SC96215

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

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Standard of Review

The scope of review of the decision of a board of zoning adjustment is in two parts. First, a court must determine whether "the decision[] of the board of adjustment [was] authorized by law." *Rosedale-Skinker Improvement Ass'n v. Bd. of Adjustment of City of St. Louis*, 425 S.W.2d 929, 936 (Mo. banc 1968).

In its brief, the BZA concedes this determination is "[a] question of law for the independent judgment of the court." BZA Br. at 6 (citing *State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 684 (Mo. banc 2000)).

Second, the court must determine whether the BZA's decision "is supported by competent and substantial evidence." *Rosedale-Skinker*, 425 S.W.2d at 936. The BZA disputes this requirement, asserting that while "a board's decision to grant a variance must be supported by substantial evidence …, a board's denial of a variance does not require substantial evidence for support." BZA Br. at 6.

The board's sole authority for this remarkable proposition is a 1968 decision of the Western District Court of Appeals. But the BZA misreads that authority. In *State ex rel. Branum v. Bd. of Zoning Adjustment of City of Kansas City*, 85 S.W.3d 35 (Mo. App. W.D. 2002), the Branums appealed the denial of their request for a variance. In affirming the denial, the court wrote: "It is not for the Board to show that it had 'solid support' for its decision. It is for the Branums to show that the evidence so clearly demonstrated the appropriateness of granting the variances that it was an abuse of discretion for the Board to deny the variances."

Id. at 39. From this statement, the BZA asserts that "a board's denial of a variance does not require substantial evidence for support." BZA Br. at 6.

But numerous Court of Appeals decisions since then—in both the Western and Eastern Districts—have held that the denial of a variance must be supported "by competent and substantial evidence." *See, e.g., Wolfner v. Bd. of Adjustment of City of Warson Woods*, 114 S.W.3d 298, 301 (Mo. App. E.D. 2003) ("The scope of our review of a board of adjustment decision [denying a variance] is limited to determining whether the decision was authorized by law and supported by competent and substantial evidence upon the whole record."); *State ex rel. Sander v. Bd. of Adjustment of the City of Creve Coeur*, 60 S.W.3d 14, 16 (Mo. App. E.D. 2001) ("We are limited to determining whether Board's decision [denying the variance] is supported by competent and substantial evidence on the whole record …."); *State ex rel. Holly Inv. Co. v. Bd. of Zoning Adjustment of Kansas City*, 771 S.W.2d 949, 951 (Mo. App. W.D. 1989) ("The Board's decision denying the variance will be affirmed if it was authorized by law and if the decision is supported by competent and substantial evidence upon the whole record.").

As such, the BZA's assertion that its denial of a variance is not subject to judicial review is contrary to this Court's holding in *Rosedale-Skinker*, contrary to repeated decisions of the Court of Appeals, and is an affront to the rule of law. *See State ex rel. GTE N., Inc. v. Missouri Pub. Serv. Comm'n*, 835 S.W.2d 356, 370 (Mo. App. W.D. 1992) ("For judicial review to have any bearing, there is a minimum requirement that the evidence … make sense to the reviewing court. On ap-

peal, the court may not approve an order simply on faith in the Commission's expertise."). Instead, the BZA's decision to deny the church's requested variance is—as this Court held in *Rosedale-Skinker*—subject to judicial review as whether it was supported by competent and substantial evidence. *See* 425 S.W.2d at 936.

Whether a decision "is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record." *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003). A decision that is "against the weight of the evidence" is not support by competent and substantial evidence. *Krispy Kreme Doughnut Corp. v. Dir. of Revenue*, 488 S.W.3d 62, 68 (Mo. banc 2016).

I. The Board of Zoning Adjustment erred in denying Antioch Community Church's request for a non-use variance to install and use a small (36" x 42") digital display on the church's existing brick monument sign

A. The BZA's argument that the church is required to show topographical or other inherently physical reasons for the requested variance is contrary to this Court's holding in *Rosedale-Skinker*, as the BZA itself admits

The BZA's chief argument is that before the church could obtain a variance to allow it to use a digital display on its existing monument sign, the church had to show "a practical difficulty … related to unique conditions of the property." *See* BZA Br. at 13-15. The BZA supports its argument with a string cite to more than a

dozen Court of Appeals decisions which it asserts support this proposition. *See* BZA Br. at 13-15.

It is not necessary to review each of those decisions, however, because the Missouri Constitution expressly provides that "[t]he supreme court shall be the highest court in the state [and i]ts decisions shall be controlling in all other courts." Mo. Const., Art. V, Sec. 2. As a result, decisions of the Courts of Appeals are "in no wise binding" on this Court. *State ex rel. Harriman v. Reynolds*, 200 S.W. 296, 297 (Mo. banc 1917).

Accordingly, the relevant precedents are this Court's precedents. And the most relevant of these is this Court's decision in *Rosedale-Skinker*, which is this Court's must recent precedent on non-use variances.[1]

There, Southwestern Bell sought a variance to allow it to construct a one-story addition to its existing building. The phone company needed the variance because the zoning code imposed a height restriction of three stories or less. 425 S.W.2d 929 at 936. In seeking the variance, Southwestern Bell explained that it had outgrown the original three-story "telephone exchange and equipment building" built in 1911. *Id.* at 934.

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[1] This Court's later decision in *Matthew v. Smith*, 707 S.W.2d 411 (Mo. banc 1986), distinguishes between a use variance and a non-use variance. The BZA concedes that "[t]he Church in the present case sought a non-use variance." BZA Br. at 8.

Neighbors who opposed the requested variance argued that Southwestern Bell had not shown a basis for the variance and, specifically, that the phone company was required to prove a "hardship arising out of the peculiar topography or … physical characteristics of the parcel of ground" in question. 425 S.W.2d at 932. But this Court 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 held that "[t]he 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).

In its brief, the BZA acknowledges this holding, writing:

> The *Rosedale-Skinker* Court distinguished authority that required a unique condition of the topography of the land for a variance to be issued. The Court held that the requirement that a practical difficulty be related to topography was not found in the state statutes or in St. Louis' code, and therefore **the unique condition justifying a variance was not required to be a unique condition of the land itself**.

BZA Br. at 10 (emphasis added).

The BZA then buries itself even deeper, when it continues discussing the *Rosedale-Skinker* case: "The Court clearly found that the Bell property, though, particularly **the history and function of the building that was a part of the property**, was a unique and peculiar situation that warranted a variance." BZA Br. at 10 (emphasis added).

This is exactly what Antioch Community Church argued before the BZA—that "the history and function of the building" warranted a variance. Specifically, the church highlighted "the history" of its presence on the property, noting that it erected its first building on the property in 1853, its current building in 1956, and explaining its influence on the surrounding area, including the fact the church sits on what is now called Antioch Road, and is just down the street from Antioch Center and Antioch Middle School—all named after the church. (LF 559).

The church also highlighted the "function" of the building, presenting evidence that the church building is used not only for church services, but also by local community groups, and the fact those groups use the new digital display to promote their events. (LF 559). The church also presented evidence of how the church itself uses the digital display to promote its own activities, using larger, (and more readable) letters—making the church's messages both easier (and safer) to read, a critically important fact given that more than 13,000 cars pass the sign every day. (LF 559). The church also introduced evidence that the digital display allows it to "greatly increase the number of messages it can share with the com-

munity," for a church member no longer has to go outside, "prop open the old display case, and arrange letters by hand to spell words – á la Scrabble." (LF 559).

In other words, the church demonstrated—through both "the history and function of the building"—that it had effectively "outgrown" the old cup-hook method of displaying messages, just as Southwestern Bell used "the history and function" of its building to show it had outgrown its building. Given this undisputed evidence, the BZA's acknowledgment that this Court, in its *Rosedale-Skinker* decision, relied on the "the history and function of the building that was a part of the property" to show the requisite "unique and peculiar situation that warranted a variance," effectively seals the BZA's fate.[2]

B. The church's requested variance is not "personal"

Recognizing the controlling effect of *Rosedale-Skinker*, the BZA attempts to recharacterize the church's request as not being based on "the history and function of the building," but instead as being based on "personal considerations." BZA Br. at 13. But the BZA misapprehends both the facts and the law.

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[2] This is particularly so given that the state statutes concerning variances have not changed since *Rosedale-Skinker* was decided, *e.g.*, they still do not require that a variance be based on topographical or physical conditions of the land. *See* Mo. Rev. Stat. § 89.090. And the Kansas City zoning ordinance—like the St. Louis ordinance at issue in *Rosedale-Skinker*—contains no such requirement. *See* BZA Br. at 2-4 (quoting BZA App. A5-A6; LF 359-60).

The church's request is not a type of "rolling request" which is personal to itself—untethered to its location—but is instead inherently tied to its location. This conclusion is easily confirmed by asking whether the church would have any interest in a digital display if the church was 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 the digital display is located adjacent to a major thoroughfare which is traversed by 13,500 cars a day—drivers who are 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.

The BZA supports its argument with cases such *Brown v. City of Maplewood*, 354 S.W.3d 664, 669 (Mo. App. E.D. 2011), where the applicant sought a variance to build a carport because his garage was full of "stuff," and *State ex rel. Klawuhn v. Bd. of Zoning Adjustment of City of St. Joseph*, 952 S.W.2d 725, 729 (Mo. App. W.D. 1997), where the applicant sought a variance to build an outbuilding because he owned too many vehicles to fit in his garage. But in each case, the applicant's accumulation of "stuff" (on the one hand) and vehicles (on the other) had nothing whatsoever to do with the location of the property. The applicants would have accumulated just as much property if their homes—like the church—

were located on a four-lane state route sandwiched between two commercial areas and traversed by 13,500 cars a day, or in the back of a quiet cul-de-sac.

Here, as shown above by the hypothetical reference to the church being in the back of a quiet cul-de-sac, the church's practical difficulty is inherently tied to the location of the church on Missouri Route 1, with its attendant 13,500 cars a day traveling between I-35 to the south, and the shopping/commercial district to the north.

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.[3]

C. The BZA's attempt to distinguish the church's other authorities is unavailing

While *Rosedale-Skinker* controls this case, the church cited several other cases in support of its position. For example, the church cited the Western District Court of Appeals decision in *Highland Homes Ass'n v. Bd. of Zoning Adjustment*, 306 S.W.3d 561, 565 (Mo. App. W.D. 2009). There, the Court of Appeals—like this Court in *Rosedale-Skinker*—squarely rejected the neighborhood association's

[3] Because the church's request is tied to the location of its property, the BZA's argument that it did not have the power to grant the variance because variances run with the land misses the mark entirely. *See* BZA Br. at 19.

argument "that variances should be limited to situations where the topography of the land makes compliance with ordinance requirements impractical," ruling instead that "a topographical challenge" is not required for the proper granting of a non-use variance. *Id.* at 567.

In its brief, the BZA concedes that the Court of Appeals approved the variance upon a showing that a 41-foot tall tower which complied with the existing site restriction would not have been as "effective" as the 95-foot tall tower for which the cell phone company sought a variance. BZA Br. at 10-11. Here, there is no question that a digital display is more "effective" in getting the church's message out to the community than the cup-hook method previously used. As such, the BZA does little to distinguish *Highland Homes*.

The church also cited *Taylor v. Bd. of Zoning Adjustment of City of Blue Springs*, 738 S.W.2d 141 (Mo. App. W.D. 1987), where the BZA denied the property owner's request for a variance to allow an oversized sign. On review, the court of appeals reversed the BZA's decision, finding the BZA abused its discretion. *Id*. at 145.

In attempting to distinguish the *Taylor* court's ruling, the BZA asserts that the court "held that the unique character of [the] property necessitated relief, because of the vagueness of the ordinance does not clearly limit the permit that was granted." BZA Br. at 12. But the BZA's argument is non-sensical—how can the vagueness of a city ordinance give a particular property "unique character"? It clearly does not, for a city ordinance applies to all properties—or, at a minimum,

to all properties in a certain zoned class of properties. As such, the BZA's attempt to distinguish the *Taylor* decision is wholly unavailing.

The BZA also attempts to distinguish the Court of Appeals decision in *Brown v. Bd. of Adjustment*, 469 S.W.2d 844, 846-47 (Mo. App. E.D. 1971). But in doing so, the BZA admits that the *Brown* court explained that "the *Rosedale-Skinker* case had, in effect, overruled previous precedent that had limited hardships or practical difficulties to 'conditions inherent in the land, such as topography, dimensions, or shape of the property.'" BZA Br. at 12. The BZA went on in its description of *Brown* to write that *Brown* confirmed that "the *Rosedale-Skinker* case had held that a variance could be granted for a difficulty arising from the application of the code to the use, construction or alteration of building and structures as well as the use of the land." *Id.*

Again, this is exactly what the church requested—a variance to "the use, construction or alteration of [a] structure" on the property, without regard to the "topography, dimensions or shape of the property." *Id.* Again, therefore, the BZA's attempt to distinguish the church's authorities is unavailing.

D. The "other" factors support the church's requested variance

Besides showing the practical difficulties with strict compliance with the zoning code, the church also demonstrated that its request satisfied the "other" factors to be considered in granting a variance. These include showing that the requested variance is not substantial, would not change the character of the neigh-

borhood, is the minimum needed, and serves the interests of justice. ACC Br. at 36-42.

In its brief, the BZA responds only briefly to two of these issues. As to the question of how the replacement of the "insides" of the 60-year old sign with a small digital display would be substantial (when the difference between a 95-foot tall tower and 41-foot tall tower was not substantial), the BZA asserts simply that **any** digital display in a residentially-zoned area would be substantial—regardless of the size of the display, regardless of the location of the display, regardless of the number of cars driving by the property every day. BZA Br. at 15.

The church submits that it is exactly this type of logic that dooms the BZA's argument, for it reflects the BZA's position that any digital display—regardless of the unique facts in this case—should be permanently prohibited. Such a position flies in the case of this Court's explanation that "[t]he variance procedure 'fulfill[s] a sort of "escape hatch" or "safety valve" function for **individual landowners** 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) (emphasis added).

The BZA also indirectly takes issue with the church's argument that the interests of justice would be served because the church's purchase of the digital display was an innocent mistake—made in reliance on a parishioner's earlier donation for a similar digital display in a residentially-zoned area of Gladstone. The BZA asserts that "[a] variance cannot be granted for a hardship resulting from the

property owner's mistake, rather than the unique physical characteristic of the property." BZA Br. at 16.

To begin with, the BZA's position that a variance can only be granted based on "the unique physical characteristic of the property" is plainly contrary to *Rosedale-Skinker*, as discussed above. Moreover, the church is not seeking a variance because of its mistake; rather, the church's innocence is a relevant additional factor (as opposed to the primary moving factor). In fact, the City's own code makes this factor relevant when it provides that when considering a requested variance, the BZA "**must consider** … whether the zoning variance is being requested due to an intentional violation of this zoning and development code." BZA Br. at 3-4 (quoting BZA App. A5-A6; LF 359-60) (emphasis added). Here, the undisputed evidence shows that the church's installation of the digital display was clearly not an "intentional violation of the zoning and development code," but was, instead, an innocent mistake.

Contrary to the BZA's position before this Court that this fact is irrelevant, the City's own code required the BZA to consider this fact, which is favorable to the church. The failure of the BZA to consider this fact is still further evidence of its abuse of discretion, for a tribunal "abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to indicate indifference and a lack of careful judicial consideration." *Martin v. Martin*, 483 S.W.3d 454, 458 (Mo. App. W.D. 2016).

E. The BZA's assertion that it lacked authority to grant the requested variance is contrary to the plain language of the sign code, and contravenes numerous canons of statutory construction

1. Whether the BZA has authority to grant the requested variance is a question of law over which this Court has *de novo* review

The BZA concedes in its brief that the question of whether it had the authority to grant the requested variance is "[a] question of law … for the independent judgment of the court." BZA Br. at 6. This is clearly correct. "[I]n determining whether the decision is 'authorized by law,' the AHC's construction of a … statute is reviewed *de novo*." *Fischer v. Dir. of Revenue,* 483 S.W.3d 858, 860 (Mo. banc 2016).

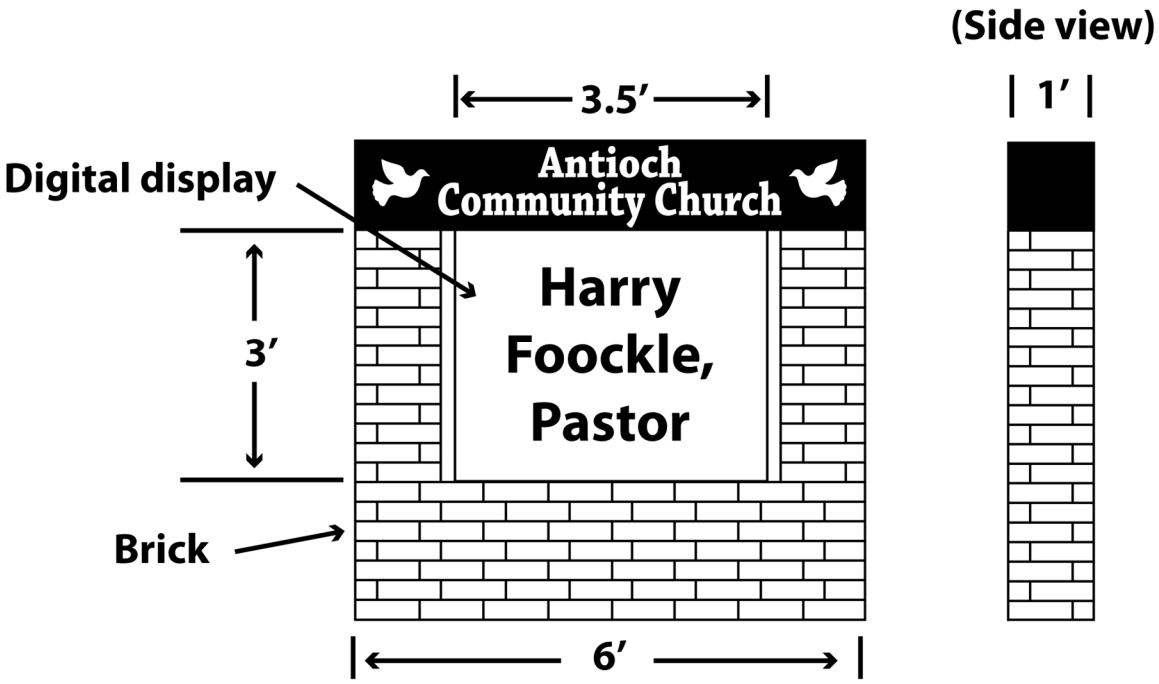
2. The church has a monument sign

The parties agree that the applicable provision of the Sign Code is Section 88-445-06-A-4, which allows a church in a residentially-zoned area to 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 BZA concedes that Antioch Community Church's sign is "a monument sign." BZA Br. at 22. This concession follows from the Sign Code's definition of 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 22; LF 435).

The church's sign sits on a base that rests upon the ground, and the width of the base is equal to the longest part of the sign, as shown in this engineering drawing.



(A 24; LF 1039).

3. The church requested a variance as to the requirement that the allowed "changeable copy … must use direct human intervention for change and may not include any form of digital or electronic display"

Section 88-445-06-A-4 also provides that a monument 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." (A 19; LF 310).

In its application for a variance, Antioch 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 example, 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 that portion of the Sign Code that required the allowable "changeable copy [to] use direct human intervention for changes and may not include any form of digital or electronic display." (A 19; LF 310).

4. The BZA's authority to vary the "requirements for signs"

Section 88-445-12 of the Sign Code provides that "[t]he Board of Zoning Adjustment may grant variances **to the requirements for signs**, except as to the type and number." (A 21; LF 321) (emphasis added). Thus, for example, the BZA could grant a variance to the requirement that a sign not exceed 32 square feet or 6 feet in height, or (as is the case here) to the requirement that the allowable "changeable copy … use direct human intervention for changes and may not include any form of digital or electronic display"—so long as the BZA did not allow more than one sign, or did not allow, for example, a pole sign.

Because Antioch Church did not seek a variance as to either the number of signs—or the type of sign—the BZA had authority to grant the requested variance,

i.e., a "variance to allow [a] digital display on an existing monument sign" (LF 555), under a plain reading of Section 88-445-12.

5. The BZA's reading of the Sign Code renders the "human intervention" provision superfluous

The BZA argues that because the Sign Code defines a "sign type" as including digital signs—and because "sign, digital" is defined to include "[a] sign or component of a sign that used changing lights to form a message," the church's sign is a "digital sign." BZA Br. at 22. The BZA then goes on to argue that because the church's sign is a "digital sign," the BZA did not have authority to vary the "sign type." BZA Br. at 22.

Under this reading of the code, however, the provision in Section 88-445-06-A-4 which requires the allowable "changeable copy" to "use human intervention" and prohibits—absent a variance—"any form of digital or electronic display" (A18; LF 310), would be superfluous, because any variance to allow a digital display would **necessarily** vary the sign type (*i.e.*, make the sign a "digital sign")—something the City asserts the BZA cannot do.

"In construing a city ordinance, we are to apply the same rules that are used in construing a state statute." *Cousin's Advert., Inc. v. Bd. of Zoning Adjustment of Kansas City*, 78 S.W.3d 774, 779 (Mo. App. W.D. 2002). "Every word, clause, sentence and section of a statute should be given meaning, and under the rules of statutory construction statutes should not be interpreted in a way that would render

some of their phrases to be mere surplusage." *State v. Joyner*, 458 S.W.3d 875, 884 (Mo. App. W.D. 2015).

Under the BZA's reading of Section 88-445-12, the entire clause in Section 88-445-06-A-4 which provides that "the changeable copy feature must use direct human intervention for changes and may not include any form of digital or electronic display" would be rendered excess verbiage, which is not permitted. "An entire clause of the statute should not be relegated to the status of excess verbiage" *Kershaw v. City of Kansas City*, 440 S.W.3d 448, 458 (Mo. App. W.D. 2014).

As such, the BZA's argument proves too much.

6. To the extent the BZA admits the sign is both a monument sign and digital sign, the "tie-breaker" goes to the church

Hedging its bets, the BZA also argues that the church's sign is not just a "digital sign," it is also both a "monument sign **and** a digital sign, as defined by the City's Code." BZA Br. at 22 (emphasis added). There are several problems with this argument. To begin with, the Sign Code itself provides that it "must be **broadly construed to allow noncommercial messages**, subject only to size, height, location and number limits." Section 88-445-04-D (A 15; LF 307) (emphasis added). Here, the requested variance does not implicate the "size, height, location and number limits," but only the sign's display options. Consistent with the mandate to "broadly construe" the code "to allow noncommercial messages," the Sign Code must be read to allow the church's noncommercial religious message, *i.e.*, to construe the church's sign as a monument sign.

Accordingly, so long as the sign can be considered a permitted monument sign, it must be considered a permitted monument sign if the effect is to allow the church to display non-commercial messages on the sign.

Similarly, a reading of the Sign Code to allow commercial entities to use digital displays—while prohibiting noncommercial entities from using the identical digital displays—would violate the canon that statutes should not be construed in a way to render them unconstitutional. "As a principle of statutory construction, this court should reject an interpretation of a statute that would render it unconstitutional, when the statute is open to another plausible interpretation by which it would be valid." *State ex rel. Neville v. Grate*, 443 S.W.3d 688, 693 (Mo. App. W.D. 2014). Because it is unconstitutional to discriminate against noncommercial speech in favor of commercial speech (*see* pp. 26-29, *infra*), the BZA's proposed construction—which would render the Sign Code unconstitutional—should be avoided.

Finally, it is well-accepted that "[a] primary rule of construction in Missouri is that zoning ordinances are in derogation of the property rights conferred by the common law, and as such should, whenever ambiguous, be strictly construed **in favor of the landowner**." *Claudia Lee & Assocs. v. Bd. of Zoning Adjustment of Kansas City*, 489 S.W.3d 802, 806 (Mo. App. W.D. 2016) (emphasis added). Accordingly, to the extent the church's sign can be both a "monument sign" and a "digital sign," the Sign Code must be strictly construed in favor of the

landowner, *i.e.,* the church. As such, the sign must be construed so that it is considered a "monument sign."

Accordingly, the BZA had the authority to grant the church's request that the BZA vary the requirement in Section 88-445-12 that the sign's "changeable copy feature must use direct human intervention for changes and may not include any form of digital or electronic display," as the church requested in its application for a variance, where the church requested a "variance to allow [a] digital display on existing monument sign." (LF 555).

II. THE CHURCH DID NOT NEED TO APPEAL THE CIRCUIT COURT'S JUDGMENT GRANTING THE CHURCH THE RELIEF IT SOUGHT

In its original Petition, Antioch Community Church alleged in Count I that the BZA's denial of its application for a variance (and the BZA's denial of its appeal from the notice of violation) were improper under Missouri law and, alternatively, violated the church's First Amendment rights. (*See* LF 11-20). In its Supplemental Petition, the church added an additional count in which it alleged that the City's Sign Code itself is unconstitutional. (*See* LF 21-35).

In its Judgment, the Circuit Court granted the church's request as to Count I and ordered the BZA to provide the church the requested variance. (A11-A12; LF 46-47). The Circuit Court then dismissed Count II as moot. (A12; LF 47). The BZA appealed the Circuit Court's judgment granting the church's request for relief under Count I. (LF 48-49).

The BZA begins its discussion of the church's alternative First Amendment claims by arguing that this Court cannot consider the church's arguments because the church did not file a cross-appeal. BZA Br. at 24-26. The BZA, however. is wrong.

A. The church could not have appealed the judgment in its favor as to Count I

To begin with, the church could not have appealed the Circuit Court's judgment as to Count I, for the church is not an aggrieved party. *See* Mo. Rev. Stat. § 512.020 ("Any party to a suit aggrieved by any judgment of any trial court in any civil cause … may take his or her appeal to a court having appellate jurisdiction"). Nor was such an appeal necessary as to Count I, for "[w]e must affirm the trial court's judgment if it is sustainable for any reason supported by the record." *Gaydos v. Imhoff*, 245 S.W.3d 303, 306 (Mo. App. W.D. 2008).[4]

[4] "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.").

As a result, in the event this Court reverses the Circuit Court's judgment as to its finding that the BZA violated Missouri law in denying the church's request for a variance, this Court can nevertheless affirm the Circuit Court's judgment as to Count I on the alternative ground that the BZA's actions were unconstitutional.

B. In the event this Court reverses the Circuit Court's judgment as to Count I, this Court can remand the case to the Circuit Court to consider Count II

Pursuant to its obligation to resolve a case on non-constitutional issues where possible, the Circuit Court dismissed Count II as moot considering the relief granted via Count I. In such cases, it is not necessary for the party prevailing below to file a notice of appeal from the Circuit Court's judgment for an appellate court to be able to remand the case for consideration of any count which was previously dismissed as moot. *See, e.g., Robertson v. Police & Firemen's Pension Plan of City of Joplin*, 442 S.W.3d 60, 71-72 (Mo. App. S.D. 2014) (remanding for consideration of count which was no longer moot); *see also Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 53 (Mo. banc 1999) ("This Court, following a long line of cases, generally declines to rule on constitutional issues that are not essential to the disposition of the case, and **retains jurisdiction nonetheless**, where, as here, there is reversible error as to other issues.") (emphasis added).

None of the cases cited by the BZA in its Brief are apposite, for none of those cases deal with a situation in which a count was dismissed as moot because of the relief granted on another count. *See* BZA Br. at 25-26.

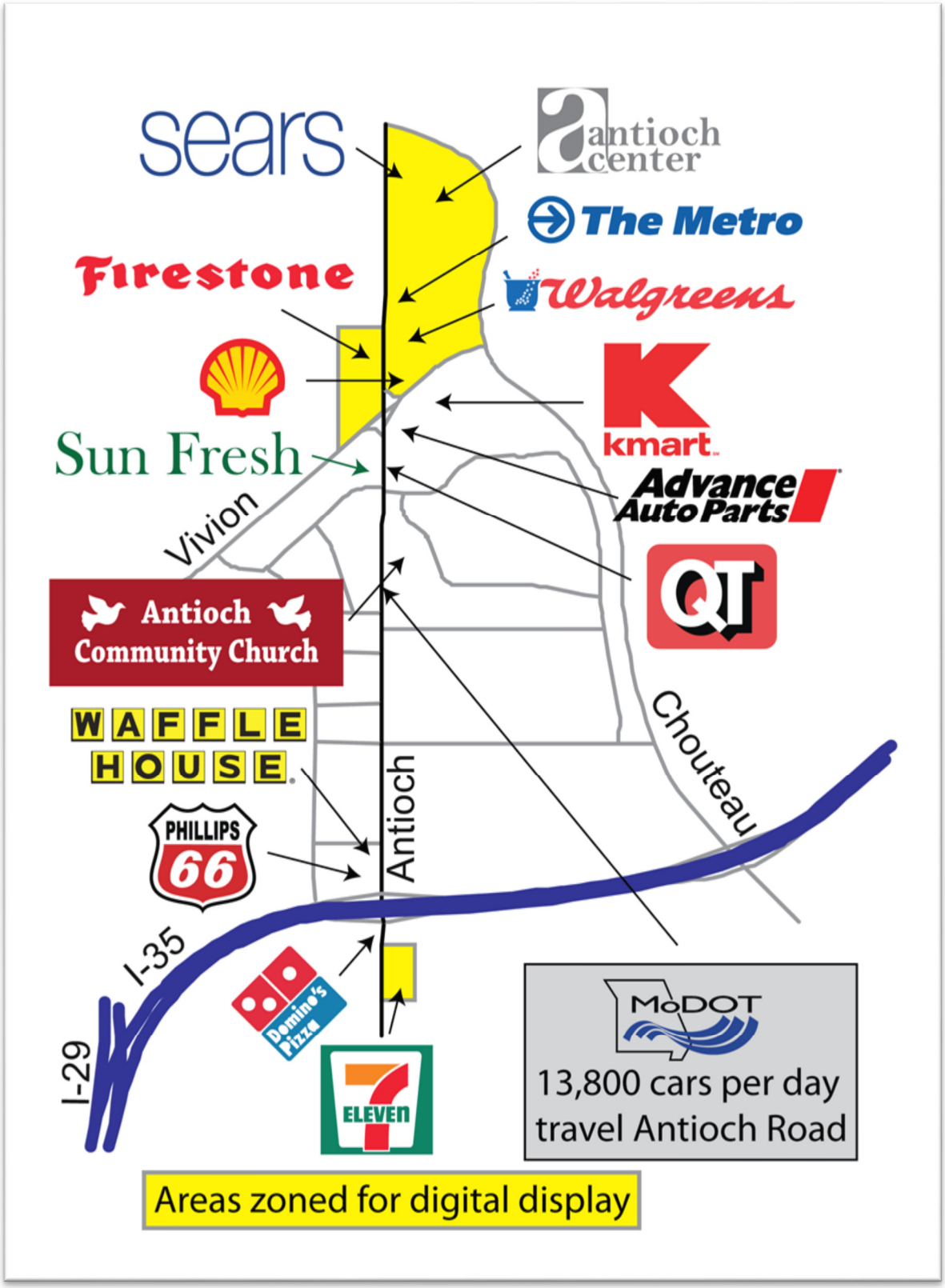
III. THE BZA VIOLATED THE FIRST AMENDMENT WHEN IT DENIED THE CHURCH'S REQUEST FOR A VARIANCE AND UPHELD THE NOTICE OF VIOLATION

In its Petition, the church specifically argued that the denial of the its requested variance, as well as the denial of its appeal of the notice of violation, were violations of the church's First Amendment rights because the denial resulted in the City favoring commercial speech over the church's noncommercial, religious message. (LF 17). In its Brief, the BZA makes the remarkable assertion that "[t]here are no facts in the record that would show that the BZA engaged in such favoritism, or that the BZA enforced an ordinance that did so." BZA Br. at 26). The record shows otherwise.

A. The facts in the record

1. The City allows commercial businesses on Antioch Road to have digital signs

During the hearing on the church's request for a variance, the church introduced into evidence an exhibit identifying numerous areas on Antioch Road in which the City's Sign Code expressly allows commercial businesses to have digital signs. That exhibit is repeated here.



(A 25; LF 1044).

The church also introduced evidence at the hearing that the City had allowed the Phillips 66/Circle K convenience store at Antioch Road and I-35 to have a pole sign with a digital display.

(A 26; LF 1045).

The Phillips 66 station is not located in an area which is zoned for digital signs—a fact which is evidenced by locating the Phillips 66 station on the map on the prior page of this Brief and comparing that location to the shaded areas which are zoned for digital displays. Despite this fact, the station continues to use a digital display to display the price of gas at its station on Antioch Road.

2. The BZA denied both (1) the church's application for variance to allow a digital display on Antioch Road, and (2) the church's appeal of the notice of violation

Arrayed against these facts is the fact the BZA denied both (1) the church's application for a variance to allow it to install a digital display on the very same stretch of Antioch Road, and (2) the church's appeal of the notice of violation. The BZA took these actions despite the church's argument to the BZA that under the Constitution, the City should give "more protection to the word of God than … to the price of gas." (LF 64).

B. The BZA's actions are an unconstitutional content-based restriction on the church's First Amendment rights

In *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218 (2015), the Supreme Court held that Gilbert'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 ordinance discriminated against the church's signs, the Court explained that it was a "content-based law," which it ruled 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 ordinance failed the "strict scrutiny" test, finding that the town's cited reasons for its ordinance—"preserving the Town's

aesthetic appeal and traffic safety"—were legally insufficient given that the town allowed other signs, which necessarily both detracted from the Town's aesthetic appeal and traffic safety. *Id.*

The same is true here. As shown above, the City allow numerous commercial businesses up and down Antioch Road to use digital displays to display their commercial messages, while at the very same time—and on the very same road—the BZA refuses to allow Antioch Community Church to use a digital display to display its noncommercial, religious message.

In its Brief, the BZA never attempts to justify this distinction. For example, the BZA never argues that the church's sign would cause a traffic hazard, or that it would distract from the "aesthetic appeal" of Antioch Road. The reason for the BZA's failure is obvious—the BZA's arguments would fail for the same reasons the Town of Gilbert's arguments failed: the fact the City allows commercial businesses along Antioch Road to use digital displays necessarily refutes any such arguments.[5]

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[5] This discrimination between commercial and noncommercial speech was not at issue in either *La Tour v. City of Fayetteville*, 442 F.3d 1094 (8th Cir. 2006), or *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27 (1st Cir. 2008), both of which the BZA cites to in other sections of its Brief. *See* BZA Br. at 29-30 & 36. In both of those cases, the ordinance prohibited all electronic signs, regard-

Instead, the BZA asserts that its actions were not intended to discriminate against the church and should, therefore, be deemed content-neutral. *See* BZA Br. at 33-37. But the BZA's argument ignores the holding in *Reed* that government actions which are content-based are "subject to strict scrutiny **regardless** of the government's benign motive, content-neutral justification, or lack of 'animus' toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228 (emphasis added).

As such, a First Amendment violation occurs whenever government action discriminates against certain speech **regardless** of the government's motive. "This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'" *Id*. at 2231.

Finally, the BZA contends the Sign Code itself is constitutional in that its distinction between residentially-zoned areas and commercially-zoned areas is rational—and that the BZA is merely enforcing that law. *See* BZA Br. at 35-36. Again, as noted above, the test is not a rational basis test, but a strict scrutiny test. In that important regard, it is obvious that—considering *Reed*—even if the City's distinction between residential and commercial areas may, on its face, "seem 'en-

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less of whether they advertised commercial or noncommercial activities. In fact, the plaintiffs in both cases were commercial businesses.

tirely reasonable,'" the effect of the distinction is to unconstitutionally discriminate against churches. This is particularly true given the fact—as this Court has noted—"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 can be seen, therefore, the BZA's contention that "[t]here are no facts in the record that would show that the BZA engaged in such favoritism, or that the BZA enforced an ordinance that did so," BZA Br. at 16, is unsupportable.

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 Supplemental Verified Petition, which the Circuit Court dismissed as moot in light of the relief the Circuit Court granted in its judgment.

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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), the brief contains 7,646 words.

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CERTIFICATE OF SERVICE

This is to certify that, on this 24th day of July, 2017, this Reply Brief of 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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