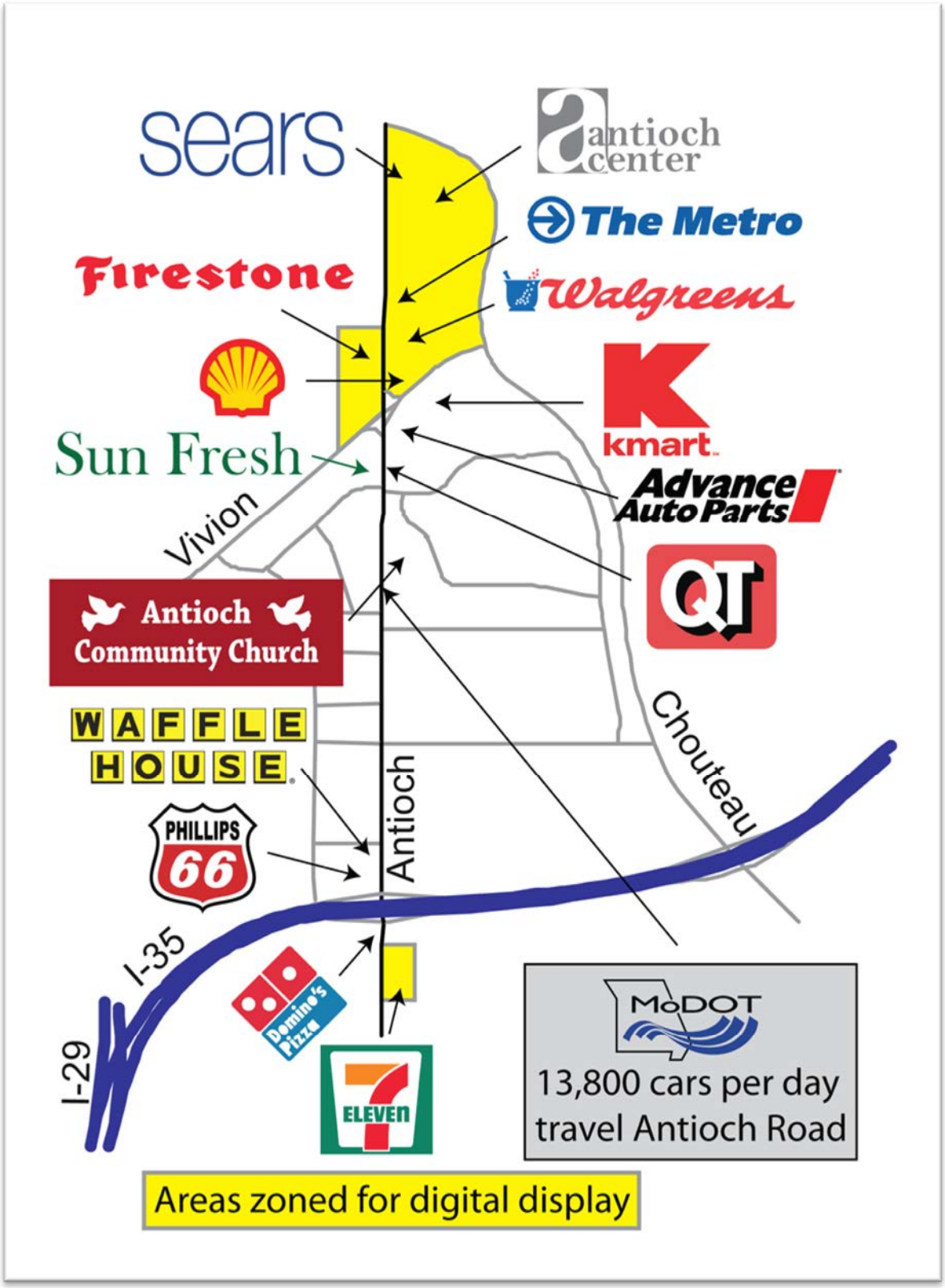
of the messages they read on the sign. (LF 107). Community groups who used the church for events, such as the North Kansas City School District, told the church they were excited their events were posted on the display. (LF 559). At no time did the church ever receive a single complaint about the display. (LF 559).

The new digital display allowed the church to greatly increase the number of messages it could share with the community, because a church member no longer had to go outside, prop open the old display case, and arrange letters by hand to spell words—à la Scrabble. (LF 559). In addition, the letters could now be made larger, thus making it easier (and safer) for passing motorists to read the new larger messages. (LF 559).

The Antioch neighborhood

As noted above, the church sits on Antioch Road, between the former Antioch Center (now Antioch Crossing) and I-35. (LF 560). According to the Missouri Department of Transportation, that one-mile stretch of Antioch Road (which is also known as Missouri Route 1) has an Average Annual Daily Traffic count of 13,800 vehicles. (LF 560). And while the church property is currently zoned residential, the church is sandwiched between the commercially-zoned intersections of Antioch and Vivion Roads at the north end, and Antioch Road and I-35 at the south end. (LF 560; 567-72). Both of these dense commercial areas include areas zoned B4, UR, D or M, which expressly allow digital displays. (LF 560).

The surrounding area is shown on the following map of the area, which was admitted into evidence during the BZA hearing.



(A 26; LF 1044).[3]

Of particular note is the fact the Phillips 66/Circle K convenience store at Antioch Road and I-35 has a pole sign with a digital display. (A 27; LF 1045).

[3] The scale shown on the exhibit (A 26; LF 1044) is incorrect. The actual distance between the I-35 exit to Antioch Road and the intersection of Antioch and Vivion Roads is exactly one-mile, as shown on the official Missouri Highway Map, *see* http://www.modot.org/missourimap, which this Court can take judicial notice of. *See Cherry v. City of Hayti Heights*, 563 S.W.2d 72, 83 (Mo. banc 1978). *See* http://www.modot.org/missourimap/documents/2017/KansasCity.pdf.

The City issues a Notice of Violation

On October 12, 2011—more than a year after the digital display was installed—the City of Kansas City, Missouri, issued a Notice of Violation to the church. (LF 554). The notice—which was addressed to the church's registered agent, who also happens to be the wife of the deceased parishioner who donated the money to help pay for the Oak Grove Park digital display—stated the church was in violation of the Kansas City Zoning and Development Code by "own[ing], leas[ing] and maintain[ing] property on which a digital sign has been placed." (LF 554).

The notice cited Section 88-445-06-A-4 of the Kansas City Zoning and Development Code, which allows a church or school in a residentially-zoned area to have a monument sign (which the church has had since 1956), but which states the sign cannot "include any form of digital or electronic display." (LF 1031).

The full provision reads as follows:

> **4. INSTITUTIONAL USES**
>
> A lot with an institutional use as its principal purpose, such as a church, school, police or fire station, hospital, community center, public park, or other permitted principal uses not described herein, may have:
>
> **(a) MONUMENT SIGNS**
>
> One monument sign per street frontage which may not exceed 32 square feet in area or 6 feet in height. One sign per lot may include

changeable copy, but the changeable copy feature must use direct human intervention for changes and may not include any form of digital or electronic display. Such sign may be internally or externally illuminated.

(A 19; LF 310).

The church appeals, and later seeks a variance

The church timely filed an appeal of the citation. (LF 540-42). Following conversations with the City's staff—and before the appeal was heard—the church also filed an application for a variance. (LF 555-60). In its variance application, the church requested a "variance to allow [a] digital display on existing monument sign erected in 1956, plus any other necessary variance." (LF 555). The church's appeal was put on hold in anticipation of receiving a variance. (LF 1031).

The City's staff report on the requested variance

The staff of the City's Planning and Development Department prepared a report on the church's request for a variance. In the report, which is dated February 14, 2012, the staff took no position as to whether the church had shown a valid basis for the requested variance, but instead took the legal position that the BZA did not have authority to grant the requested variance. (LF 1031).

Specifically, the staff cited Section 88-445-12, which provides that "[t]he Board of Zoning Adjustment may grant variances to the requirements for signs, except as to type and number." (A 22; LF 321). Despite the fact the church's sign squarely meets the definition of a "monument sign," the City's staff report disput-

ed that characterization, and stated instead that the church's sign was a "digital sign," which the staff noted was defined as "[a] sign or component of a sign that uses changing lights to form a message or series of messages that are electronically programmed or modified by electronic processes." (LF 1032).

Based on the staff's conclusion that the sign was not a monument sign—but was a digital sign—the City's staff rendered the legal conclusion that the BZA had no authority to grant a variance under the Sign Code because, according to the City's staff, "[t]he sign on the applicant's property at 4805 NE Antioch Road is a digital sign. Because 'digital sign' is a type of sign, it cannot be varied by the Board of Zoning Adjustment." (LF 1032).

The City's position at the hearing

On February 14, 2012, the BZA held a public hearing on the church's application for a variance. At the hearing, the City's staff presented conflicting testimony as to the type of sign at the church. For example, City Planner Sarah Anzicek began her testimony by describing the church's request as "a request for a variance to allow an existing **digital sign** on an existing **monument sign** to remain." (LF 54) (emphasis added). She went on to testify that "the **monument sign** is allowed in the district but the **digital sign** is not." (LF 55) (emphasis added). Despite repeatedly testifying that the church's sign is both a "monument sign" and a "digital sign," she concluded her testimony by opining that "digital is a type of sign and cannot be varied by the Board of Zoning Adjustment." (LF 56).

Just as the City staff took no position in their report as to whether the church had shown valid grounds for the requested variance, the City staff took no position on that issue during their testimony before the BZA. (LF 54-57). For example, the City proffered no evidence as to the effect of the digital display on the neighborhood, the effect on traffic safety, whether the requested variance was the minimum needed to meet the church's needs, etc. (LF 54-57). Instead, the City simply stood by its contention that the requested variance was not allowed. (LF 54-57).

The church's evidence

In response, the church's representative testified as to his belief that the church's sign was a "monument sign" with a digital display—and that the BZA had authority to allow a monument sign with a digital display. (LF 59-60). He explained that because the BZA has the power to grant a variance as to any aspect "except as to the type and number"—and the "number" and the "type" of sign, *i.e.*, a "monument sign," was not being varied—the BZA could grant the requested variance. (LF 59-60). The church's representative went on to testify that "in the unique facts of this situation where we have an existing monument sign that's been there since 1956 and the only thing done is the manner of display is changed, I think you have the authority to change – to allow that." (LF 75-76).

As to the grounds for the variance, the church's representative testified as to the commercial nature of the area, and even commented that given that Antioch Road, Antioch Middle School, and the nearby Antioch shopping center were all

named after the church, "every … commercial area you see around here is because of Antioch Church." (LF 63). He also testified as to the volume of traffic on Antioch Road, and to the fact the Phillips 66 gas stations at I-35 and Antioch Road has a digital display on its pole sign. (LF 63-64).

He further testified that "the display was changed in reliance upon a unique set of facts which caused the church, ignorant of Kansas City Zoning Code, to purchase this for several thousands of dollars … in reliance upon the fact that one of the parishioners of the church donated money to another City, the City of Gladstone, to buy an identical digital display." (LF 80-81). He went on to testify that "the money has been spent" and "[t]he old sign has literally [been] thrown away." (LF 82). As a result, if the variance was not granted, he testified that there would be a "complete waste of money for the church. We would have to go buy a new sign. We would lose all the money on the digital display." (LF 82).

He also testified that given the location of the church on a high-traffic state highway, the old sign simply was not effective in getting out the church's message. "[T]he church has … an elderly population. It was extremely difficult for them to go out and manually change each letter on the little cu[p] hooks, and so the new sign clearly gives them substantial benefit of getting additional messages out [and] changing the message." (LF 82-83).

Finally, the church's representative noted the presence of the digital display on the nearby Phillips 66 sign, and expressed the view that under the Constitution,

the City should give "more protection to the word of God than … to the price of gas." (LF 64).

The neighboring homes association's testimony

Following the church's presentation, the BZA heard from the President of the local neighborhood association, who supported the church's application. Martin Schuettpelz, the President of the Sherwood Estates Homes Association, testified as to a number of topics. First, he testified that it was a misnomer to say the church was located in a residential area.

> [A]lthough it's -- this area is zoned R6, this Antioch Road is not residential. There are a few homes along Antioch Road, but this is not a residential street. … You can go shortly just a little bit up the street less than a quarter mile, and you run into all kinds of things: a 24-hour QuikTrip, a Sun Fresh grocery store, the re-renovated Antioch Center that's undergoing, grocery store, there's at least two tire stores, there's a metro bus stop where all the buses in the northland come together and transfer people, numerous – there's Kmart. And all of that is located just shortly up the street.

(LF 85). He also testified the church is a good neighbor, offering space in the church basement to a local senior center, which offers services to seniors in the area. (LF 86). He testified that many of the homeowners in his homes association are served by the senior center. (LF 86).

Mr. Schuettpelz—whose appearance at the hearing was a surprise to the

church's representative—also expressed great frustration with the City's decision to challenge the church's sign.

> The only reason that this apparently is an issue right now is because it's sitting right in the middle -- this little dinky sign is sitting right in the middle of this stretch of Antioch Road that is still zoned R6. …
>
> [F]or some reason somebody decided that, oh, there's a little display up there on that and they picked on that for some ungodly reason. We don't understand why. And we can't see the sense in the City picking on that.
>
> * * *
>
> I'm amazed that there are signs like these movie marqu[e]es that you can park out there and somehow they would be allowed, but this little digital thing that's up there in the middle of this church monument, a very tasteful and well-designed monument, that somehow is not being allowed by the City. I can't understand why the City is doing this. I really do not. And my homes association, we are of the same opinion.

(LF 85-87).

No one testified in opposition to the church's application. (LF 54).

The comments of BZA members during the hearing

During the hearing, BZA Member Mark Ebbits, a non-lawyer (*see* LF 537-38), stated he was "very sympathetic to the church" and said "I feel for the pastor

trying to get his message in a most efficient way versus going out little letters and putting them on placards and getting out there in the cold and rain[y] weather to do it." (LF 77). He noted, however, that the BZA had previously denied other requests for a digital display. (LF 77). The BZA's chairman also noted that the board had previously denied other requests for a digital display. (LF 89-90).

The BZA's decision

Despite the fact no one testified against the application—and the fact the City staff did not contest the basis for the requested variance—the BZA denied the church's application for a variance. (LF 91). The BZA did not issue a written explanation of its decision.

The City's staff report on the church's appeal

Following the denial of the church's request for a variance, the BZA scheduled a separate hearing on the church's appeal of the zoning code citation. In advance of that second hearing, the City's staff issued its report, which is dated March 13, 2012. In its new report, the City backtracked on its earlier position that the church's sign was a "digital sign," and not a "monument sign." Specifically, the City's new report stated unequivocally: "It is City staff's opinion that the sign on the applicant's property at 4805 NE Antioch Road **is a monument sign that contains a digital display**." (SLF 3) (emphasis added).[4]

[4] In an apparent coincidence, page three of the City's March 13, 2012 staff report—the page which contains this statement—is missing from the copy of the

This is in contradiction to the staff's February 14, 2012 report on the church's application for a variance, noted above, where the staff wrote: "The sign on the applicant's property at 4805 NE Antioch Road is a digital sign." (LF 1032). And as noted above, the City used this purported change in the sign "type" from the old "monument sign" to the new "digital sign" to justify its legal position that the BZA did not have authority to grant the Church's requested variance. (*See* LF 1032).

The hearing on the church's appeal

On March 13, 2012, the BZA held a hearing on the church's appeal. At the hearing, the City's staff repeated the statement that the church's sign was "a monument sign that contains a digital sign." (LF 103). Specifically, City Planner Sarah Anzicek testified that "the City staff's position is that the sign on the applicant's property is a monument sign that contains a digital display." (LF 103).

During his presentation, the church's representative agreed that the church's sign was a "monument sign," and noted the staff's change in position, pointing out that "as the City staff report indicates, quote, it is the City staff['s] opinion that the sign on the applicant's property at 4805 NE Antioch Road is a monument sign that contains a digital display." (LF 105).

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staff report included in the Legal File prepared by the BZA. (*See* LF 547-59). Accordingly, the Church submitted a Supplemental Legal File ("SLF) which contains the complete copy of the March 13, 2012 staff report.

The church's representative also stated that in light of the BZA's denial of the church's request for a variance, the church was being deprived of the opportunity to use a digital display to express its noncommercial religious message to travelers along Antioch Road, while commercial business—like the Phillips 66 at I-35 and Antioch Road—were free to do so. (LF 104). As the church's representative testified, it is "unquestionably unconstitutional" to allow a gas station to use a digital display to show the price of gas as "$3.16" a gallon, but to deny a church the right to display the Gospel message from "John 3:16." (LF 104).[5]

The church's representative testified that the City allows digital displays in commercially-zoned areas, and that the church was willing to comply with all of the City's safety regulations for digital displays in commercial areas. (LF 105-07). The church's representative testified that the City therefore could not have any traffic or safety concerns with the continued operation of the church's sign, for the church was willing to comply with all such regulations. (LF 115-16).

In response, BZA member Quinton Lucas, an attorney (*see* LF 538), asked the church's representative "why you think this is the proper forum to determine the constitutionality of the City code situation. Might this be better placed in a different forum … [W]hy [do] we have to hear it in a regular proceeding?" (LF 112). In response, the church's representative stated: "[Y]ou swore to uphold the City

[5] Recall this hearing was in 2012, when gas was above $3.00 a gallon range. (*See* A 27; LF 1045).

Code, the Stat[utes] of Missouri, the Constitution of Missouri as well as the Constitution of the United States. … I think it is your obligation to rule over this, for I think you have no … right [to] violat[e] the Constitution of the United States or the Constitution of Missouri." (LF 109).

The BZA denied the church's appeal. (LF 116-17). Again, the BZA did not issue a written explanation of its decision.

The church appeals to the Circuit Court

On March 15, 2012, the church timely filed its Verified Petition for Writ of Certiorari in the Circuit Court of Clay County. (LF 11-20). In it, the church sought review of both the BZA's denial of the church's request for a variance, as well as the BZA's denial of the church's appeal of the zoning citation. (LF 18). The Circuit Court issued its writ, and the City filed a response. (*See* LF 9-10).

The case, which was originally assigned to then-Circuit Court Judge Anthony Rex Gabbert, lay dormant for a period following his appointment to the Court of Appeals. Later, Circuit Court Judge Janet Sutton began holding regular status conferences on the matter, during which the parties represented that two developments might moot—or at least affect—the case. Specifically, the parties stated that the City was considering amending its Sign Code so as to potentially allow digital signs in certain residential areas, and the United States Supreme Court had accepted certiorari in a church sign case, *Reed v. Town of Gilbert.*

Last year, the parties informed Judge Sutton that while the City had in fact amended its Sign Code, the amendments did not apply to smaller churches like

Antioch Community Church. The parties also informed the Circuit Court that they disagreed as to the significance of the Supreme Court's decision in *Reed v. Town of Gilbert*. Accordingly, Judge Sutton directed the parties to proceed with the matter.

The church then filed a supplemental petition, in which it reasserted its original petition for review of the BZA's decisions (1) denying the church's request for a variance, and (2) denying the church's appeal of the zoning citation. (LF 21-28). The church also added an alternative Count II, in which it sought declaratory and injunctive relief against the City, asking the Circuit Court to find the City's Sign Code unconstitutional. (LF 28-32).

The Circuit Court reverses the BZA's denial of the requested variance

Shortly thereafter, the Circuit Court issued its 12-page "Opinion and Judgment," in which it reversed the BZA's decision to deny the church's requested variance. (A 1-12; LF 36-47).

In so doing, the court began by noting that pursuant to Mo. Rev. Stat. § 89.090, the BZA was empowered to "vary or modify the application of any [zoning] ordinance relating to the construction or alteration of buildings or structures" "where there are practical difficulties … in the way of carrying out the strict letter of such ordinance." (A 6; LF 41). The court then found that the evidence which the Church presented to the BZA established such "practical difficulties," and that even "the BZA appear[ed] to accept the Church's arguments." (A 9-10; LF 44-45).

As a result, the court had little difficulty finding that the BZA had abused its discretion when it denied the church's request for a variance in the face of this unrebutted evidence. Specifically, the court found the BZA did not deny the request on the basis of the evidence it was provided, but instead did so solely because "it had previously denied other requests for a variance to allow digital displays." (A 10; LF 45). The court found this to be an abuse of discretion.

> [T]he exercise of discretion requires just that, discretion. It was improper for the BZA to deny the Church's request for a variance simply because it had denied other requests for a variance. Instead, the BZA was legally obligated to consider the evidence before it in connection with the Church's application and fairly rule on that request. **By refusing to consider the Church's evidence, the BZA abused its discretion**.

(A 10; LF 45) (emphasis added); (*see also* A 6; LF 41) ("The BZA's decision denying the requested variance is an abuse of discretion, is contrary to the evidence, arbitrary, capricious, unreasonable and unlawful.").

Following its finding that the BZA had abused its discretion, the Circuit Court dealt with the BZA's argument that it lacked authority under the Sign Code to grant the requested variance because the Code prohibited variances as to the "type and number" of signs. Not true, ruled the court. "Because the Church's sign—both before and after the insertion of the digital display—consisted of just 'one monument sign,' the BZA was not being asked to grant a variance as to the

'type and number' of signs on the property." (A 10; LF 45). Accordingly, concluded the court, "the BZA had authority to grant the requested variance." (A 11; LF 46).

In light of these findings, the Circuit Court ordered the BZA to grant the requested variance. (A 11-12; LF 46-47).

The Court of Appeals affirms the Circuit Court's judgment

The Court of Appeals for the Western District affirmed the Circuit Court's judgment. In its unanimous opinion, the Court of Appeals reviewed the evidence which the church had presented to the BZA and noted that the City's staff "presented no contrary evidence, and took no position on the Church's basis for the requested variance." *Antioch Community Church v. Bd. of Zoning Adjustment of the City of Kansas City*, No. WD 79676, 2016 WL 7209821, at *3 (Mo. App. W.D. Dec. 13, 2016). "And in rejecting the requested variance, the Board made no findings to suggest that it rejected the Church's unopposed evidence of practical difficulty." *Id.* Accordingly, the Court of Appeals agreed that "[t]he Board abused its discretion in denying the Church's variance request." *Id.* at *4.

Like the Circuit Court, the Court of Appeals also rejected the BZA's argument that it lacked the authority to grant the requested variance.

> Before the Church altered the sign in 2010, it was a monument sign. After the Church altered the sign, it remained a monument sign by definition, albeit with a digital display. Because the Board may grant variances as to sign "requirements," and the digital-display prohibi-

> tion applying to churches in residential zones is simply a sign "requirement," the Board had the authority to grant the Church a variance from the prohibition on "any form of digital or electronic display."

Id. at *3.

POINTS RELIED ON

I. The Board of Zoning Adjustment erred in denying Antioch Community Church's request for a non-use variance to allow the church to install and use a small (36" x 42") digital display on the church's existing brick monument sign, because the BZA abused its discretion, in that the uncontradicted evidence before the BZA established both (a) the practical difficulties faced by the church in getting its messages to the community due to the prohibition of a digital display, and (b) the fact the requested variance was insubstantial, would not change the neighborhood, was the only feasible alternative, and was in the interest of justice.

Rosedale-Skinker Improvement Ass'n, Inc. v. Bd. of Adjustment of City of St. Louis, 425 S.W.2d 929 (Mo. banc 1968)

Matthew v. Smith, 707 S.W.2d 411 (Mo. banc 1986)

Highland Homes Ass'n v. Bd. of Zoning Adjustment, 306 S.W.3d 561 (Mo. App. W.D. 2009)

Taylor v. Bd. of Adjustment of Blue Springs, 738 S.W.2d 141 (Mo. App. W.D. 1987)

Mo. Rev. Stat. § 89.090

KCMO Zoning Code Section 88-445-04-D

KCMO Zoning Code Section 88-445-06-A-4

KCMO Zoning Code Section 88-445-12

KCMO Zoning Code Section 88-810

II. Alternatively, the Board of Zoning Adjustment erred in (a) denying Antioch Community Church's request for a variance, and (b) denying the church's appeal of the notice of violation, because the BZA's actions violated the church's First Amendment rights by favoring less protected commercial speech over more protected noncommercial religious speech, in that the BZA's decision resulted in the City allowing commercial speech—such as the price of gas at the nearby Phillips 66—to be displayed on a digital display, while preventing the church from displaying its noncommercial religious speech on its digital display.

Reed v. Town of Gilbert, 576 U.S. ___, 135 S. Ct. 2218 (2015)

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1982)

Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1995)

U.S. Const., Amend. I

Mo. Const., Art I, Sec. 5

Mo. Const., Art. I, Sec. 8

ARGUMENT

Standard of Review

Because a board of zoning adjustment is an administrative agency, "[a]n appellate court reviews the findings and conclusions of the BZA and not the judgment of the trial court." *State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 684 (Mo. banc 2000).

"The scope of judicial review of the decisions of the board of adjustment in a zoning proceeding is limited to [1] a determination of whether the ruling is authorized by law and [2] is supported by competent and substantial evidence upon the whole record." *Rosedale-Skinker Improvement Ass'n v. Bd. of Adjustment of City of St. Louis*, 425 S.W.2d 929, 936 (Mo. banc 1968) (numbering added).

As to whether a board's ruling is legal, the standard of review is de novo. "[W]hether [an] administrative body's action exceeded the authority granted to it is a question of law for the 'independent judgment of the reviewing court.'" *State ex rel. Missouri Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 881 (Mo. banc 2009). As such, the question of whether the BZA had the authority to grant the church's requested variance is reviewed de novo. *See BT Residential, LLC v. Bd. of Zoning Adjustment*, 392 S.W.3d 18, 21 (Mo. App. W.D. 2012).

As to whether a board's decision is supported by competent and substantial evidence, the standard of review is abuse of discretion. Because "[t]he determination of whether a variance in the application of zoning regulations should be granted depends on the facts and circumstances of each case," *Rosedale-Skinker*,

425 S.W.2d at 936, a zoning board's decision on such a request is reviewed for abuse of discretion. *Highland Homes Ass'n v. Bd. of Zoning Adjustment*, 306 S.W.3d 561, 565 (Mo. App. W.D. 2009); *see Hutchens v. St. Louis County*, 848 S.W.2d 616, 619 (Mo. App. E.D. 1993) (same) (citing *Rosedale-Skinker*).

The reviewing court must consider whether the board's decision was supported by the facts. *See Bd. of Zoning Adjustment v. Mayfair Homes Ass'n*, 634 S.W. at 248 ("The Board's power is limited by the factual basis which must exist … and, of course, the existence of that factual basis is subject to judicial review."). And where the decision is not supported by the facts it must be reversed. *See State ex rel. Presbyterian Church of Washington, Missouri*, 911 S.W.2d 697, 702 (Mo. App. E.D. 1995) ("[T]here is no evidence to support the City's contention there would be a substantial increase in use that would adversely impact the surrounding neighborhood."); *Draper & Kramer, Inc. v. Mueller*, 599 S.W.2d 9, 11 (Mo. App. E.D. 1980) ("the Board of Adjustment ruling was not supported by competent and substantial evidence"); *State ex rel. Senior Estates of Kansas City, Inc. v. Clarke*, 530 S.W.2d 30, 34 (Mo. App. W.D. 1975) ("The [BZA's] order … must fail because it is not supported by substantial and competent evidence.").

Put even more simply: "The arbitrary and unreasonable application of zoning ordinances is a subject for judicial inquiry, and 'the circuit court is not bound by an arbitrary or capricious action of the board, or where there has been a manifest abuse of discretion.'" *State ex rel. Rhodes v. City of Springfield*, 672 S.W.2d 349, 356 (Mo. App. W.D. 1984).

I. The Board of Zoning Adjustment erred in denying Antioch Community Church's request for a non-use variance to allow the church to install and use a small (36" x 42") digital display on the church's existing brick monument sign, because the BZA abused its discretion, in that the uncontradicted evidence before the BZA established both (a) the practical difficulties faced by the church in getting its messages to the community due to the prohibition of a digital display, and (b) the fact the requested variance was insubstantial, would not change the neighborhood, was the only feasible alternative, and was in the interest of justice.

A. Missouri law concerning zoning variances

Missouri cities and counties are required by law to appoint a board of zoning adjustment. *See* Mo. Rev. Stat. § 89.080. Among the board's powers is the power to grant variances from the local zoning code. Specifically, the enabling statute provides that "[i]n passing upon appeals, where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, [the board has the power] to vary or modify the application of any of the regulations or provisions of such ordinance relating to the construction or alteration of buildings or structures or the use of land so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done." Mo. Rev. Stat. § 89.090.1(3) (A 13).

As this Court has explained, a zoning variance serves two purposes. First, it "'fulfil[s] a sort of "escape hatch" or "safety valve" function for individual land-owners who would suffer special hardship from the literal application of the ... zoning ordinance.'" *Matthew v. Smith*, 707 S.W.2d 411, 413 (Mo. banc 1986). Second, it "'provides an administrative alternative for individual relief that can avoid the damage that can occur … as a result of as applied taking litigation.'" *Id.*

1. The two types of variances: use v. non-use variances

There are two types of zoning variances: a use variance, and a non-use variance (which is sometimes called an area variance). A use variance, as its name suggests, allows a property owner to use the property for a use which would otherwise be prohibited by the zoning code. *Id*. In *Matthew*, for example, this Court explained that the property owner was seeking a use variance when he sought a variance so as to allow him to rent out two separate homes on a lot which was zoned for "single-family use." *Id*. Because the property owner wished to use the property for a use which was different than the use allowed by the zoning code, he was seeking a use variance.

Conversely, "'[a] nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to required yards.'" *Id*. (quoting A. Rathkopf, 3 The Law of Zoning and Planning § 38.01 (1979)).

It was a non-use variance which was at issue in this Court's *Rosedale-Skinker* decision. There, Southwestern Bell Telephone Company sought a variance to allow it to construct a four-story addition to its existing building. The phone company needed the variance because the zoning code—while permitting a commercial building on the site—imposed a height restriction of three stories or less. *Rosedale-Skinker*, 425 S.W.2d 929 at 936. Because the use which the company wished to make of the property, *i.e.*, to construct an addition to a commercial building, was a permitted use, the company's request was for a non-use variance, *e.g.*, a variance as to the height restriction of its proposed commercial building. *Id.* at 933 ("Land use is not an issue.").

The distinction between a use variance and a non-use variance exists even where—as here in Missouri—the statute does not "expressly distinguish between the two types of variances." *Matthew*, 707 S.W.2d at 413.

2. The church is requesting a non-use variance

Here, the variance sought by the church is a non-use variance. To begin with, there is no question that the church's use of the property as a church is a permitted use under the zoning code. Specifically, the property is zoned R-6 (LF 547), for which an allowable use is "Religious Assembly." (LF 135-36).

Nor is there any question that the church's now 60-year-old monument sign is a permitted sign. The City's zoning code expressly provides that within an R-6 district, "[a] lot with an institutional use as its principal use, such as a church, … may have one monument sign per street frontage." (LF 308-310). The code defines

a "monument sign" as "[a] sign placed upon a base that rests upon the ground where the width of the base of the sign is a minimum of 75 percent of the width of the longest part of the sign." (LF 490). Because the church's sign meets this definition, it is a permitted monument sign.

As such, the only question is whether the church can modify its otherwise permitted sign to add a digital display. The church's request, therefore, is for a non-use variance. *See Highland Homes,* 306 S.W.3d at 565 (finding that a variance request as to the height of an otherwise permitted cell phone tower was a request for a non-use variance).

3. The church need only show "practical difficulties"

As noted above, Section 89.090 provides that a variance may be granted upon a showing of "practical difficulties **or** unnecessary hardship in the way of carrying out the strict letter of such ordinance." Mo. Rev. Stat. § 89.090.1(3) (A 13) (emphasis added). In *Matthew,* this Court provided helpful guidance as to when an applicant must show "practical difficulties" and when an applicant must show "unnecessary hardship."

Specifically, the *Matthew* court, first explained that "practical difficulties" and "unnecessary hardship" are two different standards—and that "practical difficulties" is a slightly less rigorous standard. *Matthew,* 707 S.W.2d at 416. The Court then went on to hold that the more rigorous standard of "unnecessary hardship" applied to use variances, while the less rigorous standard of "practical necessity" applied to non-use, or area variances." *Id.* The Court set forth its reasoning

for this distinction: "The rationale for this approach is that an area variance is a relaxation of one or more incidental limitations to a permitted use and does not alter the character of the district as much as a use not permitted by the ordinance." *Id.*

4. What is a practical difficulty?

"There is no all-inclusive definition of what constitutes a sufficient showing of practical difficulty …." *Rosedale-Skinker*, 425 S.W.2d at 933. Rather, "[t]he determination of whether a variance in the application of a zoning regulation should be granted depends on the facts and circumstances of each case." *Id.* at 936.

The facts in *Rosedale-Skinker* are instructive. In 1911, Southwestern Bell built a three-story "telephone exchange and equipment building," onto which it added a fourth-story in 1923. *Id.* at 934. Following the 1923 addition, the local zoning code was amended, and prohibited commercial buildings taller than three-stories. *Id.* Later, the phone company sought to build a four-story addition onto its existing building. *Id.* Because the then-zoning code only allowed three-story or shorter structures, the company sought a variance. *Id.*

In ruling that Southwestern Bell was entitled to the variance, this Court explained that without the addition the phone company would outgrow the building and would be forced to relocate at least part of its equipment to a new building. *Id.* In the process, the company would necessarily lose its investment in some of the equipment. *Id.* Additionally, a move to a new exchange building would disrupt

service to some of the company's customers. *Id*. The Court found these facts supported a finding that the phone company would suffer practical difficulties if it was denied the variance. *Id*. at 937.

5. Practical difficulty is not dependent on physical land conditions

The neighbors who opposed Southwestern Bell's variance argued that the board lacked authority to grant the requested variance because "'there was absolutely no evidence, nor any finding by the Board, of any hardship arising out of the peculiar topography or condition of the particular piece of land involved. The physical characteristics of the parcel of ground were not mentioned.'" *Id*. at 932. This Court squarely rejected this argument, explaining that while "[s]ome state statutes specifically provide as a ground for variance the exceptional narrowness, shallowness, of shape of a particular piece of property or its exceptional topographic conditions," *id*. at 933, "[t]he Missouri enabling statute and the St. Louis zoning ordinance make no such specification." *Id*.

Accordingly, this Court had no trouble ruling that: "The topography or physical characteristics of the land itself giving rise to difficulties and undue hardships is one, **but not the sole**, ground upon which variances in the application of zoning regulations may be granted." *Id*. at 933-34 (emphasis added).

B. The church established practical difficulties under this Court's precedent

Like Southwestern Bell, Antioch Community Church established "practical difficulties … in the way of carrying out the strict letter of [the zoning] ordinance." Mo. Rev. Stat. 89.090 (A 13).

1. The church should not be required to move

To begin with, the church's 150-year-plus presence on the property in question dwarfs Southwestern Bell's mere 50-year presence. In fact, the church's "new building" is itself ten years older than Southwestern Bell's building was at the time the phone company applied for a variance. In both cases, however, the long-term presence of the two property owners is significant, for it evidences the "sunk costs" in the property.

Just like the phone company could not realistically move its equipment to a new building, the church has no realistic options of moving to a commercially-zoned area, where it could use its digital display. Rather, it is a small church with only 150 parishioners, the majority of which are elderly. Moving the church is simply not realistic.

Nor should the church be forced to abandon its 150-year old location and relocate to a commercially-zoned area. "Woe to the worthless shepherd, who deserts the flock! May the sword strike his arm and his right eye! May his arm be completely withered, his right eye totally blinded!" *Zechariah* 11:17. American civil law agrees that a shepherd belongs with his or her flock.

> No image on the American scene is more familiar than the typical old-fashioned town, a compact but low-density residential area of white clapboard houses with a church steeple arising in the middle.

N. Williams & J. Taylor, 4 American Land Planning Law § 82:1 (2003 ed.).

There is a reason churches are primarily located in residential areas: "quite apart from tradition and aesthetics, no facility is more appropriately located in residential districts than a church, from the viewpoint of its own effective functioning." *Id.* "[R]eligious uses contribute to the general welfare of the community, and can contribute most when located in residential districts." P. Salkin, 3 Am. Law of Zoning § 28.10 (Supp. 2017).

This Court itself has recognized that "the usual and customary location of churches [is] in residence districts," for obvious reasons: "near those who attend, open spaces available with good light and air, quiet locations, and their intimate connection with home life." *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 455 (Mo. 1959).

Accordingly, it would be a practical difficulty for the church to move to a commercially-zoned area in order to use its digital display.

2. Cup hooks and hanging letters are no longer practical

The church has an interest in informing parishioners, potential parishioners, passersby, and community members about information and events associated with the church. This interest is entitled to legal protection. *See Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218 (2015) (striking down local sign ordinance

which imposed burden on church's use of directional signs for its Sunday services).

As the Circuit Court found, "while letters hung on cup hooks may have been perfectly sufficient 60 years ago when the monument sign was first erected, requiring the Church to resort to such a method today imposes a substantial burden on the Church." (A 9; LF 44). "Prior to the installation of the digital display, a church representative had to go out in the weather and physically change each letter on the sign whenever the Church desired to change its message. The new digital display allows the Church to change the sign more frequently—and from inside the Church. Additionally, the digital display allows the letters to be larger—which is of value to both the Church and, importantly, to passing motorists, who can more easily (and safely) read the larger letters." (A 8-9; LF 43-44).

Accordingly, just like Southwestern Bell—which desired to upgrade its equipment—the church too desires to upgrade its sign. And like the phone company, the church is prevented from doing so by a strict reading of the zoning code. Again, therefore, the church has established practical difficulties if its request for a variance is not granted.

C. The church established practical difficulties under Courts of Appeal precedent

Since *Matthew*, the Courts of Appeal have issued numerous decisions concerning practical difficulties. The tests set forth in those cases support the Circuit Court's judgment.

1. The Western District's *Highland Homes* decision

For example, the Circuit Court relied heavily in its decision on the Court of Appeals decision in *Highland Homes*, where the Western District approved a non-use variance as to the height of an otherwise-permitted cell phone tower, finding that a tower that met the local ordinance's height restrictions would be insufficient to provide "optimal cellular coverage." 306 S.W.3d at 566. Specifically, the court found that the original design of the church's monument sign (with its cup hooks and hanging letters) no longer allows the church to meaningfully convey its non-commercial religious messages under the current ordinance—just like the antenna height restriction in *Highlands Homes* impaired the ability of the cell phone tower to provide "optimal cellular coverage." *Id.*

Moreover, in its opinion, the *Highland Homes* court—like this Court in *Rosedale-Skinker*—rejected the neighborhood association's argument "that variances should be limited to situations where the topography of the land makes compliance with ordinance requirements impractical." *Id.* at 567. To the contrary, the court found that "a topographical challenge" is not required for the proper granting of a variance. *Id.*

The court also listed additional factors to consider in determining whether an applicant had shown "practical difficulties."

> These factors include: (1) how substantial the requested variance is; (2) whether the variance will result in a substantial change to the character of the neighborhood or create a substantial detriment to ad-

> joining properties; (3) whether the difficulty can be obviated by some method, feasible for the applicant to pursue, other than a variance; and (4) whether, in light of the manner in which the difficulty arose and considering all relevant factors, the interests of justice will be served by granting the variance.

306 S.W.3d at 566 (citing *State ex rel. Branum v. Bd. of Zoning Adjustment*, 85 S.W.3d 35, 41 (Mo. App. W.D. 2002)).

a. The requested variance is not substantial

As to the first factor, ***i.e.***, whether the requested variance is substantial, the Circuit Court found that "the requested variance is not substantial." (A 7; LF 42). The court noted that the church was not asking for a 60-foot tall illuminated pole sign—which the court said would be a substantial change—but was instead merely asking to change the "insides" of the existing brick monument sign. (LF 42). As explained by the court, "[t]he Church has had its brick-framed monument sign at this location for 60 years, ***i.e.***, ever since 1956. That sign remains. As such, there will be little, if any, change, and clearly not a 'substantial' change." (LF 42-43).

The Circuit Court's decision in this regard is consistent with the Court of Appeal's decision in *Highlands Homes*. There, the court found that while the requested variance, if allowed, would have more than doubled the height of the cell phone tower, the court noted that while "a ninety-five-foot-tall ***building***" would be a substantial change, the cell tower was "quite narrow ... and so is far less obtru-

sive than its height alone would indicate." 306 S.W.3d at 566 (emphasis in original).

Here, as the Circuit Court noted, the brick frame of the church's monument sign remained the same, only the "insides" of the sign were changed. Thus, just like the cell tower, the change in the sign would not be "substantial."

b. The requested variance would not change the neighborhood

As to the second factor, the Circuit Court found that adding a digital display to the sign would not change the character of the neighborhood, or impose a substantial detriment to the adjoining properties. In its opinion, the Circuit Court noted "that the Church is not tucked inside a quiet, secluded residential neighborhood, but sits on a major thoroughfare—which, interestingly enough, it actually named after the Church, Antioch Road." (A 8; LF 43). It also noted the high traffic count on the state highway, as well as the abundant commercial development immediately to both the north and south of the church. (A 8; LF 43). Accordingly, wrote the court: "[T]he introduction of the Church's digital display on its existing monument sign is neither a substantial' change to the character of the neighborhood, nor a 'substantial' detriment to adjoining properties." (A 8; LF 43).

The Circuit Court further explained how its conclusion in this regard was supported by the absence of any objection to the church's request for a variance.

> In this regard, it is important to point out that the only neighboring property owners who appeared before the BZA supported the

> Church's application. Specifically, the local neighborhood association expressly endorsed the application for a variance, stating, among other things, the sign is located on "a major 4-lane highway from highway I-35 into Kansas City's northland," "blends into their property, and is neither [an] eyesore [n]or a nuisance," and "is unobtrusive when compared with the commercial activity in the area."

(A 8; LF 43).

As such, the irony in the BZA's decision is perhaps best expressed by a set of acronyms—one common, one not so common. Specifically, the neighborhood association's remarks affirmatively refute the concept of NIMBY (Not In My Back Yard) and instead affirmatively support the opposite concept of IMBY (In My Back Yard). Despite that fact, the BZA denied the church's request.

c. The requested variance is the minimum needed to resolve the practical difficulties caused by the ordinance

As to the third factor, *i.e.*, whether there are other "feasible" options besides a variance, the Circuit Court found that "without the requested variance, the Church's legitimate interest in informing passing motorists about the Church's offerings will be substantially harmed." (A 8; LF 43). The court explained that with the new digital display the church could not only change the message more frequently (and conveniently) but would also be displaying its messages in a more readable format, which the court explained "is of value to both the Church and,

importantly, to passing motorists, who can more easily (and safely) read the larger letters." (A 8-9; LF 43-44).

Nor does the church have feasible non-sign means of communicating the messages its posts on its sign. "Although in theory sellers remain free to employ a number of different alternatives, in practice [certain products are] not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated ... involved more cost and less autonomy than ... signs[,] ... are less likely to reach persons not deliberately seeking sales information[,] ... and may be less effective media for communicating the message that is conveyed by a ... sign .... The alternatives, then, are far from satisfactory." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977); *see also John Donnelly & Sons v. Campbell*, 639 F.2d 6, 16 (1st Cir. 1980), *aff'd*, 453 U.S. 916 (1981) ("outdoor advertising, based upon cost per exposure, is a far less expensive means of communication than radio, television, newspaper or magazines).

Again, the Circuit Court's determination is consistent with the court's finding in *Highlands Homes* that while the applicant could have erected a shorter tower that complied with the zoning code, such a tower was not "workable." 306 S.W.3d at 567. The same is true here. While the church could have continued to use its 60-year-old method of hanging individual letters on cup hooks, such a method is no longer—to use the *Highland Homes* court's term—"workable." *Id.*

d. The interests of justice are served by granting the variance

As to the fourth factor, the Circuit Court found that "in light of the manner in which the difficulty arose and considering all relevant factors, the interests of justice will be served by granting the variance." (A 9; LF 44). "There is no question that the Church made an innocent mistake in installing the digital display on its pre-existing monument sign." (A 9; LF 44). The court described the experience of one of the church parishioners donating money for a digital display on a sign in an adjoining city, and how "[b]ased on that experience, no one at the Church ever suspected a digital sign might not be allowed in a residentially-zoned area in Kansas City." (A 9; LF 44).

Moreover, explained the court, "when the Church was informed of the possibility its digital display might not be proper, it immediately retained counsel, filed a timely appeal with the BZA and, based on the advice of the City's staff, later filed a request for a variance." (A 9; LF 44). "As such, this is not a case where the Church thumbed its nose at the authorities. Rather, the evidence shows that the Church made an honest mistake and took prompt—and proper—steps to remedy its violation." (A 9; LF 44).

Additionally, the interest of justice is served in that the community itself obtains a benefit from the digital display, as the display is used to display community messages. (LF 559). "[P]ublic benefit has been recognized as a factor in determining hardship or practical difficulties for nonuse variances." A. Rathkopf,

D. Rathkopf & E. Ziegler, 3 Rathkopf's The Law of Zoning and Planning § 58:16 (4th ed. Supp. 2017).

2. The Eastern District test

The Eastern District has employed a similar test. For example, in *Brown v. City of Maplewood*, 354 S.W.3d 664 (Mo. App. E.D. 2011), the court set out these factors.

> (1) how substantial the variation is in relation to the requirement; (2) the effect, if the variance is granted, of any resulting increased population density on available government facilities, such as water supply; (3) whether a substantial change will be produced in the neighborhood's character or a substantial detriment will be created to the adjoining properties; (4) whether the difficulty can be obviated by some feasible method other than a variance, and (5) whether in view of the manner in which the difficulty arose and considering all of the above factors, the interests of justice would be served by allowing the variance.

Id. at 668; *see also Baumer v. City of Jennings*, 247 S.W.3d 105, 113 (Mo. App. E.D. 2008) (same); *Verna Properties, L.L.C. v. Bd. of Adjustment of City of Maryland Heights*, 188 S.W.3d 50, 53 (Mo. App. E.D. 2006) (same).

The church's variance satisfies this test as well. For example, as to the first factor, the church's 60-year old brick sign remains in its current location, and is not increased in size whatsoever. The second factor, dealing with increased popu-

lation density, is not applicable. And the third through fifth factors are similar to the *Highland Homes* factors discussed above.

D. The BZA abused its discretion

In its opinion, the Circuit Court noted that "[a]t no point in its ruling did the BZA ever challenge—or even address—the points noted above." (A 9; LF 44). "For example, the BZA never stated that it believed that the digital display would pose a traffic hazard, or would alter the character of the neighborhood, etc." (A 9; LF 44). Instead, the court explained, it appeared the BZA simply "fell back on the fact it had previously denied other requests for a variance to allow digital displays. But the exercise of discretion requires just that: discretion." (A 9-10; LF 44-45). The court concluded that portion of its opinion by stating:

> It was improper for the BZA to deny the Church's request for a variance simply because it had denied other requests for a variance. Instead, the BZA was legally obligated to consider the evidence before it in connection with the Church's application and fairly rule on that request. By refusing to consider the Church's evidence, the BZA abused its discretion.

(A 10; LF 45).

The church agrees with the Circuit Court. At no point did the City submit any evidence whatsoever in an attempt to rebut the evidence presented by the church. Instead, the City chose to go "all in" on its position that a variance was not allowed—and never argued that a variance was not warranted under the facts. And

because no other person opposed the church's application, the BZA had no evidence before it upon which it could have found against the church.

As such, to the extent the BZA's decision was based on an implied finding that the requested variance was not warranted, it was plainly an abuse of discretion. *See Bd. of Zoning Adjustment v. Mayfair Homes Ass'n*, 634 S.W. at 248 ("The Board's power is limited by the factual basis which must exist … and, of course, the existence of that factual basis is subject to judicial review."); *see also See State ex rel. Presbyterian Church of Washington, Missouri*, 911 S.W.2d 697, 702 (Mo. App. E.D. 1995) ("[T]here is no evidence to support the City's contention there would be a substantial increase in use that would adversely impact the surrounding neighborhood."); *Draper & Kramer, Inc. v. Mueller*, 599 S.W.2d 9, 11 (Mo. App. E.D. 1980) ("the Board of Adjustment ruling was not supported by competent and substantial evidence"); *State ex rel. Senior Estates of Kansas City, Inc. v. Clarke*, 530 S.W.2d 30, 34 (Mo. App. W.D. 1975) ("The [BZA's] order … must fail because it is not supported by substantial and competent evidence.").

E. The BZA's argument that the requested variance is "personal" is misplaced

In its transfer application to this Court, the BZA asserted that "[t]he variance was granted by a practical difficulty that was personal to the Church, contrary to previous appellate caselaw that only allowed a variance to be granted if based on unique characteristics of the property." (BZA Transfer App., at 1) The BZA

then provided a "*Cf.*" cite to this Court's decision in *Matthew*, as well as a series of Court of Appeals' decisions. (*Id.*)

1. This Court's precedent

As explained above, however, *Matthew* involved a use variance—which is not at issue here. Instead, the non-use variance in this case is governed not by *Matthew*, but by this Court's decision in *Rosedale-Skinker*—which is never mentioned in the BZA's transfer application. And, in *Rosedale-Skinker*, this Court found that Southwestern Bell had shown practical difficulties—without consideration of any unique aspect of the land itself.

Since then, numerous Court of Appeals decisions have cited Rosedale-Skinker for the proposition that practical difficulties can be found with reliance on physical property characteristics. *See, e.g., Brown v. Bd. of Adjustment*, 469 S.W.2d 844, 546-47 (Mo. App. E.D. 1971) (describing *Rosedale-Skinker* has having overruled prior precedent to the extent that precedent held that "the hardship of difficulty must be due to conditions not personal to the owner"); *Conner v. Herd*, 452 S.W.2d 272, 277 (Mo. App. E.D. 1970) ("*Rosedale-Skinker* … establishes that the terms 'practical difficulties or unnecessary hardship' are not limited to physical impossibility of use but include economic hardship").

The most apposite of these cases is the Western District's decision in *Taylor v. Bd. of Adjustment of Blue Springs*, 738 S.W.2d 141 (Mo. App. W.D. 1987), in which the Court of Appeals reversed the trial court's judgment affirming the BZA's decision to deny a variance concerning an oversized sign. There, the owner

had mistakenly installed a sign which exceeded the size dimension allowed by the local ordinance. Once the owner realized his mistake he applied for a variance, which the BZA denied.

The owner then filed suit, but the trial court affirmed by the BZA's decision. On appeal, the Court of Appeals reversed. In its opinion, the court explained that "[t]he one sign as it stands does not exceed the number contemplated by the ordinance and exceeds the dimension requirements in an amount that could only be considered *de minimis*. A variance here will be consistent with the general spirit and intent of the zoning regulations." *Id.* at 144. The court also explained that in "refusing to grant a variance, the Board is essentially requiring [the property owner] to forfeit $7,000 it has invested in the sign." *Id.*

Citing to this Court's *Rosedale-Skinker* decision, the court went on to find: "Under the facts and circumstances of this case, the variance of [the property owner] should have been granted. *Rosedale-Skinker Improvement Assn. v. Board of Adjustment of the City of St. Louis*, 425 S.W.2d 929, 936 (Mo. banc 1968)." *Id.*

As such, the BZA's argument is not supported by this Court's precedents, both as interpreted by the church—and as interpreted by both the Eastern and Western District Courts of Appeal.

2. The requested variance is not "personal"

In any event, the BZA's description of the Circuit Court's rationale for ordering the variance is incorrect—it was not personal to the church, but was directly tied to the unique nature of the property.

a. The church was not required to make specific topographical or other physical property claims

As noted above, this Court in *Rosedale-Skinker* expressly rejected the argument that a variance must be based on unique topographical or other physical property matters, explaining that while "[s]ome state statutes specifically provide as a ground for variance the exceptional narrowness, shallowness, or shape of a particular piece of property or its exceptional topographic conditions," 425 S.W.2d at 933, "[t]he Missouri enabling statute and the St. Louis zoning ordinance make no such specification." *Id.*

Accordingly, this Court had no trouble ruling that: "The topography or physical characteristics of the land itself giving rise to difficulties and undue hardships is one, **but not the sole**, ground upon which variances in the application of zoning regulations may be granted." *Id*. at 933-34 (emphasis added); *see Conner v. Herd*, 452 S.W.2d 272, 277 (Mo. App. E.D. 1970) ("*Rosedale-Skinker* … establishes that the terms 'practical difficulties or unnecessary hardship' are not limited to physical impossibility of use").

Importantly, just like the St. Louis zoning ordinance at issue in *Rosedale-Skinker*, the Kansas City zoning ordinance similarly contains no specification requiring a variance to be based on any topographical or other physical characteristics of the land itself. Specifically, the Kansas City code provides that

> Zoning variances may be approved by the board of zoning adjustment when they find substantial evidence in the official record that:

A. strict application of one or more standards or requirements of this zoning and development code would result in unnecessary hardships or practical difficulties for the subject property and that such unnecessary hardships or practical difficulties are not generally applicable to other property in the same zoning district;

B. the zoning variance is generally consistent with all relevant purposes and intents of this zoning and development code; and

C. the zoning variance will result in substantial justice being done, considering both the public benefits intended to be secured by this zoning and development code and the individual hardships or practical difficulties that will be suffered if the zoning variance request is denied.

(LF 359-60)

As can be plainly seen, this provision contains no reference whatsoever to topography or other physical characteristics of the land itself.[6]

[6] For an example of a local ordinance which expressly includes references to topographical and other physical property conditions, *see Bd. of Alderman of Cassville v. Bd. of Adjustment of Cassville*, 364 S.W.3d 246, 248 (Mo. App. S.D. 2012).

As such, under this Court's *Rosedale-Skinker* decision, it was not necessary for the church to make any such showing.

b. Property characteristics other than topography and shape can show a property is unique, including proximity to (a) commercial development and (b) a major thoroughfare

Many courts and commentators agree that a property's relation to nearby commercial development and/or a major thoroughfare can render the property unique. For example, Professor Salkin explains that in addition to size, shape and topography of a lot, another characteristic which makes a property unique—and suitable for a variance—is "[p]roximity to zoning district boundaries or other discordant uses." P. Salkin, 2 Am. Law. Zoning § 13:14 (5th ed.). Specifically, she writes: "A residential or other low-intensity property located in or adjacent to a heavily developed commercial or industrial area will sometimes be able to establish a unique hardship due its proximity to these uses. The same is true for low-intensity properties located close to … discordant uses such as major highways …." *Id.*

Among the cases Professor Salkin cites is one where the court found unique hardship based on, among other factors, "the proximity of petitioner's parcel to a major thoroughfare" and "the established commercial character of so much of the surrounding area as has been developed." *Kemp v. Fossella*, 80 A.D.2d 897, 897, 437 N.Y.S.2d 116, 117 (1981). In another case, the court ruled that "the hardship

is unique, as this is the only parcel located on a major intersection within this commercialized area which is undeveloped and zoned residential." *Rothenberg v. Board of Zoning Appeals of Town of Smithtown*, 232 A.D.2d 568, 570, 648 N.Y.S.2d 679, 681 (1996).

Numerous other cases are in accord. For example, the Maryland Court of Appeals, the state's highest court, approved a variance for a developer to build an office building on land zoned for residential use where the surrounding neighborhood had taken on characteristics not consistent with residential uses.

> Immediately to the south of the property in question are five row houses …. Immediately to the north, the entire block is occupied by the Jewish Community Center and Baltimore Hebrew College. Across the street on the east side of Park Heights Avenue are the Synagogue of the Beth Jacob Congregation, a public parking area and a large public junior high school. … A recently completed part of Northern Parkway is adjacent to this high school on the south, and an extension of the Parkway from Park Heights Avenue to Reisterstown Road on the west side is now under way. … South of the beltway extending to Park Circle (approximately 2 miles) on Park Heights Avenue are commercial and office uses, interspersed with residences. On the east side of Park Heights Avenue, at its intersection with Rogers Avenue, a short distance south of Northern Parkway, are two gasoline stations.

Frankel v. City of Baltimore, 223 Md. 97, 100, 162 A.2d 447, 449 (1960).

More recently, the owner of a single-family lot was allowed to construct two homes on the lot where the evidence showed that other nearby lots had similar high-density uses on them. *See O'Brien v. Bd. of Zoning Adjustments for City of New Orleans*, 177 So. 3d 738, 741 (La. App. 2015).

c. The church's evidence shows the property is unique

When compared to these cases, it is clear that the church's unrebutted evidence shows that its property is unique—and that its request was not based on "personal" reasons. As the Circuit Court noted, "the Church is not tucked inside a quiet, secluded residential neighborhood, but sits on a major thoroughfare—which, interestingly enough, it actually named after the Church, Antioch Road." (A 8; LF 43). It also noted the high traffic count on the state highway—more than 13,000 cars a day—as well as the abundant commercial development immediately to both the north and south of the church, with the church sandwiched in between. (A 8; LF 43). These facts—which are unchallenged—evidence the property's unique character.

This conclusion is easily confirmed by asking whether the church would have any interest in a digital display if the church was located in the back of a cul-de-sac, where the only persons passing by were neighbors walking their dogs. Of course, the church would have no interest in an $11,000 digital display if those were the facts. But those are not the facts—quite the opposite, the facts show that digital display is located adjacent to a major thoroughfare which is traversed by

13,500 cars a day—drivers who are likely on their way to or from the interstate highway to the south of the church, or the shopping center and related businesses to the north of the church. It is this very nature of the church's location which makes the variance valuable to the church.

As such, the BZA is simply wrong in asserting that the church's request is based on the church's "personal" desires; instead, it is grounded firmly in the unique nature of the location of the church's property.

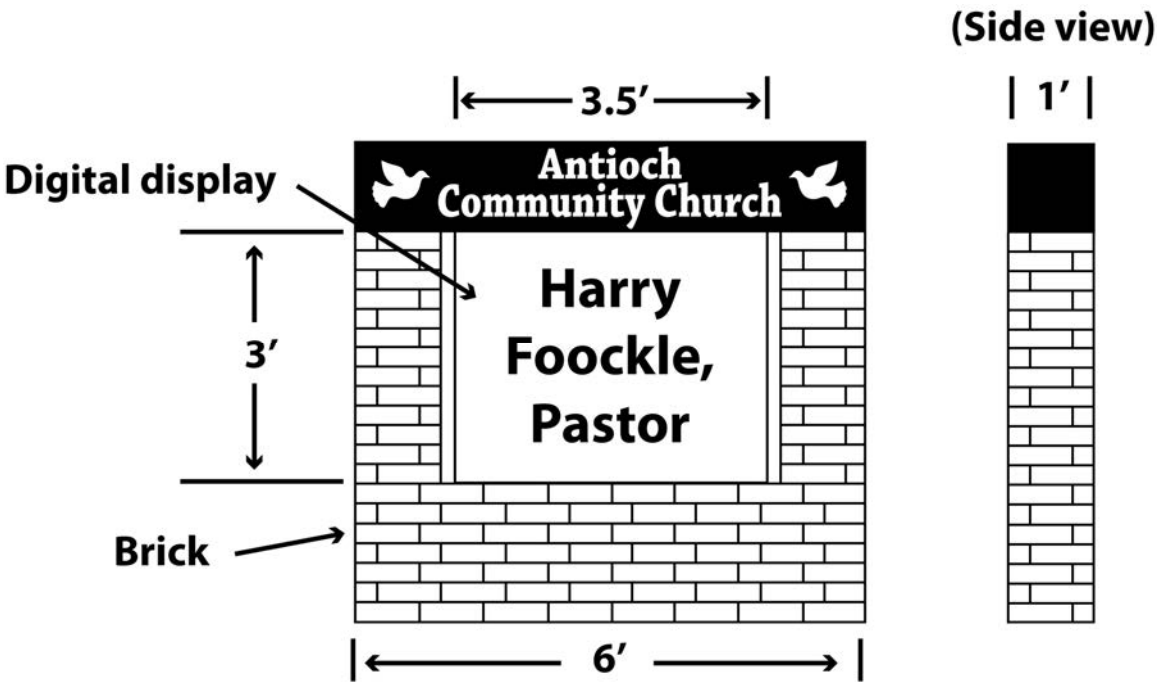
F. The BZA had authority to grant the requested variance

Finally as to Point I, to the extent the BZA's decision was based on a belief that it did not have authority to grant the requested variance—as asserted by City staff—such a decision is plainly legally wrong, as both the Circuit Court and the Court of Appeals found.

1. The applicable Sign Code provisions

Section 44-445-06-A-4 of the Sign Code provides that a church located in a residential area may have "[o]ne monument sign per street frontage which may not exceed 32 square feet in area or 6 feet in height." (A 19; LF 310).

The Sign Code defines a "monument sign" as "[a] sign placed upon a base that rests upon the ground where the width of the base of the sign is a minimum of 75 percent of the width of the longest part of the sign." (A 23; LF 435). The church's sign meets this definition: its base is equal to the longest part of the sign.



(A 25; LF 1039).

Section 44-445-06-A-4 also provides that the sign "may include changeable copy," but includes the requirement that "the changeable copy feature must use direct human intervention for changes and may not include any form of digital or electronic display. Such sign may be internally or externally illuminated." (A 19; LF 310).

Section 88-445-12 of the Sign Code, in turn, states that "[t]he Board of Zoning Adjustment may grant variances **to the requirements for signs**, except as to type and number." (A 22; LF 321) (emphasis added).

2. The Church did not request a variance of the sign type

In its application for a variance, the church stated it was "[r]equest[ing a] variance to allow [a] digital display on an existing monument sign." (LF 555). As such, the church was not requesting a variance as to the "type" of sign. For exam-

ple, it was not requesting a variance to allow the church to replace its existing monument sign with a pole sign—such as frequently seen in front of a fast-food restaurant, or a gas station. Instead, it was merely asking for a variance as to the requirement that the church's sign not "include any form of digital or electronic display." (A 19; LF 310).

3. The Circuit Court and Court of Appeals rulings

Both the Circuit Court and the Court of Appeals agreed that the BZA was not being asked to change the "type" of the more than 50-year old, brick sign. As the Circuit Court explained in its decision:

> The Sign Code defines the types of signs. Specifically, Section 88-810, which is titled "Sign types," provides: "Sign types include … pole signs, monument signs." Section 44-445-06-A-4, in turn, provides that a church located in a residentially-zoned area may have "one monument sign." Because the Church's sign—both before and after the insertion of the digital display—consisted on just "one monument sign," the BZA was not being asked to grant a variance as to the "type and number" of signs on the property

(LF 45).

Instead, explained the Circuit Court, "the BZA was only being asked to vary that portion of Section 44-445-06-A-4, which prohibited a "digital or electronic display" on a monument sign. And because a "display" is different from a

"monument sign," the BZA had authority to grant the requested variance." (A 10; LF 46).

The Court of Appeals agreed, also finding that the BZA had the authority to grant the requested variance.

> Before the Church altered the sign in 2010, it was a monument sign. After the Church altered the sign, it remained a monument sign by definition, albeit with a digital display. Because the Board may grant variances as to sign "requirements," and the digital-display prohibition applying to churches in residential zones is simply a sign "requirement," the Board had the authority to grant the Church a variance from the prohibition on "any form of digital or electronic display."

2016 WL 7209821, at *3.

G. Conclusion to Point I

As both the Circuit Court and the Court of Appeals found, the evidence before the BZA not only established the basis for granting the church's requested variance, there was no evidence supporting the contrary position. In ignoring that evidence, the BZA plainly abused its discretion. *See State ex rel. Presbyterian Church of Washington v. City of Washington*, 911 S.W.2d 697, 702 (Mo. App. E.D. 1995) (affirming trial court which ordered city to grant special use permit because "there [wa]s no evidence to support the City's contention[s]").

Equally meritless is the City's claim that the BZA lacked legal authority to grant the requested variance. Accordingly, this Court should affirm the Circuit Court's judgment.

II. Alternatively, the Board of Zoning Adjustment erred in (a) denying Antioch Community Church's request for a variance, and (b) denying the church's appeal of the notice of violation, because the BZA's actions violated the church's First Amendment rights by favoring less protected commercial speech over more protected noncommercial religious speech, in that the BZA's decision resulted in the City allowing commercial speech—such as the price of gas at the nearby Phillips 66—to be displayed on a digital display, while preventing the church from displaying its noncommercial religious speech on its digital display.

A. The Circuit Court obeyed its duty to avoid constitutional issues

In its original Petition, as well as in its Supplemental Petition, the church asserted that not only did the BZA abuse its discretion in (a) denying the church's requested variance, and (b) denying the church's appeal of the notice of violation, it also asserted that the BZA's actions were unconstitutional and violated the church's First Amendment rights in that the BZA's actions resulted in the City favoring commercial speech over noncommercial speech. (*See* LF 17-18; LF 27-28).

This Court has long held that a court should attempt to resolve a dispute on non-constitutional grounds, before reaching any constitutional challenges. *See, e.g., Conseco Finance Serving Corp. v. Dept. of Revenue*, 98 S.W.3d 540, 546 (Mo. banc 2003) ("The court should have addressed the standing and other preliminary factual issues … before reaching the[] constitutional issues."); *Farm Bureau*

Town & Country Ins. Co. v. Angoff, 909 S.W.2d 948, 353 (Mo. banc 1995) ("The constitutionality of a statute will not be decided unless essential to a disposition of the case."); *Barnes Hosp. v. Mo. Comm'n on Human Rights*, 661 S.W.2d 534, 535 (Mo. banc 1983) ("We need not reach the constitutional issue raised by Barnes Hospital, for the case may be determined on the question of sufficiency of evidence.").

B. This Court must affirm the Circuit Court's judgment if sustainable for any reason

In keeping with that guidance, the Circuit Court did not address the church's constitutional arguments, instead resolving the parties' dispute on the non-constitutional ground that the BZA had abused its discretion in not granting the requested variance, thereby giving the church the relief it sought.

Nevertheless, this Court must affirm the Circuit Court's judgment if it is sustainable for any reason. "[A]ppellate courts are 'primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result.'" To that end, the judgment must be 'affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient.'" *Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo. banc 2014) (quoting *Business Men's Assur. Co. of Am. v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999)).

This is true even where, as here, the appellate court reviews the merits of decision of the administrative agency, and not the trial court's decision. "While the

decision reviewed on appeal is that of the [administrative agency] and not the circuit court, an appellate court reverses, affirms, or otherwise acts upon the judgment of the trial court." *Bird v. Mo. Bd. of Architects*, 259 S.W.3d 516, 520 n.7 (Mo. banc 2008); *see also State ex rel. Foget v. Franklin County Planning and Zoning Comm'n*, 809 S.W.2d 430, 432 (Mo. App. E.D. 1981) (applying the "alternative grounds" doctrine in zoning case and stating "we may … affirm the decision of the trial court if there is any meritorious ground upon which the trial court could have based its decision.").

Accordingly, in the event this Court finds that the BZA did not abuse its discretion in denying the church's application for a variance, this Court must still affirm the Circuit Court's judgment if this Court finds that the BZA's decision was unconstitutional. *See Platte Woods United Methodist Church v. City of Platte Woods*, 935 S.W.2d 735, 737 (Mo. App. W.D. 1996) ("judicial review of an administrative hearing includes the ability to resolve constitutional issues"); *Perez v. Webb*, 533 S.W.2d 650, 655 (Mo. App. W.D. 1976) (same).

C. The BZA's decisions violated the church's constitutional rights

1. The relevant constitutional provisions

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech." U.S. Const. Amend. I. It also provides that "Congress shall make no law … respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. The First Amendment is made applicable to state and local governments through the Fourteenth Amend-

ment. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980).

Section 8 of the Bill of Rights to the Missouri Constitution provides "That no law shall be passed impairing the freedom of speech, no matter by what means communicated." Mo. Const. Art. I, Sec. 8. Section 5 of the Bill of Rights provides "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences [and] that no human authority can control or interfere with the rights of conscience." Mo. Const. Art. I, Sec. 5.

2. A city's sign ordinance cannot favor commercial speech over noncommercial speech

"The Constitution … accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980). "Although the protection extended to commercial speech has continued to develop, commercial and noncommercial communications, in the context of the First Amendment, have been treated differently." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981). "[T]he difference between commercial price and advertising and ideological communications permits regulation of the former 'that the First Amendment would not tolerate with respect to the latter.'" *Id.* at 507.

In *Metromedia*, the Supreme Court struck down the City of San Diego's sign ordinance as unconstitutional because it permitted on-site commercial advertising but prohibited non-commercial communications using fixed structure signs

unless permitted under specified exceptions. In its opinion, the Court began by explaining that "[t]he outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have placed a prominent role throughout American history, rallying support for political and social causes." *Id.* at 501.

The Court went on to explain that because San Diego effectively afforded a greater degree of protection to commercial than to noncommercial speech the City's ordinance was unconstitutional.

> As indicated above, our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech. …. The use of onsite billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city. Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial infor-

> mation concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

Id. at 510.

Thus, in *Whitton v. City of Gladstone*, 54 F.3d 1400, 1404 (8th Cir. 1995), the Eighth Circuit Court of Appeals found the sign ordinance of the City of Gladstone, Missouri—which, among other things, contained durational limitations on political signs that were not applied to commercial signs—unconstitutional because "the sign code makes … impermissible distinctions between commercial speech and noncommercial speech." *Id*. at 1404.

In addition, the *Whitton* court found unconstitutional that part of the ordinance which allowed externally illuminated political signs in commercially-zones areas, but not in residentially-zoned areas. In so doing, the court rejected the city's argument that a different rule should apply to residential areas, and expressly rejected the city's contention that noncommercial signs in residential areas detract from the "aesthetics of the city." *Id*. at 1409.

3. *Reed v. Town of Gilbert*

Recently, the U.S. Supreme Court re-affirmed these principles when it decided *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218 (2015). In *Reed*, the Supreme Court sustained a First Amendment challenge to a municipal sign ordinance as part of a lawsuit brought by a local church which had been cited for violating the town's sign ordinance. Specifically, the church was cited for using

small, temporary directional signs "to advertise the time and location of their Sunday services." *Id.* at 2225. The town's sign ordinance prohibited such signs.

In its ruling, the Supreme Court held that the town's sign ordinance violated the First Amendment because "the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas." *Id.* at 2227. Because the town's sign ordinance discriminated against the church's signs, the Court explained that the ordinance was a "content-based law," which it said was "presumptively unconstitutional and may be justified only if the government proves that the[law is] narrowly tailored to serve compelling state interests." *Id.* at 2222. The Court referred to this test as the "strict scrutiny" test. *Id.*

The Court went on to find that the town's sign ordinance failed the "strict scrutiny" required by the First Amendment. The Court noted that the town cited two reasons for its ordinance: "preserving the Town's aesthetic appeal and traffic safety." *Id.* at 2231. The Court found neither ground sufficient. Specifically, the Court explained that both arguments rang hollow when the town allowed other signs—which necessarily both detracted from the Town's aesthetic appeal and traffic safety. *Id.* Such discrimination, the Court held, was fatal to the Town's argument. *Id.*

4. As applied by the BZA, the City's Sign Code is unconstitutional

Kansas City's Sign Code allows monument signs with digital displays in commercially-zoned areas, but not in residentially-zoned areas. *Compare* Section

88-445-08-A (A 20-21; LF 315-16) with Section 88-445-06-A (A 17-19; LF 308-10). On its face, this would appear to plainly violate the First Amendment. This is particularly so given—as this Court has previously explained—that "the usual and customary location of churches [is] in residence districts." *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 455 (Mo. banc 1959). As such, most churches could not qualify for a digital display (without a variance).

However, the Sign Code gives the BZA authority to grant variances. And as the Missouri Supreme Court has explained, the very purpose of a variance is to provide "a sort of 'escape hatch' or 'safety valve' function for individual land-owners who suffer hardship from the literal application of the … zoning ordinances." *Matthew v. Smith*, 707 S.W.2d 411, 413 (1986).

As a result, if the BZA had granted the church's requested variance (or, at a minimum, vacated the zoning citation), the church would not be in a position to challenge the constitutionality of the Sign Code because the code –"as applied" by the BZA—would have been construed to permit a monument sign with a digital display in a residentially-zoned area. "[A] plaintiff generally cannot prevail on an as-applied challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally applied to him. Specifically, when someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so. *McCullen v. Coakley*, 573 U.S. ___, 134 S. Ct. 2518, 2534 n.4 (2014).

But the BZA denied the church's request variance, and denied the church's appeal of the zoning citation. As a result, the BZA's actions—and not the Sign Code itself—can be said to have violated the church's First Amendment rights, unless the BZA's decisions can withstand strict scrutiny—which they cannot.

5. The BZA's decisions cannot withstand strict scrutiny

As the Circuit Court found, the BZA did not exercise its discretion and meaningfully weigh the competing considerations, it merely relied on the board's past practice of denying similar requests for digital displays in residential areas.

> [T]he BZA appear[ed] to ... f[a]ll back on the fact it had previously denied other requests for a variance to allow digital displays. But the exercise of discretion requires just that: discretion. It was improper for the BZA to deny the Church's request for a variance simply because it had denied other requests for a variance.

(A 9-10; LF 44-45). As such, it is simply impossible for the BZA to meaningfully contend that it met the strict scrutiny standard.

Quite the contrary, the evidence adduced at the two hearings establishes that the BZA did not—and could not—have complied with the strict scrutiny test. For example, at no point did the City—or anyone else—even attempt to show that the digital display on the nearby Phillips 66 sign posed more of a traffic threat than the church's digital display. Nor could they, for at the hearing before the BZA the church's representative testified the church would agree to all of the City's safety requirements for digital displays in commercially-zoned areas. (LF 115-16). As a

result, the BZA cannot assert that the church's digital sign would pose any additional danger to drivers.

Nor did the City—or anyone else—even attempt to rebut that evidence showing that this one-mile stretch of Antioch Road is sandwiched between two dense commercial areas and is traveled daily by more than 13,000 persons. Nor did the City—or anyone else—even attempt to show that the digital display would negatively affect the "aesthetics" of the neighborhood. To the contrary, the only evidence from anyone other than the City and church came from the President of the local homes association, who testified before the BZA that the Church's sign was "very tasteful" and "well designed" and he "can't understand why the City is doing this." (LF 85-87).

As the Circuit Court found, the BZA considered none of this evidence. Rather than reach a principled decision—based on the unique facts of a 150-year old sitting on a state highway, bookended by intense commercial areas—the board merely acted like a typical bureaucrat and stamped "deny" on the church's application because that is the stamp the board had used on earlier applications for digital displays in residential areas. In so doing, the board made no whatsoever to balance the church's important interest in spreading its message with any other interests. Such an insolent attitude is the antithesis of strict scrutiny.

Moreover, the board's "head in the sand" approach violated its very charge under the City's Sign Code. Specifically, the code expressly provides that the it "must be broadly construed to allow noncommercial messages, subject only to

size, height, location and number limits that would apply to any sign bearing any message in that zoning district." (A 16; LF 307). Because the church's variance request did not involve the "size, height, location and number limits" of any sign, the board was required under the code to "broadly construe" the code so as to allow the church to display its "noncommercial messages" on its digital display.

Finally, on the critical question of whether the board members carefully considered the constitutional issues raised by the church, the records shows the exact opposite. Specifically, when the church expressly raised the claim that the board's actions was unconstitutional, BZA member Quinton Lucas, an attorney (*see* LF 538), asked the church's representative "why you think this is the proper forum to determine the constitutionality of the City code situation. Might this be better placed in a different forum … [W]hy [do] we have to hear it in a regular proceeding?" (LF 112).

As such, the uncontradicted evidence shows that not only did the BZA not exercise the required strict scrutiny—it exercised no scrutiny whatsoever.

CONCLUSION

For the reasons stated above, Antioch Community Church respectfully requests this Court affirm the judgment of the Circuit Court, which reversed the decision of the Board of Zoning Adjustment which denied the church's request for a variance to allow it to install and use a digital display on its existing monument sign, and which directed the BZA to grant the requested variance. In the event the Court reverses the Circuit Court's judgment, the church requests that the Court

remand the case back to the Circuit Court for further proceedings on Count II of the church's Supplement Verified Petition, which the Circuit Court dismissed as moot in light of the relief the Circuit Court granted in its judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b) and Local Rule XLI(A); and

3. According to the word count function of counsel's word processing software (Microsoft Word) and excluding those portions of the brief as permitted by Rule 84.06(b) and Local Rule XLI(D), the brief contains 15,653 words.

s/ Bernard J. Rhodes
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CERTIFICATE OF SERVICE

This is to certify that, on this 24th day of May, 2017, this Substitute Brief of Appellant Antioch Community Church with Appendix was electronically filed and served by use of the Case.net filing system on the below named counsel:

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