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IN THE SUPREME COURT OF MISSOURI

No. SC96215

ANTIOCH COMMUNITY CHURCH,

Respondent,

v.

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

Appellant.

On Appeal from the Circuit Court of Clay County, Missouri
Honorable Janet Sutton, Circuit Judge

**SUBSTITUTE BRIEF OF THE BOARD OF ZONING ADJUSTMENT
OF THE CITY OF KANSAS CITY, MISSOURI
(RESPONDENT'S BRIEF PER RULE 84.05(e))**

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STATEMENT OF FACTS

Plaintiff/respondent Antioch Community Church ("Church") is a Missouri not-for-profit corporation. (A1; LF 21) The Church is located at 4805 N.E. Antioch Road, Kansas City, Missouri, on property that is zoned R-6, a single-family residential zoning category, and the property is completely surrounded by single-family residential uses. (A1, A4; LF 21, 1030 (see also BZA Ex. 10, video showing Church and surrounding single-family uses))

On October 12, 2011, the City of Kansas City, Missouri served the Church with a notice of violation after the Church placed a digital sign on its property, in violation of Section 88-445-06-A-4, which provides as follows:

> **INSTITUTIONAL USES**
>
> A lot with an institutional use as its principal use, 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.

(A2, A9; LF 23, 310)

The Church appealed this notice of violation to the Board of Zoning Adjustment ("BZA") and applied for a variance. (LF 23) The variance application requested a variance to allow the Church to install the digital display on its existing monument sign, which it had already installed. (A3; LF 24)

The BZA decisions that were challenged in this action were decisions to deny a variance for the Church's digital sign, and to uphold the notice of violation that the sign violated the City's Zoning and Development Code ("Code"). The Church had installed the digital sign without a permit, and it was prohibited in the single family residential zoning district in which the Church was located. (A13; LF 1031) The BZA's decision to deny the variance was based on the Church's failure to prove an undue hardship to justify the variance, and based on a Code provision that prohibited the BZA from granting a variance to the type of sign allowed in a district, and its determination that a digital sign was a sign type. (February 14, 2012 transcript, pp. 41-42 (LF 90-91)) The BZA also, in a separate decision, upheld the notice of violation that staff had issued because the sign violated the Code. (March 13, 2012 transcript, pp. 17-18 (LF 166-17))[1] On appeal, the Church has not challenged the BZA's decision upholding the notice of violation.

Kansas City's Code sets out the allowable review criteria and factors to be considered for the BZA to grant a variance:

88-565-06 Review Criteria

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[1] The BZA heard the appeal a month later than the variance request because the Church's attorney requested a continuance of the appeal. (LF 43)

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

88-565-06-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;

88-565-06-B. the zoning variance is generally consistent with all relevant purposes and intents of this zoning and development code; and

88-565-06-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.

88-565-07 Factors to be Considered

In acting on requested zoning variances, the board of zoning adjustment must also consider the following factors:

88-565-07-A. whether the undue hardship or practical difficulties are the result of the actions of the property owner or applicant, their agent, employee, or contractor;

88-565-07-B. whether granting the requested zoning variance will result in advantages or special privileges to the applicant or property owner that this zoning and development code denies to other land, structures, or uses in the same district;

88-565-07-C. whether the requested zoning variance is the minimum zoning variance necessary to provide relief;

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88-565-07-D. whether the zoning variance, if allowed, will substantially interfere with or injure the rights of others whose property would be affected by allowance of the zoning variance; and

88-565-07-E. whether the zoning variance is being requested due to an intentional violation of this zoning and development code.

(A5-A6; LF 359-60)

The "practical difficulty" claimed by the Church to justify the requested variance was that the digital display would allow the Church to change its message more frequently and conveniently, and in a more readable format, and would not require Church members to go out in the weather. (Church's brief, p. 35)

On March 15, 2012 the Church appealed to the circuit court the BZA's decisions denying the requested variance and upholding the notice of violation by filing a petition for writ of certiorari, naming the BZA as the defendant. (LF 10, 11) On April 6, 2016, the Church filed a supplemental petition which named the City of Kansas City, Missouri ("City") as a defendant for the first time, and added a Count II challenging the constitutionality of the City's Code. (LF 7, 21-35) The City was not served with this supplemental petition, and was not made a party to the case. (LF 7) On April 7, 2016, the court issued the judgment, reversing the BZA's decision to deny the variance, holding that the BZA had abused its discretion, denying the Church's appeal of the BZA's upholding of the notice of violation as moot, and dismissing Count II of the supplemental petition filed the previous day as moot. (LF 46-47) The BZA appealed the court's ruling that its

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denial of the variance was an abuse of discretion. (LF 7) The Church did not file an appeal or cross-appeal of the circuit court's decision. (LF 7)

The Church quotes extensively from the circuit court's opinion, both in its Statement of Facts and throughout its brief, and attaches the opinion in its appendix. The circuit court's opinion regarding issues in this case is not relevant to this appeal, which is a review of the BZA's decision rather than the circuit court's decision. The circuit court's opinion contained many "facts" that were not in the record, although there was no evidentiary hearing at the circuit court, and the only relevant facts should be those from the record before the BZA.

ARGUMENT

Standard of Review

The appellate courts review the BZA's denial of a variance, and not the judgment of the trial court. *State ex rel. Branum v. Bd. of Zoning Adjustment of City of Kansas City, Mo.*, 85 S.W.3d 35, 38 (Mo. App. 2002). The determination of whether a practical difficulty alleged by an applicant for a non-use variance was proved and warrants a variance is a matter for the discretion of the BZA. *Id.* The BZA's decision will only be reversed for an abuse of discretion. *Id.* The burden is on the applicant to prove to the BZA that the variance should be granted. *Id.* The BZA's power to grant a variance "'should be exercised sparingly and in accordance with public welfare.'" *Id.* (quoting *Hutchens v. St. Louis Cty.*, 848 S.W.2d 616, 619 (Mo. App. 1993)).

The court should hold the BZA's decision to be unlawful if the BZA exceeds its authority. *State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681,

684 (Mo. banc 2000). A question of law is for the independent judgment of the court. *Id.* A court applies the same rules of construction in construing city ordinances as are applicable to the construction of state statutes. *Id.* "The cardinal rule for construing ordinances is to ascertain and give effect to the intent of the enacting legislative body." *Id.* If a term is specifically defined by the ordinance, that "definition is binding on the court and must be given effect." *Id.*

The Church argues that the BZA's decision to deny a variance must be supported by competent and substantial evidence, citing cases including *Rosedale-Skinker Imp. Ass'n v. Bd. of Adjustment of City of St. Louis*, 425 S.W.2d 929, 936 (Mo. 1968). The *Rosedale-Skinker* case was one in which the board granted a variance, and the grant of a variance must be supported by evidence to justify that grant upon the applicant's satisfaction of its burden of proof. *Branum*, 85 S.W.3d at 39. In the *Branum* case, the applicants who were denied a variance argued that there was not sufficient evidence to support the board's decision. The court held that the applicants failed to understand the standard of review by making that argument. "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.* Thus, a board's decision to grant a variance must be supported by substantial evidence, and is then reviewed for an abuse of discretion, but a board's denial of a variance does not require substantial evidence for support. The standard in the present review of the BZA's denial of the variance is whether the BZA abused its discretion.

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I. The Board of Zoning Adjustment did not err in denying Antioch Community Church's requested variance to allow a digital display on an existing monument sign because the digital display was prohibited in the residential zone in which the Church was located, because the Church did not prove that it had practical difficulties in complying with the Code, and because the Code prohibited the BZA from varying the "sign type" allowed by the Code and a digital display was specifically included in the Code's definition of "sign type." (response to Point I)

A. A sign containing a digital display is prohibited in the residential zone in which the Church is located by the City's Zoning and Development Code.

The Church is located on property which has been zoned for residential uses under the City's Zoning and Development Code. (A13; LF 1031) The uses surrounding the Church are single-family land uses in all directions. (A13; LF 1031) An institutional use, such as a church, which is located in a residential district, is allowed to have a monument sign, but any changeable copy feature may not include any form of digital display. Code Section 88-445-06-A.4. (A9, A13; LF 310, 1031) The Code does not allow *any* signs for *any* allowed uses to have a digital display in a residential zoning district. Code Section 88-445-06. (A7-11; LF 308-312)

B. The BZA did not abuse its discretion in denying the requested variance because the Church did not prove a "practical difficulty" as that term is defined in Missouri law and in Kansas City's Code.

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This court in *Matthew v. Smith* set out four general principals of variance law that indicate what an applicant for a variance must prove:

> (1) relief is necessary because of the unique character of the property rather than for personal considerations; and
>
> (2) applying the strict letter of the ordinance would result in unnecessary hardship; and the
>
> (3) imposition of such a hardship is not necessary for the preservation of the plan; and
>
> (4) granting the variance will result in substantial justice to all.

707 S.W.2d 411, 415–16 (Mo. banc 1986). While these standards apply to all variances, an applicant for a use variance must prove an unnecessary hardship, whereas an applicant for an area (non-use) variance must prove a practical difficulty, which is a burden that is slightly less rigorous than unnecessary hardship. *Id.* at 416. Additionally, an applicant for a non-use variance must "[a]t the very least" prove that the property "cannot be used for a permitted use without coming into conflict with certain of the ordinance's restrictions." *Slate v. Boone County Bd. Of Adjustment,* 810 S.W.2d 361, 364 (Mo.App.1991). The Church in the present case sought a non-use variance.

The Church argues that several Missouri cases have eliminated the requirement that a practical difficulty must stem from a unique circumstance of the involved property, rather than for personal considerations, the first-listed requirement under *Matthew v. Smith*. This brief will examine the cases cited by the Church, most of which pre-date *Matthew v. Smith*.

1. A practical difficulty under *Rosedale-Skinker*.

The Church relies on the case of *Rosedale-Skinker Imp. Ass'n v. Bd. of Adjustment of City of St. Louis*, 425 S.W.2d 929, 937 (Mo. banc 1968) to support its argument that the Church proved that it had practical difficulties justifying a variance under Missouri law. The *Rosedale-Skinker* case is not analogous to the present case, and does not support the Church's argument.

In *Rosedale-Skinker*, the Southwestern Bell Company had built its four-story telephone and exchange building in accordance with the zoning requirements in effect when the original building and its additions had been constructed. Forty years after the original building was constructed, the zoning code was amended to limit structures in its zone to three stories. The evidence before the St. Louis Board of Adjustment showed that Bell needed to expand its building because of the increasing needs of the public for telephone service, and the expansion needed to be the same height as the existing building for the equipment housed therein to function properly. *Id.* at 935. Telephone service to the public would be severely disrupted if Bell was forced to move to a new building. *Id*. at 934-36. The Court held that under these unique circumstances, the Board did not abuse its discretion in granting a height variance for the addition. *Id.* at 937. In reaching this decision the Court recognized that the power to grant variances is to be exercised sparingly, but held that Bell had shown a unique and peculiar situation, a practical difficulty justifying the Board's grant of a variance. *Id.* The Court did not hold that Bell "was entitled to the variance," as argued by the Church in the present case (Church brief p. 31), but rather that the Board exercised "sound discretion in granting the variance." *Id.*

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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. *Id.* at 932-34. 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.

2. A practical difficulty under *Highland Homes*

The Church also cites the case of *Highlands Homes Ass'n v. Bd. of Adjustment*, 306 S.W.3d 561, 565 (Mo. App. 2009) to support its argument that the BZA abused its discretion in denying the variance. The *Highland Homes* case does not support the Church's argument, although it reaffirms several important principals.

In *Highland Homes*, the Columbia Board of Adjustment granted variances to allow a cell tower to exceed the height limitations of its zoning district, and to allow a related equipment structure to be located above-ground. The court explained the difference between a use variance and a non-use variance, and held that the applicant's burden of proof for a non-use variance is "slightly less rigorous" than that of an applicant for a use variance. *Id.* The determination of whether practical difficulties exist is a factual matter, the determination of which is in the discretion of the board, and thus an abuse of discretion standard is used on review. *Id.* The court stated that a non-use variance applicant must show that as a practical matter, the property cannot be used for a permitted use without

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being in conflict with certain of the ordinance's restrictions. *Id*. at 566. Because the applicant proved that the cell tower, which was a permitted use, would not be effective without exceeding the ordinance's height restriction, the court held that the board did not abuse its discretion in granting the variance. *Id.* The court did not hold that the board would have abused its discretion had it denied the variance; the discretion is left with the board.

3. A practical difficulty under the *Taylor* and *Brown* cases

The Church cites *Taylor v. Bd. of Zoning Adjustment of City of Blue Springs*, 738 S.W.2d 141 (Mo. App. 1987) to support its argument that Missouri law no longer prohibits variances for reasons unrelated to the physical characteristics of the property after the *Rosedale-Skinker* case. (Church's brief p. 45-46) In *Taylor,* a business named SRB, which was located in a shopping center, applied for and was granted a permit by the City to construct a free-standing sign that was 99 square feet in size. The City later determined that it should have only allowed a 92.93 square foot sign, based on SRB's street frontage, and the fact that it had allowed an additional six square feet would take away from the sign allowance for other stores, based on the City's rules for shopping centers. The City revoked the permit for the sign, even though it had been erected at an expense of $7,000.00. The Board of Zoning Adjustment denied SRB's requested variance to allow the sign to remain, and the court of appeals held that this was "one of those rare cases in which there has been a manifest abuse of discretion." *Id.* at 143-44. The court held that the City's regulations were not specific as to allocating sign size based on a business' frontage, the ordinance was vague, and the permit for the sign had been properly applied for and granted. *Id*. at 144.

The court held that the vague regulations were the City's problem to fix, and the individual property owner should not be punished for the City's mistake. *Id.* at 145.

The *Taylor* court did not hold that personal reasons can justify a variance. The court repeated *Matthew v. Smith*'s list of variance requirements, the first of which is that "relief is necessary because of the unique character of the property rather than for personal considerations." *Id.* at 144. The court then held that the unique character of SRB's property necessitated relief, because the vagueness of the ordinance does not clearly limit the permit that was granted. *Id.*

Although the court used a variance to grant relief to SRB, whose permit had been issued and revoked because of the city's vague regulations, the court found that the permit was properly issued under the city's regulations. The court, therefore, was not varying the regulations. Rather, the court essentially was overturning the City's decision to revoke the permit.

The Church also cites *Brown v. Bd. of Adju*stment, 469 S.W.2d 844, 846–47 (Mo. App. 1971) as holding that the *Rosedale-Skinker* case had overruled previous precedent prohibiting variances based on personal conditions. The *Brown* court did state that the *Rosedale-Skinker* case had, in effect, overruled a previous case that had limited hardships or practical difficulties to "conditions inherent in the land, such as topography, dimensions, or shape of the property," but elaborated 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.*

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While *Rosedale-Skinker* makes clear that topography, dimensions and shape of land are not the sole reasons that a variance can be granted, the requirement that the variance be based on unique characteristics of the property, which was found by the court in approving the variance in that case, was certainly not dispensed with by the court. *Rosedale-Skinker*, 425 S.W.2d at 937.

4. A practical difficulty under Missouri caselaw.

The appellate cases since *Rosedale-Skinker* have stated or enforced the requirement that a practical difficulty must be related to unique conditions of the property rather than for personal considerations, including this court's decision in *Matthew v. Smith*, 707 S.W.2d 411, 415 (Mo. banc 1986). *See also Board of Alderman of City of Cassville v. Board of Adjustment of City of Cassville*, 364 S.W.3d 246, 251 (Mo. App. 2012)(board abused its discretion in granting variance to allow carport to keep resident out of the rain); *Brown v. City of Maplewood*, 354 S.W.3d 664, 668 (Mo. App. 2011)(variance could not be justified based on the property owner having too much "stuff" in his garage or his wife's disability; these are not conditions related to the unique characteristics of the property); *Baumer v. City of Jennings*, 247 S.W.3d 105, 115 (Mo. App. 2008)(board did not abuse its discretion by denying variance when there was insufficient evidence of any practical difficulty unique to the property that would prevent petitioner from using the property for a permitted use); *State ex rel. Charles F. Vatterott Const. Co. v. Rauls*, 170 S.W.3d 47, 50 (Mo. App. 2005)(commission did not abuse its discretion in denying variances when practical difficulties were not because of condition of the land but rather would benefit the developer financially); *Wolfner v. Board of Adjustment of City of Warson Woods*, 114

S.W.3d 298, 303 (Mo. App. 2003)(board properly denied variance because there were no practical difficulties relating to the condition of the land, and owners bought the land knowing that it did not meet the zoning requirements); *Cousin's Advert., Inc. v. Board of Zoning Adjustment of Kansas City*, 78 S.W.3d 774, 784 (Mo. App. 2002)(variance requested to locate sign so that it does not block view of the building next to it is a personal difficulty and cannot justify a variance); *State ex rel. Branum v. Board of Zoning Adjustment of City of Kansas City, Mo.*, 85 S.W.3d 35, 42 (Mo. App. 2002)(the practical difficulty relied on must be unusual or peculiar to the property involved and different from that suffered throughout the zone or neighborhood, and board was not required to relieve homeowners from the cost of their mistake); *State ex rel. Klawuhn v. Board of Zoning Adjustment of City of St. Joseph, Mo.*, 952 S.W.2d 725, 729 (Mo. App. 1997)(board abused its discretion in granting variance because of the large number of vehicles the landowner wanted to store; that was a personal condition); *Wells & Highway 21 Corp. v. Yates*, 897 S.W.2d 56, 63 (Mo. App. 1995)(owner's plight was due to personal choice rather than characteristics unique to the land and therefore does not justify a variance); *Hutchens v. St. Louis Cty.*, 848 S.W.2d 616, 619 (Mo. App. 1993)(conditions personal to the landowner are not relevant to whether a variance should be granted); *State ex rel. Tucker v. McDonald*, 793 S.W.2d 616, 618 (Mo. App. 1990)(variance cannot be granted based on personal conditions, but can only be granted based on unique conditions of the property that make the property unsuitable for a permitted use); *Behrens v. Ebenrech,* 784 S.W.2d 827, 829 (Mo. App. 1990)(practical difficulty must be condition especially affecting the lot in question); *Ogawa v. City of Des Peres*, 745 S.W.2d 238, 244 (Mo. App. 1987)(board

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properly denied variance based on personal conditions rather than conditions especially affecting property in question). Although there are differences in the standards emphasized in these cases, the requirement that the practical difficulty be unique to the property is consistent.

5. The practical difficulty alleged in the present case, distinguished.

The Church in the present case argues that its practical difficulty is that the Church's sixty year old sign no longer allows it to "meaningfully convey its noncommercial religious messages" and the variance will allow it to change the messages more frequently and conveniently. This is clearly a personal convenience consideration and not a unique condition of the property, and therefore it does not justify a variance under Missouri caselaw. The Church does not, and cannot argue that its property cannot be used for a permitted use without the variance, which is a requirement for a variance recognized by *Highland Homes* and many other cases. The property has been used for a church, a permitted use, without a digital sign for 150 years. The Church's argument that it will be forced to move if it does not receive a variance for a digital sign is implausible.

The Church also argues that the requested variance is not substantial. If the Church cannot prove the basic requirements of a variance that it must be based on unique circumstances of the property, and that the property cannot be used for a permitted use without needing a variance, a variance cannot be granted, substantial or otherwise. However, a variance to allow a commercial-style digital sign in a residential zone when the City's Code does not allow any residential uses to have digital signs, particularly a use surrounded by single-family homes, certainly would be a substantial variance.

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The Church argues that "the City" did not submit any evidence to rebut the evidence presented by the Church, nor did it "argue" that a variance was not warranted. (Church brief, p. 43) The Church, like the applicant in *State ex rel. Branum v. Bd. of Zoning Adjustment of City of Kansas City, Mo.,* 85 S.W.3d 35 (Mo. App. 2002), simply misunderstands the standard of review and the burden of proof of the applicant for a variance. The burden is on the applicant. *Id.* at 39. "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.* The BZA clearly had the discretion to deny the variance when the practical difficulty being presented was purely a personal hardship of the Church, which was only its inconvenience in changing the sign's message, and was totally unrelated to any condition of the property. The fact that the Church spent money on the sign is irrelevant. Economic hardship can only be a consideration if "the land in question cannot yield a reasonable return if the variance is not granted; that the hardship on the owner is due to unique circumstances and not to the general conditions in the neighborhood; and that the variance will not alter the essential character of the locality." *Id.* at 41. (*citing State ex rel. Holly Inv. Co. v. Bd. of Zoning Adjustment of Kansas City,* 771 S.W.2d 949, 951 (Mo.App.1989)). A variance cannot be granted for a hardship resulting from the property owner's mistake, rather than the unique physical characteristic of the property. *Wehrle v. Cassor*, 708 S.W.2d 788, 790 (Mo. App. 1986)(the board exceeded its authority in granting a variance based on a mistake in measurement by the landowner).

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The Church argues that its former static sign which used "cup hooks and hanging letters" and which required a Church member to go out in the weather and change the message imposed a "substantial burden on the Church" justifying a variance, and that burden is just like Southwestern Bell's "desire" for an additional story in the *Rosedale-Skinker* case (Church's brief, pp. 34-35). The desire for Church members to stay out of the elements is not comparable to Southwestern Bell's need to upgrade its equipment to meet public demands for telephone service. The Church additionally argues that its proximity to commercial development and a major thoroughfare makes its property unique and eligible for a variance. (Church's brief p. 49) The Church quotes P. Salkin, 2 Am. Law. Zoning § 13:14 (5th ed.) as stating that a residential property located in or adjacent to a heavy commercial or industrial area will sometimes be able to establish a unique hardship. The Church did not quote the remainder of the paragraph from that source, which continues "Properties often fail the uniqueness prong in these contexts, however, due to the existence of other similar properties that experience the same supposedly-unique impacts from the discordant land use. Accordingly, the rule is often repeated that the mere fact that a property is undeveloped or located in close proximity to some discordant land use does not make it unique; rather, additional evidence of special circumstances is required." *Id.*

The evidence presented to the BZA does not show that the Church's property is unique because of its location, and does not show that it is adjacent to or even near commercial uses. The Church is zoned as a residential use, and is completely surrounded by residential zoning and residential uses. *See* BZA Ex. 8 (A12, LF 546), which shows the Church property surrounded by R-6 and R-1.5 residential zoning, BZA Ex. 9 (A4;

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LF1030), which describes the surrounding land use as single family in all directions, BZA Ex. 11 (A14; LF 550), a map which shows the single family residential lots surrounding the Church property, BZA Ex. 13, p. 2 (A15; LF 553), which shows the single family home immediately across Antioch Road from the Church sign, and BZA Ex. 10 (provided to Court in separate envelope), video showing surrounding single family homes. Although the Church presented an exhibit which was intended to show that the Church was surrounded by commercial uses by placement of greatly out-of-proportion commercial logos from businesses which are blocks away, BZA Ex. 8 (Church Appendix A26; LF 1044), the Church property is not in a commercial area and is not adjacent to a commercial area, and its location is not a unique circumstance. If the Church did believe that it was inappropriately zoned because of its location, the City's Code provides a remedy; the Church could apply for a rezoning of the property under Section 88-515 of the Code. ((A16-18; LF 336-38). The criteria for rezoning includes the zoning and use of nearby property and the physical character of the area in which the property is located. ((A18; LF 338) The Church has not applied for rezoning, but instead is seeking the Court's approval of its digital sign, rather than the static sign, which is allowed to have changeable copy, that every other church in Kansas City uses, and that is allowed by the City's Code. If the Court were to grant its request, it would be usurping the City Council's legislative authority to determine zoning regulations, which is not allowed under Missouri law. "Courts cannot legislate…." *State ex rel. Otto v. Kansas City*, 276 S.W. 389, 403 (Mo. banc 1925)

Kansas City's Code sets out the allowable review criteria and factors for the BZA to grant a variance. (The criteria and factors are quoted in the Statement of Facts on pages

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2-4 of this brief.) The requested variance in this case was based on the purely personal convenience of the applicant, there was no showing that it was based on the property itself or an inability to use the property for an allowed use without the variance, the variance would have provided an approval to the applicant not allowed others in the same district, and any financial hardship resulted from the Church's installation of a sign without the required permit and its ignorance of City Code requirements. The BZA did not abuse its discretion in denying the Church's requested variance, and in fact, would have abused its discretion if it had granted the variance based on a purely personal hardship of the Church.

Variances are permanent, they run with the land, and are not personal to the owner. *Ogawa v. City of Des Peres*, 745 S.W.2d 238, 245 (Mo. App. 1987), *citing* 3 A. Rathkopf, *The Law of Zoning and Planning* § 38.06 (1979). The BZA is an administrative body with no legislative authority. *State ex rel. Nigro v. Kansas City*, 27 S.W.2d 1030, 1032 (Mo. banc 1930). Under Missouri's statutes that govern zoning, only the City's legislative body, the City Council, has the authority to zone and set standards for the various zoning districts. *Id;* §89.020, R.S.Mo. If the BZA had unlimited authority to grant variances for purely personal reasons, the exceptions would eventually undermine the uniformity of the Code, and in time would nullify the Code. *Ogawa,* 745 S.W.2d at 242; *Brown v. Beuc*, 384 S.W.2d 845, 853 (Mo. App. 1964). The BZA properly denied the Church's requested variance based on its personal considerations.

C. The BZA is prohibited by the City's Zoning and Development Code from granting a variance to the type of sign allowed by the Code, and therefore was prohibited from granting the variance requested by the Church.

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The Church requested a variance from the BZA to allow it to display a digital signface on an existing monument sign. The City's Zoning and Development Code specifically prohibits such a variance, and the BZA would have exceeded its authority in granting such a variance.

Section 88-445-12 of the City's Code provides as follows:

> **88-445-12 Sign Variances**
>
> The Board of Zoning Adjustment may grant variances to the requirements for signs, *except as to type and number*, and except as to sign location and spacing requirements for outdoor advertising signs, in accordance with the procedures of 88-565 of this chapter. The Board shall make its determination within sixty days after application, unless the applicant has requested a time extension or continuance which has delayed the process.

(emphasis added)((A19; LF 321)

Section 88-445-12 clearly states that the "type" of sign allowed in a zoning district cannot be varied. The Code defines "sign type" in Section 88-810 as follows:

> **SIGN TYPE**
>
> A group or class of signs that are regulated, allowed, or not allowed in this code as a group or class. Sign types include, but are not limited to, pole signs, monument signs, oversized monument signs, outdoor advertising signs, wall signs, projecting signs, roof signs, ornamental tower signs, *electronic or digital or motorized signs*, banner signs, and temporary signs.

(emphasis added)(A20; LF 436)

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The Code defines "digital sign" in Section 88-810 as follows:

> **SIGN, DIGITAL**
>
> 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.

(emphasis added)(A26; LF 435)

Therefore, a component of a sign that is digital is a "digital sign" as defined by the Code, and "digital sign" is specifically listed as a "sign type" in the Code's definition of that term. The Code prohibits any variance from being granted to allow a sign type that the Code prohibits, and therefore the BZA would have exceeded its authority under the Code had it granted the requested variance.

The BZA obtains its authority to grant variances to the Zoning and Development Code both from § 89.090.1(3), RSMo., and from § 88-565 of the City's Code, and both provisions must be followed by the BZA. City ordinances may further define the power of a board of adjustment if they are in harmony with the general purpose and intent of the statute. *Matthew v. Smith*, 707 S.W.2d 411, 415 (Mo. banc 1986). An ordinance which would provide a board of adjustment unlimited discretion to grant variances without standards would be an unconstitutional delegation of legislative authority. *Wehrle v. Cassor*, 708 S.W.2d 788, 791 (Mo. App. 1986). If a board grants a variance not allowed by the language of a city's code, then the board has exceeded its authority and the courts will hold that decision to be illegal and void. *Id.* at 790.

Kansas City's Code specifically prohibits a variance from being granted to a "sign type," the Code specifically defines "sign type" to include a "digital sign," and it specifically defines "digital sign" to include a digital component of a sign. Therefore, the BZA clearly did not abuse its discretion in denying the variance to allow a digital component to be added to an existing monument sign, and conversely it would have exceeded its authority had it granted the requested variance.

The Church argues that the BZA had the authority to grant the variance by quoting the circuit court decision, which had misquoted the Code. On p. 54 of the Church's brief, it quotes the definition of "sign type" in § 88-810 of the Code as "Sign types include…pole signs, monument signs." As that section is correctly quoted, above, the list of "sign types" does not end at "monument signs," as the Church states, but in fact, lists several other sign types, including digital signs, a term which was left out of the Church's quote. The Church then argues that because the sign was a monument sign, which was an allowed sign type, the BZA was not being asked to vary the sign type. The Church further argues that the BZA was only being asked to vary the prohibition on a "digital display" on a monument sign. Of course, the Code defines the term "digital sign" as including a digital component, like a digital display, and therefore a digital display is a "digital sign," which is a sign type. The Church can only make its argument by misquoting the Code and leaving out the relevant portion of the definition of "sign type." The Church's requested sign was both a monument sign and a digital sign, as defined by the City's Code.

Although the Code clearly defines a digital display as a sign type, the Church argues that it did not request that the sign type be varied, but only requested that the "requirement"

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that the sign not include a digital display be varied, and that because it had made the request in that way, the BZA did have authority to vary that requirement. The seminal rule of statutory construction is that the intent of the legislative body should be determined from the words used, and it is presumed that every word or provision used has meaning. *Lake v. Levy*, 390 S.W.3d 885, 891 (Mo. App. 2013). When the City Council enacted a provision that defined a digital component of a sign as being a digital sign and a sign type, and then barred the BZA from varying a sign type, the Council expressed its clear legislative intent that the BZA cannot allow a digital component of a sign where it is otherwise not allowed, regardless of how the applicant phrases its request. Defining a digital component as a sign type would be a useless act if that was not intended to control where such components were allowed, and whether that sign type could be varied.

POINT I CONCLUSION

Segregating residential districts from commercial uses, including commercial-style signs, is a basic function of a zoning ordinance, and the determination of the particular provisions in the zoning ordinance are a matter for determination by the legislative body, here the City Council. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 392, (1926). The BZA's power to vary such regulations must be exercised sparingly, and must be based on unique circumstances of the property at issue. The variance requested by the Church in the present case was not based on such unique circumstances, but rather was based on the convenience of Church members. Additionally, the City's Code did not allow the BZA to vary the sign type, and defined a digital component of a sign as being a sign

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type. Therefore, the BZA did not abuse its discretion in denying the Church's requested variance.

II. The BZA did not violate the First Amendment in denying the variance because the BZA did not favor commercial speech over non-commercial speech; there were only two issues before the BZA, whether the Church's sign violated the City's Code and whether the Church proved a practical difficulty which would justify a variance. (response to Point II)

A. The Church did not appeal the circuit court's dismissal of the denial of the appeal of the notice of violation or the dismissal of the claim that it raised in Count II of the Amended Petition, which it filed the day before the judgment, challenging the constitutionality of the City's ordinance; the Church has no right to request relief on those dismissed claims, or to request remand to the circuit court.

In its Conclusion to Part II of the Church's brief, the Church argues that because the circuit court did not address the Church's constitutional arguments, if this court reverses the circuit court's decision on the variance the case should be remanded back to the circuit court for a decision on the constitutional claims in Count II of its supplemental (amended) petition. The Church cites no precedent for such a request.

On April 6, 2016 the Church filed a supplemental petition in the circuit court adding a Count II which challenged the City's Code as being unconstitutional in violation of the First Amendment to the United States Constitution. (LF 7, 21-35) The supplemental petition named the City of Kansas City, Missouri as a party to the action for the first time.

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(See original petition, LF 11-20, which only named the BZA as a defendant.)[2] The next day, April 7, 2016, the court entered its judgment. (LF 7) The City had not been made a party to the case at that point, and had not filed an answer. (LF 7) The City would have been a necessary party to any action challenging the constitutionality of an ordinance. Section 527.110, RSMo. Therefore, the Church's argument regarding the constitutionality of the City's Code (pp. 63-65 of Church's brief) cannot be made when the City is not a party to the case. The circuit court in its judgment reversed the BZA's decision denying the variance, denied the Church's appeal of the notice of violation, and dismissed Count II of the supplemental petition. (LF 46) The BZA is the only party who appealed the court's decision; neither the City (which was not yet a party) nor the Church filed a notice of appeal. (LF 7)

Generally, unless there is a cross-appeal, the "reviewing court is concerned only with the complaint of the party appealing and…the opposing party who filed no appeal will not be heard to complain of any portion of the trial court's judgment adverse to him." *Goldberg v. State Tax Comm'n*, 618 S.W.2d 635, 642 (Mo. 1981). If a respondent does not appeal from a ruling adverse to him in the trial court, the judgment of the trial court on that

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[2] The BZA is an appropriate party for the appeal of the BZA's decision; although the BZA has no capacity to be sued, it is proper to name the BZA as a party to an appeal of the BZA's decision, because its status as an independent legal entity is irrelevant in such a case. *Reifschneider v. City of Des Peres Pub. Safety Comm'n*, 776 S.W.2d 1, 2-3 (Mo. banc1989); *Hubbard v. Board of Adjustment*, 779 S.W.2d 26 (Mo. App. 1989).

issue must be affirmed. *Jenkins v. Meyer*, 380 S.W.2d 315, 323 (Mo. 1964); *see also Dunham v. Estate of Hamilton*, 718 S.W.2d 152, 153 (Mo. App. 1986)(without a cross-appeal, the opposing party cannot complain of any portion of the trial court's judgment adverse to him); *Cragin v. Lobbey*, 537 S.W.2d 193, 195–96 (Mo. App. 1976)(when only a part of a judgment is appealed, the remainder is not brought into the appellate court and is "out of our hands.") If an issue is neither appealed nor reviewed by the appellate court, a reversal of the case on the issues actually appealed would not disturb or affect those other portions of the judgment that were not appealed: those other issues were finally decided, and if they had not been, the appeal should have been dismissed due to the lack of an appealable judgment. *Edmison v. Clarke*, 61 S.W.3d 302, 308 (Mo. App. 2001).

The only issue ruled on in the trial court adverse to the only appellant, the BZA, was the court's ruling that the BZA's decision on the variance was an abuse of the BZA's discretion. That is the only issue that is properly before this court, and any consideration of, or remand on the other issues that were ruled adverse to the Church and that were not appealed would be improper under Missouri law.

B. The BZA's decision did not violate the Church's First Amendment rights.

The Church argues in Part II of its brief that the BZA's decision violated the Church's First Amendment rights because it favored commercial speech over noncommercial speech. There 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.

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The BZA is charged with interpreting and enforcing the City's Code and it has no legislative power but must interpret the Code as written by the City Council. *Conner v. Herd*, 452 S.W.2d 272, 276 (Mo. App. 1970).

The only fact which the Church cites to support its First Amendment argument was the Church's attorney's testimony that a "nearby" gas station that was adjacent to a highway had a digital display showing the price of gas. (LF 64-65) The gas station was in a commercial zoning district and the sign regulations in the Code had changed since that sign was installed. (LF 64-65) The gas station is down the road from the Church, and is next to the interstate highway.[3] The gas station's price sign is not comparable to the

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[3] According to the scale on the Church's Exhibit 18 (LF 1044)(which the Church includes in its facts on p. 6, but deletes the scale) the gas station is several miles from the Church. (The Church does include the exhibit with the scale as A26 of its appendix.) That exhibit is not accurate and is out of proportion, and the BZA believes that exhibit exaggerates that distance, but there is nothing in the record that actually shows the correct distance between the Church and the gas station. (LF 1044) That exhibit also misleads regarding the residential nature of the area in which the Church is located through the oversized commercial logos on the exhibit. No residential uses are shown on that exhibit, although the area is largely residential. The Church is completely surrounded by single family residential uses. (A4, A25; LF 1030, 1034) See BZA Exhibit 10 (videotape showing surrounding area) for an accurate representation of the residential area.

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Church's sign in location or type and does not show that the BZA violated the First Amendment in denying the variance.

1. *Whitton* does not support the Church's argument.

A gas station price sign in a commercial zoning district, approved years ago under a different sign code, does not show that the BZA applied the Code's prohibition of digital signs in a residential zone in an unconstitutional manner. The Church cites *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1404 (8th Cir. 1995) as rejecting the City's sign code scheme that applies different rules to residentially zoned areas. (Church brief p. 62) *Whitton* did not hold that the City of Gladstone's ordinance allowed externally illuminated political signs in commercially-zoned areas but not in residentially zoned areas, and that that distinction was unconstitutional, as argued by the Church. In fact, the City of Gladstone's ordinance in dispute in *Whitton* did not allow any political signs to be externally illuminated, either in residential or commercial zones. *Id*. at 1409-10. The court found that Gladstone's ordinance violated the First Amendment because it did not allow political signs to be illuminated, but allowed other signs to be illuminated, in both residential and commercial zones. *Id.* The court examined the commercial sign provisions separately from the residential sign provisions, and only compared how political signs were treated less favorably to other signs within the same category (residential or commercial) in holding that because political signs were treated less favorably based on their message, the ordinance violated the First Amendment. *Id*. *Whitton* does not support the Church's argument that the City may not have more restrictive signage requirements in residential districts.

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The Eighth Circuit subsequently distinguished *Whitton* in upholding the constitutionality of a sign ordinance which prohibited all digital signs, but whose city officials did not enforce the prohibition for time and temperature displays, in an as applied challenge to the city ordinance. *La Tour v. City of Fayetteville, Ark.*, 442 F.3d 1094, 1096 (8th Cir. 2006). The court held that the time and temperature signs did not pose the same concerns as signs that "function similarly but that display messages that are more distracting." *Id.* Because the regulation being examined was content neutral on its face, it is constitutional if it is narrowly tailored to serve a significant governmental interest and leaves open alternative channels of communication. *Id.* at 1097.

Because the constitutionality of the City's ordinances in the present case is not at issue, the as applied challenge in *La Tour* is more relevant to the present case than *Whitton,* where a sign code on its face treated non-commercial political signs less favorably than other signs based only on the content of the sign. The gas station price sign in the present case is similar to the time and temperature sign at issue in the *La Tour* case, with its display of only numbers, and was in a commercial zoning district, which is distinctly different than the Church's residential zoning district.

2. *Reed* does not support the Church's argument.

The Church cites *Reed v. Town of Gilbert, Ariz.*, ___ U.S. ___, 135 S.Ct. 2218, 192 L. Ed. 2d 236 (2015), but does not explain the significance of *Reed* to the present case. In *Reed,* the Supreme Court struck down a law which placed specific time and size limits on "temporary directional signs" which directed the public to an event of a nonprofit group, while allowing ideological signs to be much larger and with no time limits, and allowing

political signs to be even larger, with no time limits. 135 S.Ct. at 2224. The plaintiff, a small church with no permanent location, and therefore which relied on directional signs, challenged the law after the Town of Gilbert repeatedly cited it for failure to comply with the temporary directional sign requirements because it had left the signs up longer than allowed.

Justice Thomas, joined by five other Justices, struck down the law, finding that the distinctions in the regulations between the different types of noncommercial signs were content-based, and could not withstand strict scrutiny. The Court emphasized three principles which guided the result. First, a law which is a content-based restriction on speech on its face is subject to strict scrutiny, even when the government has a benign motive. *Id.* at 2222. Second, "'[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Id.* at 2230 (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 537 (1980)). Third, a law can be content-based if it either makes distinctions based on the message conveyed or based on what event is announced. ("A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea.") Justice Alito, joined by Justices Sotomayor and Kennedy, joined the majority opinion but wrote a separate concurrence to "add a few words of further explanation." *Id.* at 2233 (Alito, J., concurring). Justice Alito outlined examples of signage regulations that would not trigger strict scrutiny, which included rules regulating the locations where signs may be placed, rules distinguishing between lighted and unlighted

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signs, rules distinguishing between signs with fixed messages and electronic signs with messages that change, and rules distinguishing between the placement of signs on commercial and residential property. *Id.*

The *Reed* case was one in which a *law* was challenged, not an individual administrative decision enforcing a law, and therefore has limited relevance for the present appeal. Even if the present case had involved a constitutional challenge to the City's laws, Kansas City's sign provisions, which the BZA enforced in the decision appealed in this case, contain none of the distinctions that caused the Town of Gilbert's ordinance to be stricken. The Church was cited for violating section 88-445-06-A.4, which allows a lot with a principal use of an institutional use to have one 32 sq. ft. monument sign, "which may not include any form of digital or electronic display." (A9; LF 310) No signs allowed in residential zoning districts, all of which are governed by section 88-445-06, are allowed to have digital displays. (A7-11; LF 308-12) That section additionally allows institutional uses to have other signs, including wall signs, incidental signs and interim signs. There is no distinction made between ideological signs, political signs, or directional signs, as was found to be a content-based distinction in the *Reed* case; all noncommercial messages are treated equally under the Kansas City Code.

The Church complains only that commercial entities can have digital displays in commercial zoning districts. Section 88-445-08-A.3 ((A21-22; LF 315-16), a provision that applies to commercially zoned property, does not allow digital signs within 250 of any residentially zoned property, and only allows digital monument signs in zoning district B4 (the most intense business district), UR (urban redevelopment), D (downtown) and M

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(industrial) districts. These are the most intense commercial districts, and if the Church was located in such a district, it would be allowed to have a digital sign. It is not; it is located in a residential district, which does not allow such signs under Section 88-445-06. Justice Alito's concurring opinion in *Reed* specifically states that distinctions between signs allowed in commercial and residential zoning districts are not content-based distinctions requiring strict scrutiny analysis. *Reed,* 135 S. Ct. at 2233.

The City's sign regulations make no distinctions based on the content of the sign, but rather only make distinctions based on zoning district, a practice specifically held to not be a distinction that subjects the ordinance to strict scrutiny under *Reed*. Therefore, the ordinance that the BZA enforced in the present case is not invalid under *Reed*, and neither is the BZA's decision enforcing the ordinance, as plaintiff argues.

3. ***Metromedia*** **does not support the Church's argument.**

The Church cites *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), in support of its argument that the City's Code, and the BZA in its enforcement of the Code, favors commercially zoned areas. In *Metromedia,* the Court held that San Diego's billboard ordinance was unconstitutional on its face, in part because the ordinance allowed onsite signs to carry commercial messages related to the commercial use of the premises, but prohibited the use of "otherwise identical billboards" carrying noncommercial messages. *Id.* at 513. The Church has not pointed to any similar defects in Kansas City's Code. In fact, Section 88-445-03 (A23; LF 306) specifically states that nonconforming messages can always be substituted for commercial messages:

88-445-03 - NONCOMMERCIAL SIGNS; SUBSTITUTION OF MESSAGES

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88-445-03-A. Any sign allowed or that would be allowed without permit, by sign permit, by special use permit, or by variance, may contain, in lieu of any other message or copy, any lawful noncommercial message that does not direct attention to a business, product, commodity or service for sale or lease, or to any other commercial interest or activity, so long as the sign complies with the size, height and other requirements of this chapter.

88-445-03-B. It is the city's policy to regulate signs in a constitutional manner that is content neutral as to noncommercial signs.

San Diego's ordinance was struck down because it did not have a similar allowance of noncommercial signs wherever commercial signs are allowed, not because it had different sign requirements for different zoning districts. The *Metromedia* case does not support the Church's argument in this case.

4. The BZA's enforcement of the Code was reasonable and did not make content-based distinctions and was not subject to strict scrutiny.

The Church argues that the City failed to rebut the Church's evidence. (Brief p. 66) The City is not a party to this case. The BZA is a board with limited authority that can only interpret ordinances or grant variances in cases of undue hardship. Under § 89.090, RSMo, the Board's "administrative discretion is limited to the narrow compass of the statute; they can not merely pick and choose as to the individuals of whom they will or will not require a strict compliance with the ordinance." *State ex rel. Nigro v. Kansas City*, 27 S.W.2d 1030, 1032 (Mo. banc 1930). Any testimony presented to the City Council when it enacted

the City's sign provisions as to the safety problems created by digital signs, and the aesthetic issues created by these signs when they are located in certain areas, particularly residential areas, is not a part of the record in this case, since this case merely involves the Church's appeal and request for variance, and not a challenge to the City's Code. The Council's purpose and intent in enacting all of the various sign restrictions, though, is stated in the Code, which is an exhibit in the record of this case:

88-445-01-A. INTENT

The intent of this chapter is to provide an orderly, effective and reasonable control of off-premises and on-premises signs, thereby halting indiscriminate sign proliferation and enhancing the visual environment of the city and to achieve balance among the following different and at times, competing goals:

1. to encourage the effective use of signs as a means of communication for businesses, organizations and individuals in Kansas City;
2. to provide for adequate way-finding in the community, thus reducing traffic congestion;
3. to provide adequate means of business identification, advertising and communication;
4. to prohibit signs of such excessive size and number that they obscure one another to the detriment of the economic and social well-being of the city;
5. to protect the safety and welfare of the public by minimizing hazards to vehicles and pedestrians;

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6. to preserve property values by preventing unsightly and chaotic signage that has a blighting influence on the city;

7. to differentiate among those signs that, because of their location, lighting, movement or other characteristics may distract drivers on public streets and those that may provide information in a safer manner;

8. to minimize the possible adverse effects of signs on nearby public and private property;

9. to implement the goals of the comprehensive plan,

10. to protect the constitutional rights of our citizens.

(A24; LF 303)

The Council quite reasonably prohibited digital signs in residential zoning districts, and allowed them in only the most intense commercial districts. These regulations further the above-stated goals to minimize hazards to vehicles and pedestrians, to preserve property values by preventing unsightly and chaotic signage, to differentiate between signs that because of their lighting and movement may distract drivers, and to minimize the adverse effects on nearby public and private property. Courts have recognized the traffic hazards that can be created by allowing electronic signs: "It is given that a billboard can constitute a traffic hazard. It follows that EMCs [electronic message centers], which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous." *Naser Jewelers, Inc. v. City of Concord,* 513 F.3d 27, 35 (1st Cir. 2008).

Churches are free to locate in the City's intense commercial districts if they would like that type of commercial signage.

Although churches are allowed to locate in residential zoning districts under Missouri law, and cities cannot control the location of churches, cities have the power to regulate church signage. *St. John's Evangelical Lutheran Church v. City of Ellisville*, 122 S.W.3d 635, 643-44 (Mo. App. 2003). In the *St. John's* case, the court held that application of a city's sign ordinances to a church did not constitute a violation of the church's free exercise guarantee, a right derived from the U.S. Constitution. *Id.* The Court cited approvingly the New York case of *Lakeshore Assembly of God Church v. Village Board of Westfield*, 124 A.D.2d 972, 972 (N.Y. App. Div. 1986), which held that "[i]t is wholly appropriate to impose limitations on a church property and its accessory uses when reasonably related to the general welfare of the community, including the community's interest in preserving its appearance."

The Church attempts to apply the same strict scrutiny standard held to be appropriate in *Reed* and *Metromedia* to the present case (Church's brief p. 65). Those cases involve challenges to sign codes that made content-based distinctions on the face of the ordinances, not to an individual administrative decision enforcing the code as written. The Church cites no authority that would allow a single administrative decision enforcing a city code to be analyzed with strict scrutiny. There is no evidence that the BZA made its decision based on the content of the Church's sign, and any strict scrutiny analysis is totally inappropriate in the present case.

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CONCLUSION

For the reasons stated in this brief, Respondent Board of Zoning Adjustment of the City of Kansas City, Missouri respectfully requests that this Court uphold the decision of the BZA denying the variance requested by the Church because the BZA had no authority to grant a variance based on a personal hardship of the applicant, and because the BZA had no authority to grant a variance as to sign type under the City's Code. The BZA did not abuse its discretion or authority in denying the variance. The BZA's decision to uphold the notice of violation, which was upheld by the trial court, was not appealed by the Church and therefore is not before this court. The BZA's decision denying the variance did not violate the First Amendment because they did not favor commercial speech over non-commercial speech, but merely enforced the City's Code as written. The constitutionality of the City's Code is not before the court, but the Code is a part of the record in this case and the Code does not make content-based distinctions between non-commercial signs, nor does it favor commercial signs over non-commercial signs.

Therefore, the circuit court's decision which reversed the BZA's denial of the requested variance should be reversed.

Respectfully submitted,

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CERTIFICATION REQUIRED BY RULE 84.06(c)

The undersigned hereby certifies that Respondent's Brief complies with the limitations in Rule 84.06(b), and that it contains 10,380 words (exclusive of the cover, table of contents, table of authorities, signature block, this certificate and the certificate of service) as counted by Microsoft Word 2010.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this brief was filed electronically with the Clerk of the Court, to be served by operation of the Court's electronic filing system this 3rd day of July, 2017, upon the following:

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