UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

NEW SOUTH MEDIA GROUP, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.: 5:20-cv-2050-LCB**
	)	
THE CITY OF HUNTSVILLE, ALABAMA,	)	
	)	
Defendant.	)	

ORDER

New South Media Group, LLC ("New South") alleges that the City of Huntsville ("HSV") has infringed upon its right to freedom of speech as guaranteed by the Constitutions of the United States and the State of Alabama. Specifically, New South contends HSV's former Sign Code Regulations—which allegedly regulated speech on the basis of content—prohibited New South from erecting eight billboards in the City. HSV contends that the Court should dismiss this action because New South lacks standing to challenge many provisions mentioned in its Verified Amended Complaint ("VAC") and because New South has failed to state a claim upon which relief can be granted.

Before the Court are HSV's Motion to Dismiss and Brief in Support (Docs. 34 & 35), New South's Opposition (Doc. 37) and HSV's Reply. (Doc. 40). For the

reasons that follow, HSV's Motion is **GRANTED** and this action is **DISMISSED** in part with and **DISMISSED** in part without prejudice.

FACTUAL BACKGROUND

I. HSV's Former Sign Code Regulations

Before the first week of March 2021, HSV had in place several Sign Code Regulations as part of its larger Zoning Ordinance. HSV's first Zoning Ordinance, adopted on March 21, 1963, (Doc. 36–1 at 29), was designed to "promot[e] the health, safety, morals, and general welfare of the City," and to

> lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; [and] to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements.

(Doc. 36–1 at 15; *see also id.* at 30). In accordance with those goals, HSV divided itself into several districts. *Id.* Each district was categorized according to the types of activities to take place and buildings to be built there. The districts were subject to various restrictions, including limitations on the sizes and types of signs that could be built upon property located within them.

The former Sign Code Regulations in Article 72 of HSV's Zoning Ordinance provided that any sign that any builder sought to erect in HSV was subject to a general permit requirement. (Doc. 36–1 at 304). Those applications had to include

> written consent of the property owner or lessee desiring any sign to be erected, by plans and specifications setting for the character and nature of the sign in all its structural parts, and, except in the case of attached accessory signs, by an accurate engineering survey of the property designating the location of all existing signs on the property and the proposed location of the desired sign.[1]

(Doc. 36–1 at 304).

The former Sign Code Regulations defined types of signs, delineated where certain types of signs could appear, and outlined other limitations related to the restrictions with which signs in various district had to conform.

The most relevant distinction between sign types for this case concerned accessory and non-accessory signs. According to § 72.1 of the former Sign Code Regulations, accessory signs were signs that "related to a business or profession conducted, or to a commodity or service sold or offered, upon the premises where such sign is located, provided that an accessory sign may also display a non-commercial message." (Doc. 36–1 at 301). Non-accessory signs were defined as signs that were "unrelated to a business or profession conducted, or to a commodity or service sold or offered, upon the premises where such a sign is located." *Id.* at 302. Crucial to this case, non-accessory signs were strictly prohibited in C1 districts. *Id.* at 306.[2] According to Article 22 of the former Zoning Ordinance this type of district was "primarily intended to serve the day-to-day needs of surrounding

[1] §72.3.1.
[2] §72.4.2.

residential neighborhoods for retail goods and personal services." (Doc. 36-1 at 72). It was "a restricted commercial district offering a limited range of convenience and services combined with low-intensity business and professional offices and upper story apartments." *Id*.

In other districts, like those designated "light industry, heavy industry, highway business C-4, and neighborhood business C-2 districts," accessory and non-accessory signs were permitted. (*See* Doc. 28–1 at 10–11; Doc. 36–1 at 309–310[3]). Both types of signs were subject to various restrictions in those districts. *Id*.

Also relevant to this dispute are the definitions of artisan and ground signs in the former Sign Control Regulations. Artisan signs, in accordance with § 72.1, were "temporary sign[s] of a mechanic or artisan maintained only while work [was] being performed on the premises." (Doc. 36–1 at 302). Artisan signs were also generally limited in the following ways:

> Only one sign board shall be erected per construction site per street frontage and each mechanic or artisan must mount his individual sign on that board. The size of the sign board shall not exceed one hundred and sixty (160) square feet. However, in any residence district when no more than three mechanics or artisans are employed on a construction site, the maximum size of the sign board shall be eighteen (18) square feet or each mechanic or artisan may erect one individual sign not to exceed six (6) square feet in size.

Id.

[3] §72.4.4.

Ground signs were defined as signs that were "permanently affixed to the ground by no more than two poles, columns, or uprights permanently imbedded in the ground, which is not a direct part of a building, whether illuminated or not." (Doc. 28–1 at 3).

The "General Sign Regulations" found in § 72.5 provided some limitations on the size, square-footage, distance, and height requirements of signs across the City. (*See* Doc. 28–1 at 24–25). For instance, no ground sign could exceed 35 feet in height above the ground as measured from the highest point of the sign, save for some exceptions related to elevated highways. (Doc. 36–1 at 323).[4] The immediately following subsection to that rule provided that:

> Non-accessory ground signs shall not exceed fifty (50) feet in length and no such sign shall be placed closer than one thousand (1000) feet to another such sign on or along the same side of a street, except in a Highway Business C-4 district and along interstate highways where the minimum separation between such signs shall be two thousand (2000) feet. Non-accessory ground signs shall not be built within the required front, side, or rear yard areas as set forth in the Zoning Ordinance of Huntsville.

(Doc. 36–1 at 324).

Finally, according to § 72.12 of the former Sign Code Regulations, none of those provisions were applicable to "any signs erected and maintained pursuant to

[4] §72.5.12(1).

and in discharge of any government function or required by any law of governmental function." (Doc. 36-1 at 334).

II. Allegations in New South's Verified Amended Complaint

New South is a Georgia-based LLC owned by Neil Bell. (Doc. 28 at 1–2). The company is in the business of putting up billboards and signs for various businesses and organizations. *Id*.

At some undisclosed time, New South decided that Huntsville's size and location made it a perfect location to generate new sign-based revenue. (Doc. 28 at 3). This belief led New South to ask its clients whether they wanted to advertise in HSV on a New South sign. *Id*. Several of New South's clients expressed interest in the venture. *Id*. After hearing from his clients, Mr. Bell and other New South employees reached out to several landowners and lessees in HSV to negotiate lease agreements. These lease agreements were meant to allow New South to build signs on the landowner or lessee's property. Eventually, New South negotiated agreements to build signs at the following addresses:

(1) 2121 Whitesburg Drive;
(2) 4016 University Drive;
(3) 4113 Bob Wallace Avenue;
(4) 4811 University Drive;
(5) 7531 Bailey Cove Road;
(6) 7904 Memorial Parkway;
(7) 8220 Stephanie Drive; and
(8) 8402 Whitesburg Drive.

Id. New South avers that "[e]ach of the signed leases allows the installation,

maintenance, and operation of a new sign on the property for a term of years in exchange for a substantial rental payments [sic]." *Id*. at 4.

At some point before March 2021, New South acquired a copy of HSV's former Sign Code Regulations to determine what it needed to do to receive permission to build its contemplated signs. (Doc. 28 at 4).[5] After review, New South concluded that some of those Regulations limited speech based on content. (Doc. 28 at 22).

New South contends that, based on its conclusion that HSV had content-based regulations in-place, it had trouble deciding which category of sign to designate each of its contemplated signs at the addresses above. (Doc. 28 at 5). For instance, New South alleges that it "sought to post signs promoting non-profit organizations and various noncommercial messages," but that "[m]ost of the messages of these groups are unrelated to the premises where the signs would be posted" and, "because the content was noncommercial in nature," the signs it wished to post "qualified as either 'accessory signs' or 'non-commercial signs' pursuant to the Sign Control Regulations." *Id*. at 5–6; *see also id*. at 6–7.

At some unspecified date, New South got a copy of HSV's Sign Application form from the HSV municipal website. (Doc. 28 at 7; Doc. 28–2 at 2). The form

[5] HSV amended its Sign Control Regulations on February 25, 2021, and those amended provisions took effect the following week. (Doc. 28 at 22).

contains blanks for the applicant to fill-in, including: (1) the proposed sign's address; (2) the type of sign applied-for; (3) the sign's size; (4) the sign's material; (5) the sign's total square footage; (6) a description of how the sign is anchored; (7) the sign's height; (8) an indication of whether the sign is new construction; and (9) an indication as to whether any other signs are at that address and the size and type of those signs. (Doc. 28–2 at 2). A blank box was featured at the bottom of the application form. *Id*. At the bottom of the applications, applicants were to "show [the] sign['s] location in relation to property lines and building and show **setback** and other existing signs on [the] property[.]" *Id*. (emphasis in original). According to § 72.3.1 of the former Sign Control Regulations, each sign application required:

> [1] the written consent of the property owner or lessee desiring any sign to be erected, [2] by plans and specifications setting forth the character of the sign in all its structural parts, and, except in the case of attached accessory signs, [3] by an accurate engineering survey of the property designating the location of all existing signs on the property and the proposed location of the desired sign.

(Doc. 36–1 at 304).

New South completed eight (8) sign applications—one for each address above (Doc. 28 at 9)—and provided all necessary information to HSV in each application. *Id*. New South also alleges that it designated a sign type that most closely aligned with the "intended content" of each sign in each of its applications. (Doc. 28 at 8), and that each of its proposed signs complied with each of HSV's content-neutral restrictions. *Id*.

A. New South's First Seven Sign Applications

New South submitted its first sign application for a proposed sign at 2121 Whitesburg Drive via email on August 21, 2020. (Doc. 28 at 10). New South maintains that it designated this sign a government function sign on the "Type of Sign" question on HSV's application form because it "would be used to promote public service messages sponsored by the Alabama Department of Public Health, the Alabama Department of Corrections, and the Alabama Department of Revenue." (Doc. 28 at 10). New South included with its application "images of specific public messages that would be displayed on the sign." *Id*. The photos feature messages from the "click-it-or-ticket" campaign, the "drive sober or get pulled over" campaign,[6] an advertisement for job opportunities with the Alabama Department of Corrections, a sign advertising the Huntsville Career Center, and a sign advertising besuretoinsureal.com.[7] (Doc. 36–2 at 34–38). Nothing in the record or in New South's VAC shows that it provided HSV with a document or other form of proof that the sign applied for at 2121 Whitesburg Drive was in done partnership with or on behalf of an Alabama State Agency.

[6] These two signs featured insignia from the Alabama Department of Economic and Community Affairs.

[7] This sign featured insignia from the Alabama Department of Revenue.

HSV's staff received, reviewed, and processed New South's application. *Id*. Allan Priest, one of HSV's City Sign Enforcement Officers, responded to that application on August 24, 2020. (Doc. 28 at 11). Mr. Priest denied New South's application because New South provided no evidence that it had partnered with an Alabama State Agency for that billboard. This shortcoming caused HSV to treat this sign as a non-accessory sign. And HSV denied New South's application because such signs weren't permitted in C1districts—the type of district in which 2121 Whitesburg was located. More detail regarding this application is provided infra.

New South submitted six more sign applications on August 27, 2020. (Doc. 28 at 11). These included applications for signs at 4811 University Drive, 4016 University Drive, 7904 Memorial Parkway, 8220 Stephanie Drive, 8402 Whitesburg Drive, and 4113 Bob Wallace Avenue. (Doc. 28 at 11–12). HSV received, reviewed, and processed each application. (Doc. 28 at 12).

New South designated its proposed sign at 4811 University Drive a non-accessory ground sign. (Doc. 28 at 11). Its dimensions were to be 7 feet by 21 feet; it was to measure at 147 square feet and was to be 30 feet high. (Doc. 3–2 at 126). There was no reason for denial provided in the application form submitted to the Court. *Id*.

New South designated its proposed signs at 4016 and 7904 Memorial Parkway non-accessory ground signs. (Doc. 28 at 11). The dimensions of the

proposed sign at 4016 Memorial Parkway measured 10.6 feet by 36 feet. (Doc. 36–2 at 94). It was to have "drilled footing" and measure 40 feet high. *Id*. There was no reason for denial provided on the application form for this sign submitted to the Court. *Id*. The dimensions and size for the proposed sign at 7904 Memorial Parkway (misidentified on the application form) mirrored the sign at 4016 Memorial Parkway. (Doc. 36–2 at 110). However, it was to be 35 feet high. *Id*. The application form submitted to the Court indicates that HSV denied this application because it didn't meet the distance requirements for non-accessory ground signs.

New South designated its proposed signs at 8220 Stephanie Drive and 8402 Whitesburg Drive as non-commercial signs. (Doc. 28 at 12). The proposed dimensions of the 8220 Stephanie Drive sign (misidentified as 6822 Stephanie Drive on the application form) measured 10.6 feet by 36 feet and 35 feet high, with 378 total square feet. It was also to have drilled footing. (Doc. 36–2 at 62). The application form submitted to the Court indicates that HSV treated the sign as a non-accessory sign. Because non-accessory signs couldn't be built in 8220 Stephanie Drive's zoning district, HSV denied this application. *Id*. New South's proposed sign at 8402 Whitesburg featured the same dimensions, height, size, and square footage as its proposed sign at 8220 Stephanie Drive. (Doc. 36–2 at 79). HSV denied that application for the same reason given to New South's proposed sign at 8220 Stephanie Drive. *Id*.

Finally, New South designated its proposed sign at 4113 Bob Wallace Avenue an artisan sign. (Doc. 28 at 12). Its dimensions were to be 7 feet by 21 feet; it was to be 30 feet high and have a total square footage of 150 feet. (Doc. 36–2 at 41). The application form submitted to the Court shows that HSV denied that application because it found that New South had improperly classified its proposed sign. *Id*. As with its decisions concerning 8220 Stephanie Drive and 8402 Whitesburg, HSV treated this sign as a non-accessory sign. And because non-accessory signs couldn't be built in 4113 Bob Wallace's zoning district, the application was denied. *Id*

By September 8, 2020, HSV City Sign Enforcement Officer Scott Phares had denied the above applications via email. (Doc. 28 at 12). Mr. Phares informed New South that he'd considered each sign a non-accessory sign, applied the corresponding Regulations, and denied each application accordingly. (Doc. 28 at 12). New South contends that Mr. Phares applied the restrictions applicable to non-accessory signs without citing any specific provision in the former Sign Control Regulations. (Doc. 28 at 12). An email chain between the parties concerning those applications was attached to New South's VAC as Exhibit D (*See* Doc. 28–4). A large portion of that email chain is redacted and the reasons outlining Phares's denial aren't included. As detailed infra, Mr. Phares's affidavit notes that three of New South's applications were for signs located in C1 districts. (Doc. 36–2 at 5–6). The remainder were in other types of districts and denied in accordance with limitations

on non-accessory signs used in those districts. (*See* Doc. 36–2 at 140).

New South contends that HSV's actions were "entirely based on [Mr. Phares's] inaccurate assumption that the signs would display non-accessory content" and that HSV had "no lawful basis for its actions." (Doc. 28 at 13). New South appealed HSV's decisions on September 18, 2020. (Doc. 28 at 13).

B. New South's Final Sign Application

New South submitted its eighth and final sign application for a proposed sign at 7531 Bailey Cove Road on September 29, 2020. (Doc. 28 at 14). The application form indicated that the sign would measure 10 feet by 36 feet, have a total of 360 square feet, and be 35 feet high. (Doc. 36–2 at 141). New South also indicated that this sign would be anchored with drilled footing. *Id*. New South designated this sign a government function sign because it would be used to "promote State-sponsored public service and safety messages." (Doc. 28 at 14). New South contends it included with this application the images which it intended to display on that sign along with "all other required information." (Doc. 28 at 14). The photos submitted with this application effectively mirror the photos that accompanied New South's application for a sign at 2121 Whitesburg Drive. (Doc. 36–2 at 150–154). There's no indication that New South provided HSV with any information showing it was working in partnership with or on behalf of any Alabama State Agency in erecting this sign.

C. Letter from HSV's City Attorney

On October 6, 2020, New South received a letter from HSV's City Attorney, Mr. Trey Riley. (Doc. 28 at 14; Doc. 28–6). In his letter, Mr. Riley outlined several reasons why HSV was denying New South's sign application for its proposed sign at 7531 Bailey Cove Road. (Doc. 28 at 14). Mr. Riley included among those reasons that "[the] staff identifie[d] this sign as a non-accessory sign that is not allowed in a C-1 Zoning District." (Doc. 28 at 14). New South appealed this decision like its other denials. *Id*.

Mr. Riley also stated that his "real purpose" in writing to New South was to help its counsel "determine whether some additional information" would help clarify the situation between the parties and avoid disputes and further deficiencies in New South's several applications. (Doc. 28–6 at 3). Thereafter, Mr. Riley provided a detailed list of reasons HSV hadn't previously given New South as to why its earlier applications were deficient. (Doc. 28–6 at 3–7). Addressing those other signs, Mr. Riley noted the following deficiencies in New South's applications:

(1) The applications for signs at 7904 Memorial Parkway and 4016 University Drive failed to establish the consent of the property owners or lessees of those properties;

(2) The application for 4016 University Drive failed to meet the distance requirements, setback requirements, and height limitations required in the former Sign Code Regulations;

(3) The application for 4016 University Drive was missing an engineering survey and information regarding appropriate utility

and right of way clearances. The application also identified a proposed contractor who lacked a proper license, and it failed to disclose whether the sign would be digital;

(4) The application for 7904 Memorial Parkway failed to meet the minimum distance requirements;

(5) The applications for 2121 Whitesburg Drive, 8220 Stephanie Drive, 4113 Bob Wallace Avenue, 4811 University Drive, 8402 Whitesburg Drive, and 7531 Bailey Cove Road were all incomplete;

(6) The application for 2121 Whitesburg Drive was missing information regarding the lessor's deed. The sign's dimensions on the application also differed from the dimensions indicated on the submitted drawing. The proposed sign's location (a parking lot) would prevent the lot from maintaining the minimum number of parking spots in that lot. Also., the application was missing an engineering survey and it lacked information regarding setback and right of way requirements;

(7) The application for 4811 University Drive was missing the landowner's consent;

(8) The application for 4113 Bob Wallace Drive was missing the landowner's consent, the site of the sign provided in the application was situated on a different parcel of property, the lease agreement submitted was for the wrong parcel, and the application was missing an engineering survey and an accurate site diagram;

(9) The application for 8220 Stephanie Drive featured the wrong address, the sign's proposed location appeared outside the parcel in question, and the sign's proposed location was in the railroad right of way. Moreover, the application was missing an accurate engineering survey demonstrated that the proposed sign met right of way and setback requirements; and

(10) The application for 8402 Whitesburg Drive was missing an engineering survey and failed to disclose whether the sign's pole

> would meet the required setback from the right of way. The application also failed to disclose the total number of signs on that property.

(Doc. 28-–6 at 3–6). Mr. Riley also indicated that the sign descriptions New South chose in each of the above sign applications was incorrect because the signs' various features were incongruous with the definitions in the former Sign Code Regulations. (Doc. 28–6 at 6).

New South maintains that Mr. Riley's letter indicated, for the first time, that its applications were incomplete and that HSV shouldn't have processed them. (Doc. 28 at 15). New South also contends that HSV's determination that its applications were incomplete was incorrect for various reasons, and further contends that some of HSV's reasons for denial were merely post-hoc justifications. (Doc. 28 at 15). For instance, New South maintains, HSV's determination of incompleteness was faulty based on HSV's reliance upon former § 72.3.1 to find that New South failed to submit consent of every party with an interest in the property of a proposed sign, when that section only requires "written consent of the property owner or lessee during any sign to be erected." (Doc. 28 at 15). New South maintains it did this by submitting copies of its leases with the property owners or the long-term lessees of the property. New South also alleges that HSV's determination that the sign applications were incomplete because they didn't include an engineering survey was incorrect. New South rests its contentions on the facts that the phrase "engineering

survey" isn't defined in the former Sign Control Regulations and that each application featured "an accurate site plan depicting all needed information." (Doc. 28 at 16). New South alleges that the remaining reasons Mr. Riley offered amounted to after-the-fact justifications for denial and were meritless. (Doc. 28 at 17–19). New South elected not to make any changes to its applications and resubmit them. (Doc. 28 at 19).

III. Email chain evidence

HSV has moved to dismiss this action in accordance with Rule 12(b)(1) of the Federal Rules of Civil Procedure. In accordance with a factual attack made under that Rule, the Court isn't required to accept New South's allegations as true when considering the existence of subject-matter jurisdiction. HSV has also moved to dismiss this action in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure. While the Court is required to accept New South's facts as true under that standard, to the extent those facts conflict with the exhibits, the court isn't required to (and doesn't) treat those allegations as true. *See Williams v. Fannie Mae*, 2020 U.S. Dist. LEXIS 225620, at *2 n.2 (S.D. Ala. Dec. 2, 2020) (collecting authorities).

Attached to New South's VAC are several exhibits, including an email chain between Mr. Bell and Mr. Priest (one of HSV's Sign Enforcement Officers), and an email chain between Mr. Bell and Mr. Phares. (Doc. 28–3; Doc. 28–4). The former

concerns New South's application for a sign at 2121 Whitesburg Drive. The latter concerns New South's applications for proposed signs at every location except Bailey Cove Road. Neither party disputes the veracity of those communications and they are central to New South's claims.

The first email chain discloses the following exchange. On August 24, 2020, Mr. Priest informed Mr. Bell that his sign couldn't be built at 2121 Whitesburg Drive because it was in a C1 district. (Doc. 28–3 at 5). Mr. Bell responded that Mr. Priest's analysis didn't make sense because "[p]er 72.12 of the code, signs serving government functions are exempt." (Doc. 28–3 at 5). Mr. Priest replied that the section upon which Mr. Bell relied applied only to "state and municipality use." (Doc. 28–3 at 4). In reply, Mr. Bell stated that "[New South] work[s] with the Alabama Department of Public Health on all these campaigns, so the proposed copy is 100% for state use" and asked "[w]ill you approve if I add a letter from the Dept.?" (Doc. 28–3 at 4). In response, Mr. Priest stated, "[b]illboards are not allowed in a C1 zoning district, and the article that you are referring to does not apply to the Alabama Department of Public Health wanting to advertise on your proposed billboard." (Doc. 28–3 at 3). Afterwards, and in response to a question from Mr. Bell, Mr. Priest stated, "Billboards are defined as Non-Accessory Signs in our ordinance. I used the term Billboard to communicate with you because that is a common term used in the industry." (Doc. 28–3 at 2).

The second email chain is a continuation of the first, with two additional messages from Mr. Phares. (Doc. 28–4 at 2). However, as noted supra, it appears that the section detailing Phares's reasons for denial have been redacted from the exhibit. The portion of that chain relevant to this dispute is contained on the final page. In relevant part, it features HSV's reasons for denying New South's signs for 4811 University Drive, 4016 University Drive, 8402 Whitesburg Drive, 8220 Stephanie Drive, 4113 Bob Wallace Avenue, and 7904 Memorial Parkway. (Doc. 28–4 at 9). At the bottom of that document, it's noted that "[t]he above-mentioned reasons for denial are not meant to be understood as solely the reasons for denial. Additional reasons for denial may be applicable." (Doc. 28–4 at 9).

IV. The Parties' Affidavits

The parties have also submitted several affidavits. HSV has submitted affidavits from Mr. Scott Phares and Mr. Thomas Nunez, the Manager of Planning Services for the City of Huntsville. (Doc. 36–2 & Doc. 36–1). New South has submitted Neil Bell's affidavit.

In his affidavit, Mr. Nunez testifies that as HSV's Manager of Planning Services, he assists the City with the "enforcement, administration, and oversight of its zoning laws" and he "serve[s] as an advisor to the Planning Commission." (Doc. 36–1 at 2). The substance of Mr. Nunez's testimony concerns the New Sign Ordinances which went into effect on March 3, 2021.

Mr. Phares testified about the reasons why he and Allan Priest denied New South's sign applications for the locations at 4113 Bob Wallace Avenue, 8220 Stephanie Drive, 8402 Whitesburg Drive, 4016 University Drive, 7940 Memorial Parkway, and 4811 University Drive. (Doc. 36–2 at 5–6). Those reasons, as depicted in an exhibit attached to Phares's affidavit, include the following:

> (1) 4811 University Drive: Subject parcel is only permitted one accessory ground sign per road frontage. Two accessory ground signs currently exist on University Drive. Subject sign is functioning as a non-accessory ground sign but is labeled as an accessory ground sign. The pole width for accessory ground signs is restricted to 24 inches or less;
>
> (2) 4016 University Drive: Non-accessory ground sign does not meet distance requirement to the west. Non-accessory ground sign does not meet distance requirement from intersection. Non-accessory ground sign pole does not meet 50-foot setback from right-of-way. Non-accessory ground sign fronts two street and two pole setbacks are required; and height of non-accessory ground sign is limited to 35-feet;
>
> (3) 8402 Whitesburg Drive: Non-accessory ground signs are not permitted in a neighborhood C-1 district, and non-accessory ground sign is classified incorrectly on application;
>
> (4) 8220 Stephanie Drive: Non-accessory ground signs are not permitted in Neighborhood C-1 district, and non-accessory ground sign is classified incorrectly on application;
>
> (5) 4113 Bob Wallace Avenue: Non-accessory ground signs are not permitted in a Neighborhood C-1 district; and Non-accessory ground is classified incorrectly on application; and
>
> (6) 7904 Memorial Parkway: Non-accessory ground sign does not meet distance requirements.

(Doc. 36–2 at 140). At the close of the document, it's noted that "[t]he above-mentioned reasons for denial are not meant to be understood as solely the reasons for denial. Additional reasons for denial may be applicable." *Id*.

Finally, in his affidavit, Mr. Bell contends that some of HSV's contentions regarding the purported deficiencies in the sign applications were incorrect. Specifically, Mr. Bell avers that New South obtained the written consent of the landowners or lessees of several properties upon which New South sought to erect signs. (*See generally* Doc. 37–1).

V. New South Files This lawsuit

On December 22, 2020, after rounds of municipal appeals and a parallel action in the Madison County Circuit Court, New South filed this action. And, as noted supra, HSV amended its Sign Control Regulations on February 25, 2021, and those Regulations took effect the following week. (Doc. 28 at 22). New South is "gratified that the City has finally corrected the unconstitutional Sign Control Regulations that it had enforced for many years[,]" but maintains eight counts against HSV in its VAC. (Doc. 28 at 22–23). Each count alleges a violation of its First Amendment right to free speech under the Constitution of the United States and its rights under Section Four of the Constitution of the State of Alabama. (*See, e.g.*, Doc. 28 at 27). In each count, New South challenges the constitutionality of "the provisions of the Sign Control Regulations that actually contributed to the denial of [each] application,

the provisions the City alleges could have contributed to the denial of [each] application, and the provisions that are directly relevant to such provisions." (*See, e.g.*, Doc. 28 at 28). The specific provisions which New South challenges in Counts I, II, V, and VIII include the following:

a) The preamble of Ordinance No. 63-93 and Section 1.3 of the Zoning Ordinance (allegedly articulating purposes of Sign Control Regulations),
b) Setback provisions of the Zoning Ordinance allegedly applicable to certain sign types in C-1 districts,
c) The introductory paragraphs of the Sign Control regulations, and
d) Sign Control Regulations §§ 72.1, 72.3.1, 72.3.3, 72.4.2, 72.5.12(1) – (2), 72. 8, and 72.12.

(Doc. 28 at 28–29, 31, 38). New South challenges these sections along with §§ 72.6.1–72.6.8 in Counts III, IV of its VAC. (Doc. 28 at 33). In Count VI, New South challenges the sections featured above in points (a)–(d), as well as § 72.4.4 (Doc. 28 at 40). In Count VII, New South challenges all the sections featured in points (a)–(d), as well as § 72.4.4. (Doc. 28 at 42).

In each count, New South contends that every provision above is unconstitutional because they're content-based, they fail various constitutionality tests, and they were part of a "patently unconstitutional" sign code that was "riddled with improper content control" that "repeatedly afforded City officials with impermissible discretion" and "lacked procedural safeguards." (*See, e.g.*, Doc. 28 at 27). Further, in each count New South contends that because the former Regulations were constitutionally deficient, HSV should be compelled to allow New South to

construct its requested signs. *Id*. at 29. Finally, New South asks the Court for damages in accordance with 42 U.S.C. § 1983 and reimbursement for all reasonable costs in accordance with § 1988. (*See*, *e.g.*, Doc. 28 at 29).[8]

LEGAL STANDARDS

HSV has moved to dismiss New South's VAC under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Both standards are set out below.

I. Rule 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits dismissal of an action for lack of subject-matter jurisdiction. Movants may use this Rule to attack the Court's subject-matter jurisdiction in two ways: facially and factually. *See Murphy v. Sec'y, United States Dep't of the Army*, 769 Fed. Appx. 779, 781 (11th Cir. 2019). In a facial attack, the Court merely looks to the complaint to see whether the plaintiff has sufficiently alleged a basis for subject-matter jurisdiction. *Murphy*, 769 Fed. Appx. at 781 (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.3d 507, 511 (5th Cir. 1980)). When ruling on a Rule 12(b)(1) motion asserting a "factual attack" on jurisdiction, the Court may consider "matters outside the pleadings, such

[8] In its final ad damnum clause, New South requests the following relief: (1) an order declaring that the City's denial of New South's sign applications violated the First Amendment of the United States Constitution and Article I, Section 4 of the Alabama Constitution; (2) an order compelling HSV to permit the applied-for signs; (3) an award of damages in accordance with 42 USC § 1983 as a consequence of HSV's unconstitutional conduct; (5) an award of legal fees and expenses in accordance with 42 USC § 1988; (6) a trial by jury; and (7) any other relief the Court deems equitable and just. (Doc. 28 at 45–46).

as testimony and affidavits[.]" *Id.* (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). In such instances, the Court is "not constrained to view [the facts] in the light most favorable" to the plaintiff. *Carmichael v. Kellogg, Brown & Root Servs.*, 572 F.3d 1271, 1279 (11th Cir. 2009); *see also Murphy*, at 781.

II. Rule 12(b)(6)

Rule12(b)(6) permits a defendant to move to dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Rule requires the Court to "accept[] [as true] the allegations in the complaint and construe[] them in the light most favorable to the plaintiff." *Brophy v. Jiangbo Pharms. Inc.*, 781 F.3d 1296, 1301 (11th Cir. 2015) (quoting *Piedmont Office Realty Trust, Inc. v. XL Speciality Ins. Co.*, 769 F.3d 1291, 1293 (11th Cir. 2014)). To defeat a motion to dismiss, a plaintiff must plead facts sufficient to state a claim to relief that is plausible on its face, so as to nudge a claim across the line from conceivable to plausible. A claim is facially plausible when the plaintiff pleads facts which allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Finally, a court may consider exhibits on a motion to dismiss if the document's contents are alleged in the complaint, no party questions those contents, and the document is central to the plaintiff's claims. *See Daewoo Motor America v. General Motors Corp.*, 459 F.3d 1249, 1266 n.11 (11th Cir. 2006) (quoting *Day v. Taylor*, 400 F.3d 1272, 1276

(11th Cir. 2005)); *see also Financial Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284–85 (11th Cir. 2007) (considering defendant's exhibits on a motion to dismiss where the exhibit was essential to the plaintiff's case, it was referred to in the complaint, and neither party challenged its authenticity) .

DISCUSSION

As noted by the Eleventh Circuit, "[t]he regulation of billboards [or] the law billboards is a law unto itself." *Café Erotica of Florida, Inc. v. St. Johns County*, 360 F.3d 1274, 1285 (11th Cir. 2004) (quoting *Metromedia, Inc. v. City of San Diego*, 453 US 490, 501(1981)). Thus, before turning to the parties' substantive contentions, the Court finds it useful to review certain decisions which will guide its analysis below.

The Court turns first to the Supreme Court's *Metromedia*[9] decision. There, the Court was asked to strike down San Diego's sign ordinance. The ordinance totally forbade off-premise advertisements—both commercial and non-commercial in nature. *Metromedia*, 453 US at 496. A plurality of the Court found constitutional the provision of the ordinance that distinguished between on-site and off-site commercial speech. *Id*. at 511–12. However, the Court struck down the portion of the ordinance which prohibited, generally, all other billboards. *Id*. at 512–514. Finding that portion unconstitutional, the Court stated "[i]nsofar as the city tolerates

[9] *Metromedia*, 453 U.S. 490 (1981).

billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of *non-commercial messages*." *Id*. at 513 (emphasis added).

Several significant opinions have followed in *Metromedia's* wake. In 1992, the Eleventh Circuit addressed an on-premise–off-premise billboard distinction in Douglasville, Georgia's sign ordinance. *Messer v. City of Douglasville*, 975 F.2d 1505, 1507 (11th Cir. 1992). The ordinance prohibited off-premise signs in Douglasville's historic downtown district. Off-premise signs were defined as "sign[s] which direct[] attention to a building, profession, product, service, activity, or entertainment not conducted, sold, or offered on the property upon which the sign is located." *Id.* at 1508 n.1. Messer contended that Douglasville's ordinance prohibiting off-premise signs in that district impermissibly favored commercial speech over non-commercial speech. *Id*. at 1507.

The Eleventh Circuit disagreed. Writing for the court, Judge Clark noted that the *Metromedia* plurality opinion had held that "regulation favoring on-site commercial advertising over off-site commercial advertising was permissible, but regulation favoring on-site commercial over non-commercial speech was impermissible." *Id.* at 1508 (citing *Metromedia*, 453 US at 511–12). The court noted, however, that *Metromedia* "did not distinguish between onsite and offsite

noncommercial messages[,]" thus "not directly address[ing] the question before us: whether a regulation allowing *onsite noncommercial signs while denying offsite noncommercial signs would be constitutionally permissible.*" *Id*. at 1509 (emphasis added). The court went on to find that the ordinance was content neutral, stating:

> [a] non-commercial enterprise would be able to put up a sign bearing a non-commercial message as long as it relates to an activity on the premises. Similarly, a commercial enterprise would be able to put up a sign bearing a non-commercial message which related to any activity on the premises.

Id.; *see id.* at 1510. Ultimately, the court concluded that such a distinction was constitutional. *Id*. at 1511. The Supreme Court denied cert. on Messer's petition. *Messer v. City of Douglasville, Ga.*, 508 U.S. 930 (1993).

Nine years after *Messer*, the Eleventh Circuit addressed the constitutionality of a different municipal sign ordinance in *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Fla.*, 348 F.3d 1278 (11th Cir. 2003). Affirming the district court, the court concluded that the St. Petersburg's sign ordinance was content-neutral and that "[the city] could only process permit applications based upon objective criteria set forth in the ordinance. No official is able to reject an application simply because of the proposed content." *Id.* 348 F.3d at 1282; *see also id.*at 1282 n.3 ("The City's sign examiner stated [that she only reviewed the sign's content to] ascertain if pertains to an on-premises commercial or non-commercial activity or an off-premises activity[.]").

Three years after *St. Petersburg*, the Eleventh Circuit decided *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005). The appellant, a business that wanted to use its digital billboard to display commercial and non-commercial messages, failed to obtain a sign permit prior to building its sign on its premises. *Id*. at 1252. After receiving several citations and working through the Neptune Beach's application process, Solantic raised facial First Amendment challenges to the Neptune City's exemptions to its sign permit requirements and contended that the appellee's permit requirement amounted to an unlawful prior restraint. *Id*. at 1255. The court found in Solantic's favor, noting that a total exemption of categories of signs based on their content was facially unconstitutional. *Id*. at 1264.

Recently, the United States Supreme Court's decision in *Reed v. Town of Gilbert, Ariz.*[10] has given further guidance to courts on the issue of content-based speech regulations. In *Reed*, the respondent town classified several signs based on their content, and each received different levels of treatment under the law. While three categories were exempted from the sign ordinance entirely, each received different levels of treatment and were subject to different requirements regarding the amount of time they could remain in place and how many signs could be at any one location. *Id*. at 160. Writing for the Court, Justice Thomas found that the regulations were content based, *id*. at 164, and thus presumptively unconstitutional. In so

[10] 576 U.S. 155 (2015).

finding, the Court cautioned lower courts that government regulations of speech are content-based if a law applies to a particular type of speech because of: (1) the topic discussed; (2) the idea expressed; or (3) the message expressed. *Id*. at 163. Moreover, the Court cautioned, courts should pay close attention to subtly worded ordinances that define speech according to its function or purpose, as both are content-based regulations. *Id*. at 164. In an oft-cited concurring opinion, Justice Alito opined that "municipalities [are not] powerless to enact and enforce reasonable sign regulations" including "[r]ules regulating the locations in which signs may be placed. These rules may distinguish between . . . on-premise and off-premise signs." *Id.* at 174–75 (Alito, J., concurring).

I. Any facial challenge New South made to the former Sign Code Regulations is moot.

Before turning to the threshold question of standing, the Court must determine the nature of New South's challenges to HSV's former Sign Code Regulations. That is, the Court must determine whether they're "facial" constitutional challenges or "as-applied" constitutional challenges.

As noted by HSV, (Doc. 35 at 20), First Amendment facial challenges are rendered moot where the challenged law is repealed and "the court is sufficiently convinced that the repealed law will not be brought back." *National Advertising Co. v. City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2005) (quoting *Coral Springs St. Sys. v. City of Sunrise*, 371 F.3d 1320, 1331 (11th Cir. 2004)).

After review of the record, the Court is convinced that any facial challenge to HSV's former Sign Code Regulations is moot. Specifically, the Court finds persuasive, the following: (1) the information contained in Thomas Nunez's affidavit; (2)HSV's repeal of the old ordinances; and (3) New South's apparent concession that the allegedly unconstitutional provisions have been repealed, (Doc. 28 at 22–23), and that they aren't likely to be re-enacted. Because New South's facial challenge to the former Sign Code Regulations is moot, any such challenge is **DISMISSED** for lack of subject matter jurisdiction. *See National Advertising Co.*, 402 F.3d at 1335 (reversing the district court's decision and remanding with instructions to dismiss the action for lack of subject matter jurisdiction due to mootness).

Considering the above, this repeal also moots any request for equitable relief New South sought in accordance with any federal statute. This leaves New South with only its equitable claims brought in accordance with the Alabama State Constitution. The Court **DECLINES** to exercise supplemental jurisdiction over any such claim. *See Kilgore v. City of Rainsville, Alabama*, 2009 WL 10694610, at *8 (N.D. Ala. Sept. 18, 2009) *report and recommendation adopted*, 2009 WL 10694606 (N.D. Ala. Oct. 9, 2009), *aff'd sub nom. Kilgore v. City of Rainsville*, Ala., 385 Fed. Appx. 952 (11th Cir. 2010).

II. New South lacks standing to challenge any provision of the former Sign Code Regulations that didn't cause the denial of its applications or didn't threaten imminent denial of those applications.

It's axiomatic that a plaintiff must have standing to bring a claim against a defendant. A plaintiff's standing is evaluated under a three-part test where they must show: (1) an injury-in-fact; (2) that the defendant's conduct caused the injury; and (3) redressability by a favorable decision from the Court. *Sierra v. City of Hallandale Beach, Florida*, 996 F.3d 1110, 1113 (11th Cir. 2021) (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992)).

In billboard litigation, a plaintiff only has standing to challenge the provisions of a law which caused its injury or provisions of the law which will (or would have) imminently caused such injury. *See Roma Outdoor Creations, Inc. v. City of Cumming, Ga.*, 599 F. Supp. 2d 1332, 1339 (N.D. Ga. 2009) (citing *Granite State Outdoor Adver., Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1114 (11th Cir. 2003)). The Eleventh Circuit, in following the Supreme Court, has found when "the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control" imminence is "stretched beyond the breaking point" and injury is speculative. *Id.* (quoting *Lujan* at 564 n.2). In those circumstances, "[the Court has] insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Id.*

In its VAC and Opposition, New South characterizes many of the reasons HSV believed New South's applications to be deficient as "could have" or "hypothetical" reasons for denial. (*See, e.g.*, Doc. 28 at 18–19; Doc. 37 at 2, 3, 10). The Court agrees – these reasons amounted to mere speculation. And, as noted supra, New South refused to resubmit its applications after their initial denials and those provisions have since been amended.

New South maintains, however, that it has standing to challenge every provision highlighted in these conjectural denials, relying on *KH Outdoors, LLC v. Clay County*, 482 F.3d 1299, 1303 (11th Cir, 2007). (Doc. 37 at 13). But that case is inapplicable. The excerpt of *Clay County* upon which New South relies stands only for the proposition that if *unchallenged* provisions of a challenged sign ordinance could have caused an aggrieved party's injury, its injury is non-redressable and the party lacks standing. *Clay County*, 482 F.3d at 1303.

The Court is satisfied that the reasons featured in the Mr. Riley's letter (except for those provisions relating to New South's proposed Bailey Cove Road sign) didn't supply the bases for HSV's denials of New South's applications. Thus, they caused New South no injury. Instead, the reasons cited on the application forms before the Court and the reasons outlined in the exhibit attached to Mr. Phares's affidavit (Doc. 36–2 at 140) showed why HSV denied New South's applications.

Moreover, considering the above authorities, the fact that the alternative

reasons for denial outlined in Mr. Riley's letter amounted to mere speculation, and New South's decision not to resubmit its sign applications while the former Sign Code Regulations were effective, the Court concludes that the provisions in Mr. Riley's letter didn't or wouldn't have imminently caused New South injury. *See, e.g.*, *City of Clearwater, Fla.*, 351 F.3d at 1117 (finding appellant lacked standing to challenge the provisions of the sign ordinance that didn't cause it injury). Accordingly, New South lacks standing to challenge any provision those provisions and those challenges are **DISMISSED** for lack of subject matter jurisdiction.

Review of the record shows New South has standing to challenge the following provisions of HSV's former Sign Code Regulations because they caused New South's applications to be denied: Sections 72.4.2;[11]; 72.5.12(1)–(2)[12]; 72.8[13]; 72.4.4.[14]

III. HSV's former distinction between accessory and non-accessory signs wasn't content-based.

The First Amendment, as applied to the States through the Fourteenth Amendment, forbids government regulation of speech, and a government has no authority to restrict expression because of its message, ideas, subject-matter, or its content. *Reed* at 163. When determining whether a government's regulation of

[11] Related to C1 districts' prohibitions on non-accessory signs.
[12] Related to ground sign regulations.
[13] Setback provisions.
[14] Related to non-accessory signs in light industry districts.

speech is content-based, courts ask whether a law applies to a particular type of speech because of the topic discussed or the idea or message expressed. *Id*. This requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Id*.

New South contends that the distinction between accessory and non-accessory signs is content-based. (*See, e.g.*, Doc. 37 at 20, 23, 26, 28). Specifically, New South maintains that this distinction is "content-based on [its] face because [it does] or do[es] not apply depending on whether the sign bears non-accessory, accessory, artisan, non-commercial, or government function content." (Doc. 35 at 23; *see id.* at 26: "[T]o determine how to regulate a sign under the Sign Code, the City must know both the content of the message that is conveyed to determine whether it is 'accessory' or 'non-accessory' to the activity being conducted on the property. As content is involved, the regulations are content-based.").

The Court disagrees with New South's contentions. The distinction between accessory and non-accessory signs in HSV's former Sign Code Regulation definitions was content-neutral. Those definitions show that accessory and non-accessory signs could have carried commercial and non-commercial messages. The only relevant distinction between the two were the location of the sign in relation to the speaker. *See St. Petersburg, Fla.*, 348 F.3d at 1282. With accessory signs, the sign must have been on the speaker's premises. Non-accessory signs were off the

speaker's premises.

Despite the foregoing, New South protests that those former Regulations were still content-based because "non-commercial messages related to the premises could not qualify as 'non-accessory signs' and would be relegated to 'accessory signs.'" (Doc. 35 at 28). As the Court understands it, New South's contention here is that HSV couldn't treat different forms of non-commercial speech differently according to an on-premise–off-premise distinction. But, as noted supra, this was the precise issue settled in *Messer*.

Considering the above, the Court must answer two questions: (1) whether the regulation is drawn to advance a substantial government interest; and (2) whether the regulations are narrowly tailored and leave open ample channels of communication. *See Kilgore v. City of Rainsville, Alabama*, 2009 WL 10694610, at *6 (N.D. Ala. Sept. 18, 2009) (citing *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1280 (11th Cir. 2006) *report and recommendation adopted*, 2009 WL 10694606 (N.D. Ala. Oct. 9, 2009), *aff'd sub nom. Kilgore v. City of Rainsville, Ala.*, 385 Fed. Appx. 952 (11th Cir. 2010); *Messer v. City of Douglasville, Ga.*, 975 F.2d 1505, 1510 (11th Cir. 1992).

HSV's former distinction between on- and off-premises speech and the size, height, setback, square footage, and other time, place, and manner restrictions on signs supported HSV's substantial interest in promoting the "public health, safety,

morals, convenience, order, prosperity, and general welfare of the City of Huntsville." (*See* Doc. 35 at 24; Doc. 35–1 at 30). New South argues that these purposes are too general. But analogous provisions promoting aesthetic and safety goals are routinely found sufficient to pass constitutional muster. *See Kilgore*, 2009 WL 10694610, at *6; *Messer* at 1510 ("It is well settled that the state may legitimately exercise its police powers to advance its aesthetic interests. It is also well settled that both traffic safety and aesthetics are substantial government goals.") (internal citations omitted). Likewise, New South's reliance upon *Tinsley Media, LLC v. Pickens County*[15] is misplaced. There, the challenged ordinance had *no* listed purpose or goals whatsoever. 203 Fed. Appx. at 273. As to alternative channels of communication, New South's VAC and briefing fail to point the Court to any further prohibition which would have unconstitutionally limited its other available speech channels. And the Court's review of the former Sign Code Regulations reveals no such limitation. Accordingly, those former provisions were constitutional and New South's claims fail as a matter of law.

IV. New South lacks standing to challenge the former government function exemption and artisan sign provision because a finding that those provisions were unconstitutional wouldn't redress New South's injury.

As noted supra, a plaintiff's standing is subject to a three-part test. And each

[15] 203 Fed. Appx. 268 (11th Cir. 2006).

element is an indispensable requirement of justiciability. *See KH Outdoor, LLC v. City of Vestavia Hills, Alabama*, 2008 WL 11422600, at *4 (N.D. Ala. Sept. 30, 2008) (quoting *CAMP Legal Defense Fund*, 451 F.3d 1257, 1269 (11th Cir. 2006)). On redressability, the Eleventh Circuit has found a plaintiff's inability to build its desired billboard non-redressable where other unchallenged provisions of an ordinance or statute would have caused the denial of the same billboard. *Clay Cty., Fla.*, 482 F.3d at 1303–04 (11th Cir. 2007) (collecting authorities). Moreover, this Court–citing the Eleventh Circuit–has found the same injury non-redressable where "even if th[o]se provisions [plaintiff claims are unconstitutional] were declared unconstitutional, the ordinance would continue to prohibit . . . the plaintiff's only intended activity, such that its injury would not be redressed by a favorable decision." *City of Vestavia Hills, Alabama*, 2008 WL 11422600, at *5 (quoting *Granite State Outdoor Advertising, Inc. v. Cobb Cty.*, 193 Fed. Appx. 900, 906 (11th Cir. 2006)).

HSV contends that New South lacks standing to challenge the former government function exemption artisan sign provision.

On the former, HSV contends New South lacks standing because: (1) that provision only relates to signs erected by separate sovereigns which HSV has no authority to regulate; and (2) New South never supplied proof of its partnership with any Alabama State Agency, and was, therefore, subject to the former Sign Code

Regulations, which were appropriately applied and caused the denial of New South's applications.

In Opposition, New South contends that *Solantic* requires this Court to find that HSV's former government function exemption was unconstitutional and that HSV's reasons for denial (as they related to non-accessory signs' site plans, engineering survey, and written consent) were erroneous. (Doc. 37 at 29–31). In Reply, HSV echoes its earlier standing argument and insists that *Solantic* is inapplicable because that decision considered Florida law.

As to the former artisan sign provision, HSV contends New South lacks standing because any injury in accordance with this provision, too, is non-redressable. Specifically, HSV contends that New South applied for a sign with features that ran afoul of the temporary nature of artisan signs – New South applied for a permanent sign with steel footing. (Doc. 35 at 13). Because New South "did not wish to install a temporary sign, it [couldn't have been] injured by regulations pertaining to temporary signs, nor can its injury be remediated by allowing it to erect a temporary sign that it did not request." *Id*. New South responds that this definition amounts to a content-based restriction (Doc. 37 at 23, 32) and the Court should find it unconstitutional. In Reply, HSV reiterates that New South's injury regarding the former artisan sign provision is non-redressable because it sought to erect a permanent sign, which prevented its categorization as an artisan sign (Doc. 40 ta 5).

HSV also points to other reasons why it could have denied this application. *Id.*; *see also id.* at 6.

New South has suffered injuries because it wasn't able to build its proposed signs at 2121 Whitesburg, 7931 Bailey Cove, and 4113 Bob Wallace. And those injuries are traceable to HSV's conduct, i.e., the denial of those applications based on limitations applicable to non-accessory signs. But those limitations, as noted above, aren't content-based.

New South has failed to argue that HSV incorrectly re-categorized those signs because their various features ran afoul of the types of signs New South initially chose.[16] (*See generally* Doc. 37). But even if New South had argued that HSV's re-categorization was incorrect, the Court notes that New South also failed to respond to HSV's position that New South failed to supply proof that it partnered with an Alabama State Agency, thereby entitling it to the government function exemption. (*See generally* Doc. 37).[17] And New South failed to show that its applied-for artisan

[16] On this point, New South simply contends in its factual recitation that, "[HSV] unilaterally re-classified these six signs as non-accessory signs." (Doc. 37 at 9).

[17] On this point, New South contends in its factual recitation that

> New South also sought to post signs bearing public safety messages sponsored by Alabama governmental agencies. New South often contracts with local and state governments, such as the Alabama Department of Public Health, to post signs displaying their desired messages. These signs plainly qualify for the Sign Code's exemption for signs erected and maintained pursuant to and in discharge of any government function.

sign at 4113 Bob Wallace complied with the temporal component of the artisan sign definition, i.e., that its drilled steel footing didn't indicate that the sign was permanent. New South only argues the former government function exemption and the artisan sign category are content-based and that the Court should find them unconstitutional accordingly. (*See, e.g.*, Doc. 37 at 23).

By failing to rebut these contentions, New South has effectively failed to deny that its signs shouldn't have been considered non-accessory signs. In fact, New South argues HSV shouldn't have denied its signs in accordance with *some* restrictions imposed upon non-accessory signs in its Opposition. (*See, e.g.*, Doc. 37 at 32–36). These arguments, however, fail to substantively address the size, setback, and other limitations imposed on non-accessory signs, as well as the prohibition of non-accessory signs in C1 districts and the temporal component of artisan signs. *Id*.

Therefore, even if the Court found that the former government-function exemption and artisan sign provision were unconstitutional content-based regulations on speech, such a finding wouldn't redress New South's injury—the

(Doc. 37 at 6). New South's factual account doesn't advance the proposition that it supplied proof to HSV entitling it to the government function exemption. New South simply states that the messages were government sponsored and concludes that the government function exemption applied. New South also concludes that it "made sure to comply with all restrictions in the Sign Code that applied regardless of content." (Doc. 37 at 8) (citing Doc. 28 at 8, paragraph 25). That paragraph only states that New South complied with every content-neutral regulation in former Sign Control Regulations. As discussed supra, the various provisions which New South has standing to challenge aren't content-based. And the record is devoid of any evidence which shows that New South provided to HSV evidence that it was building these signs in partnership with an Alabama State Agency.

denial of its application in accordance with the former Regulations which forbade non-accessory signs in C1 districts and other lawful limitations on non-accessory signs. *See City of Vestavia Hills, Alabama*, 2008 WL 11422600, at *6 (distilling Eleventh Circuit precedent and refusing to analyze plaintiff's challenge to ordinance sections where such injury would be non-redressable).

V. Any "unbridled discretion" claim has been waived.

Unbridled discretion claims are most common when "a law gives a government official power to grant permits but [fails] to provide [any] standard[] by which the official's decision must be guided." *Barrett v. Walker County School District*, 872 F.3d 1209, 1221 (11th Cir. 2017) (citing *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1198–99 (11th Cir. 1991)). Indeed,

> [r]egulatory ordinances must be narrowly drawn so as not to vest in government officials unbridled discretion over whether to permit or deny expressive activity, and the purposes stated in an ordinance cannot be so broad that they provide no meaningful standards to rein in an official's discretion.

60 Am. Jur. 2d Peddlers, Solicitors, Etc. § 44.

HSV has moved to dismiss any unbridled discretion claim New South pled. In support of its position, HSV argues that its former Sign Code Regulations provided objective criteria by which it was required to process New South's applications. (Doc. 35 at 26). New South presents no argument to the contrary in its Opposition. (*See generally*, Doc. 37). Because New South failed to respond to this

argument, the Court finds any unbridled discretion claim abandoned. *See Evans v. Jefferson County Comm'n*, 2012 US Dist. LEXIS 67737, at *29 (N.D. Ala. May 15, 2012) (citing *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir. 2000)) (parenthetical omitted).

CONCLUSION

Based on the foregoing the Court **ORDERS** as follows:

(1) New South's claims for equitable relief made in accordance with 42 U.S.C. §§ 1983, 1988 are **DISMISSED WITHOUT PREJUDICE** for lack of subject-matter jurisdiction;

(2) The Court declines to exercise supplemental jurisdiction over New South's equitable claim made in accordance with the Alabama State Constitution;

(3) New South's claims against HSV—insofar as they relate to the former government function exemption and artisan sign provision—are **DISMISSED WITHOUT PREJUDICE** for lack of subject-matter jurisdiction in accordance with Rule 12(b)(1) of the Federal Rules of Civil Procedure;

(4) New South's claims against HSV–to the extent that they challenge the time, place, and manner restrictions imposed by the former Sign Code Regulations–are **DISMISSED WITH PREJUDICE** for failure to state

a claim upon which relief can be granted in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure; and

(5) New South's claim(s) for unbridled discretion are **DISMISSED** with prejudice based on abandonment.

The Clerk of Court is DIRECTED to close the case

DONE and **ORDERED** October 1, 2021.

LILES C. BURKE
UNITED STATES DISTRICT JUDGE