

FILED

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Wag More Dogs, LLC,)
)
Plaintiff,)
)
 v.)
)
Melinda M. Artman, in her official)
capacity as Zoning Administrator)
for Arlington County, Virginia;)
Arlington County, Virginia)
)
Defendants.)

2010 DEC -2 A 8:49

CLERK OF U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

Civil Action No. 1:10CV1347-LMB/TCB

**PLAINTIFF'S ORIGINAL COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. This civil-rights lawsuit seeks to vindicate the right of an entrepreneur to express herself without jeopardizing her right to earn an honest living. Kim Houghton is the owner and operator of Plaintiff Wag More Dogs, LLC, a canine daycare, boarding, and grooming facility in Arlington County, Virginia. As part of opening her new business, Ms. Houghton commissioned a painting of happy cartoon dogs, bones, and paw prints on the rear of its building.

2. For the past three months, this artwork has been covered by a series of large blue tarps. This is because Defendants have concluded that any artwork that "has any relationship with [Wag More Dogs]" is a "sign." The Arlington County, Virginia, Zoning Ordinance requires that would-be speakers must obtain a permit (with some minor exceptions) before displaying a sign. Businesses in a manufacturing district (where Wag More Dogs is located) may display signs that are up to sixty square feet in area. Wag More Dogs cannot obtain a sign permit for its artwork because it covers most of a wall. If Wag More Dogs unveils its artwork and lets people

see its happy dogs with bones, Defendants will fine it, revoke its certificate of occupancy, force it to close, and perhaps subject it to criminal penalties.

3. Arlington County's zoning ordinance on its face and as enforced by Defendants restrains Plaintiff's speech and has no constitutionally acceptable justification.

JURISDICTION AND VENUE

4. Plaintiff brings this lawsuit pursuant to the First and Fourteenth Amendments to the United States Constitution; the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the Declaratory Judgments Act, 28 U.S.C. §§ 2201-02. Plaintiff seeks injunctive and declaratory relief against the enforcement of Arlington County, Virginia, Zoning Ordinance Sections 34(B) and (G) ("Sign Code"), as well as Section 36(G), which, facially and as applied, violate Plaintiff's First Amendment right to display its art.

5. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343.

6. Venue lies in this Court pursuant to 28 U.S.C. § 1391(b).

PARTIES

7. Plaintiff Wag More Dogs, LLC, is a Virginia limited liability company with its principal place of business in Arlington, Virginia.

8. Wag More Dogs operates a boarding, grooming, and daycare facility located in an area of Arlington County known as Shirlington.

9. Wag More Dogs, LLC, is wholly owned by Kim Houghton, a Virginia resident.

10. Defendant Melinda M. Artman is the Zoning Administrator for Arlington County, Virginia, and is the official responsible for enforcing Arlington County's zoning ordinance. Defendant Artman is sued in her official capacity.

11. Defendant Arlington County, Virginia is a locality under Virginia law. *See* Va. Code Ann. § 15.2-102.

STATEMENT OF FACTS

Plaintiff Wag More Dogs, LLC

12. Plaintiff Wag More Dogs, LLC, is a Virginia limited liability company that owner Kim Houghton founded in December 2008.

13. Ms. Houghton first came up with the idea for Wag More Dogs after working for more than twenty years as an advertising executive at the Washington Post. Wanting to find a career she could be passionate about, Ms. Houghton thought about what activities she most enjoyed.

14. After realizing that she took pleasure in her dogs, Ms. Houghton discovered the doggy-daycare concept where dog owners drop off their pets in the morning to be fed, walked, and cared for during the day. The owners then pick up their pets from the business in the late afternoon or early evening.

15. In July 2009, Wag More Dogs rented a space at 2606 South Oxford Street in the Shirlington neighborhood of Arlington.

16. Arlington County zoning officials told Ms. Houghton shortly after she signed her lease that she could not use the space because it lacked sufficient parking.

17. In October 2009, Ms. Houghton resolved the parking issues with Arlington County and began to hire consultants to convert the space into an upscale pet daycare, boarding, and grooming facility.

18. The rear wall of the building that Wag More Dogs rents abuts an Arlington County, Virginia, park colloquially known as the “Shirlington Dog Park.”

19. Ms. Houghton has taken her dogs to the Shirlington Dog Park since 2004.

20. Ms. Houghton has come to know and become friendly with many of the patrons of the Shirlington Dog Park.

21. Ms. Houghton currently sits on the board for ArlingtonDogs, a volunteer group that helps maintain Shirlington Dog Park as well as other dog parks in Arlington, Virginia, and advocates on behalf of dogs and their owners.

22. Ms. Houghton also volunteers with Lost Dogs Rescue, a non-profit animal rescue organization; Pets on Wheels, a group that connects pets with people living in nursing homes and assisted living facilities; and various other canine-related groups.

23. Ms. Houghton chose the 2606 South Oxford Street property because it was close to a major thoroughfare and in a building that Shirlington Dog Park patrons could easily access.

24. As renovations on Wag More Dogs' future location proceeded, Ms. Houghton decided to paint a piece of art on Wag More Dogs' exterior rear wall.

25. Ms. Houghton's goal for the mural, both as owner of Wag More Dogs and as a long-time patron of the Shirlington Dog Park, was to beautify the area.

26. Ms. Houghton also intended for the mural to create goodwill with the people who frequented the dog park, many of whom were potential Wag More Dogs customers.

27. Ms. Houghton hired a local artist named Mark Gutierrez who came up with the design for the artwork, which incorporates some of the cartoon dogs in Wag More Dogs' logo.

28. Mr. Guitierrez began painting Wag More Dogs' mural in March 2010.

29. Wag More Dogs' mural was completed in May 2010 at a cost of \$4,000.

30. The finished piece is roughly sixteen feet tall by sixty feet wide and portrays images of cartoon dogs, bones, and paw prints.

31. The picture below and as attached to this Complaint as Exhibit A is a fair and accurate depiction of the artwork on the rear of Wag More Dogs' building.



32. Wag More Dogs' art is painted directly on the building's rear wall and does not protrude from the building.

33. Many of the patrons of the dog park have told Ms. Houghton how they like the artwork and feel that it contributes to the community.

Arlington County, Virginia, Zoning Law

34. Section 34 of the Arlington County, Virginia, Zoning Ordinance is entitled "Nameplates, Signs, And Other Displays Or Devices To Direct, Identify, And Inform."

35. Section 34(B) of the Arlington County, Virginia, Zoning Ordinance defines a "sign" as "[a]ny word, numeral, figure, design, trademark, flag, pennant, twirler, light, display, banner, balloon or other device of any kind which, whether singly or in any combination, is used to direct, identify, or inform the public while viewing the same from outdoors."

36. Section 34(A)(1) of the Arlington County, Virginia, Zoning Ordinance states that “[a] sign permit shall be obtained from the Zoning Administrator before any sign or advertising is erected, displayed, replaced, or altered.”

37. Persons who wish to put up artwork that does not meet the definition of a sign under the Arlington County, Virginia, Zoning Ordinance need not obtain a sign permit.

38. Section 34(G)(1) of the Arlington County, Virginia, Zoning Ordinance states that “commercial buildings in all ‘C’ and ‘M’ Districts [may have] up to three (3) signs for each tenant, up to a maximum total sign area of sixty (60) square feet per tenant, or a total sign area of one (1) square foot per linear foot of the tenant's frontage, whichever is greater.”

39. Arlington County zoning maps show Wag More Dogs’ building at 2606 South Oxford Street as being located in an “M” District.

40. Section 37(D)(1) of the Arlington County, Virginia, Zoning Ordinance states that an individual or business that violates any provisions of the ordinance “shall be subject to a civil penalty of two hundred dollars (\$200.00) for the first violation.”

41. If an individual or business does not correct the purported violation within a ten-day period, they may be subject to “a civil penalty of not more than five hundred dollars (\$500.00), or such lesser amount so that the total amount of fines imposed will not exceed a total of five thousand dollars (\$5,000.00) arising out of the same set of facts, for each subsequent violation.”

42. Virginia law and Section 37(G) of the Arlington County, Virginia, Zoning Ordinance state that once Defendants levy five thousand dollars in civil penalties for a single violation, government officials may prosecute the violation “as a criminal misdemeanor, as provided within the Code of Virginia.”

Zoning Controversy

43. On August 13, 2010, Defendant Melinda Artman contacted Ms. Houghton via email and stated that Wag More Dogs' artwork was an illegal sign under the Arlington County, Virginia, Zoning Ordinance.

44. Defendant Artman stated that the mural was a sign because it was "showing dogs at play and leading to your emergency exit door."

45. Defendant Artman, in an August 16, 2010, email, stated that "[t]he mural meets the definition of a sign, quoted in relevant part: 'Any . . . figure, design . . . which, . . . is used to direct, identify or inform the public while viewing the same from outdoors'."

46. Due to this and other violations, Defendant Artman placed a "'lock' on the building permit until the violations are corrected."

47. The "lock" placed on Wag More Dogs' permit meant that Wag More Dogs' contractor could not schedule a final building inspection for the facility.

48. Defendant Artman stated in her August 13, 2010, email that rather than paint over Wag More Dogs' art, Ms. Houghton could apply for a "Comprehensive Sign Plan" from the Arlington County Board. Defendant Artman continued on, saying "This is a legislative application. It does not comply with our sign guidelines and is not likely to be approved, but you have the right to ask."

49. The Arlington County Department of Community Planning, Housing and Development defines a Comprehensive Sign Plan as a "special exception" to the generally applicable sign rules.

50. Section 36(G)(1) of the Arlington County, Virginia, Zoning Ordinance states that a Comprehensive Sign Plan may or may not be granted at the discretion of the Arlington County

Board, the five-member governing body of Arlington, Virginia, vested with its legislative powers.

51. A Comprehensive Sign Plan may be approved by a “use permit,” which is a special exception that permits the County Board to impose special conditions particular to the character of the use.

52. In order to apply for a Comprehensive Sign Plan, one must complete an application for a use permit and submit a non-refundable \$1,782 fee, which covers the cost of processing the application.

53. Civic associations, homeowners associations, nearby neighbors, partnerships, and county agencies are notified about the pending use permit, given a copy of the application package, and offered an opportunity to submit input to Arlington County planning officials, who then prepare a report and recommendation for the County Board.

54. According to Arlington County’s Planning Division, the average time between applying for a use permit and a decision by the County Board is 68 days.

55. Applying for and securing a Comprehensive Sign Plan would be necessary solely because of the content of Wag More Dogs’ art.

56. On August 16, 2010, Ms. Houghton emailed Defendant Artman and asked “[w]hat correction would be needed to change the sign into a mural?” No sign permit is required to display a mural.

57. On August 17, 2010, Defendant Artman responded, stating that “[f]or the mural to NOT be considered a sign, it may depict anything you like EXCEPT something to do with dogs, bones, paw prints, pets, people walking their dogs, etc. In other word [sic], the mural can not show anything that has any relationship with your business. If it does, then it becomes a sign.”

58. Had an identical design been painted on the exterior wall of a flower shop, it would not be considered a sign under the Arlington County Zoning Ordinance.

59. That same day, Ms. Houghton told Defendant Artman that she would cover the artwork with a tarp until she could hire painters to “change the dogs to flowers.”

60. Defendant Artman responded by asking Ms. Houghton to tell her “when you have covered the mural with a tarp. I will then unfreeze the building permit.”

61. Ms. Houghton covered most of the art with a series of tarps but did not cover the last eight feet because of the presence of an emergency exit and roof access ladder.

62. Defendant Artman refused to release the building permit “lock” because some dogs remained visible and suggested that Ms. Houghton “manage to think of something that will cover the mural and not the door.”

63. On or about August 23, 2010, Defendant Artman released the building lock after Ms. Houghton covered the art with an additional tarp that was secured to the building.

64. On August 27, 2010, Defendant Artman stated that, in order to release Wag More Dogs’ certificate of occupancy, Ms. Houghton had to propose a “a plan, a timeline and/or an action that demonstrates conformity with all the applicable provisions of the [Arlington County Zoning Ordinance].”

65. That same day, Ms. Houghton suggested that she would keep the “tarp up pending any signage or enforcement changes.”

66. After Defendant Artman asked “if there are no signage and enforcement changes? Then what?”, Ms. Houghton stated that the artwork “will stay covered until April 30th 2011 (8 mos), pending signage/enforcement changes or actions by the County Board or County Manager's office.”

67. On September 10, 2010, Wag More Dogs received its temporary certificate of occupancy for 2606 South Oxford Street, albeit with a provision that states “[t]his permit is valid as long as the tarp covering a mural that also meets the definition of a sign as determined by the Zoning Administrator and which faces Shirlington Dog Park remains in place.”

68. Wag More Dogs opened for business on September 15, 2010.

69. Wag More Dogs’ temporary certificate of occupancy listed the business’ artwork as an outstanding deficiency.

70. On September 21, 2010, Arlington County officials again inspected the artwork and ordered Wag More Dogs to secure the tarps again because, in part, it was “not adequately secured behind and to the sides of the black metal fire ladder exposing parts of the mural including a depiction of a dog bone.”

71. After Wag More Dogs secured the tarps behind the ladder, Defendant Artman issued Wag More Dogs its final certificate of occupancy, albeit under the condition that the tarps remain in place.

72. Wag More Dogs would be liable for civil penalties and possible criminal prosecution if Ms. Houghton removed the tarps without Defendants’ prior permission.

Arlington Officials Suggest Replacing Plaintiff’s Artwork with Their Own

73. Following discussions with Ms. Houghton, Arlington officials came up with an option that would allow the tarps to come down without requiring Wag More Dogs to paint over its artwork.

74. In an October 8, 2010, email, Laiza N. Otero, Constituent Services Manager for the Office of the County Manager, suggested that if Ms. Houghton, at her own expense, painted

“the official name of the [Shirlington Dog Park] on the mural” then “the mural becomes an informational sign” under Section 34(E)(4) of the Sign Code and would not require a permit.

75. The official went on to state that the lettering would have to run the length of the artwork and estimated “that the lettering would have to be at minimum 48 inches tall.”

76. Under this option, Wag More Dogs must “provide the County [with] a sketch prior to painting the lettering to ensure it will be in compliance.”

77. In an email dated October 15, 2010, Ms. Otero noted that the Arlington Department of Parks, Recreation, and Cultural Resources was in support of the option and informed her that the park’s official name was “Shirlington Park’s Community Canine Area.”

78. Ms. Otero also stated that the Department of Parks, Recreation, and Cultural Resources asked that the words “Welcome to” be added, so that the entire lettering would read “Welcome to Shirlington Park’s Community Canine Area.”

79. The official noted that, due to the message’s length, Wag More Dogs may need to use two lines (or eight feet of vertical wall space) to accommodate it.

80. Ms. Otero also told Ms. Houghton that, if she had to remove the tarps so that a sign contractor or artist could create a sketch, she should “let us know how long the sign contractor or artist needs the tarp down and when you propose to re-apply the tarp.”

Wag More Dogs’ First Amendment Injury

81. The “lock” placed on Wag More Dogs’ building permit prevented Wag More Dogs’ contractor from having the building inspected or certificate of occupancy issued for a ten-day period.

82. In order to have the “lock” on its building released, Ms. Houghton and Wag More Dogs had to spend \$350 on tarps and bolts needed to secure the tarps in place.

83. Ms. Houghton had to spend hours installing the tarps herself, in some cases drilling directly into her building's cinder block wall.

84. Ms. Houghton monitors and maintains the tarps so as to ensure that they do not come loose and inadvertently display her artwork.

85. Ms. Houghton may not display her unaltered mural without risking Wag More Dogs' certificate of occupancy.

86. Wag More Dogs' artwork has been covered up for three months, including late Summer and Fall 2010 when patrons to the Shirlington Dog Park could have enjoyed the painting of happy dogs, bones, and paw prints.

87. Patrons of the Shirlington Dog Park have told Ms. Houghton that the presence of the tarps makes them think that Wag More Dogs is closed.

88. Defendants have told Ms. Houghton that in order to remove the tarps she must paint over her mural's message with another that Arlington officials feel is not too related to her business (like flowers, dragons, or ponies).

89. Whether a piece of art is considered a sign under the Arlington County zoning ordinance, as implemented by Defendants, turns on the identity of the person or business who wishes to speak.

90. Painting over the mural entirely, or replacing the dogs, bones, and paw prints with other graphics like flowers, dragons, or ponies would require Ms. Houghton to hire painters at her own expense and would change the mural's message.

91. Defendants have told Ms. Houghton that she may also remove the tarps if she will paint the words "Welcome to Shirlington Dog Park's Canine Community Area" in four-foot high letters above her artwork.

92. Adding the phrase that Defendants suggest would require Ms. Houghton to hire painters at her own expense, provide a sketch to Arlington County officials for their approval, and change the mural so that it conveyed Defendants' message rather than her own.

93. Defendants have told Ms. Houghton that she may remove the tarps if she applies for and receives a "Comprehensive Sign Plan."

94. Asking for a "comprehensive sign plan" would require Wag More Dogs to fill out a "use permit" application and submit a non-refundable fee of \$1,782.

95. The Arlington County Board is the governmental body that would decide whether to grant any application for a Comprehensive Sign Plan.

96. The County Board has discretion to approve a use permit request, deny it, defer it until a later date, or take no action on a request whatsoever.

97. Wag More Dogs wants to display its artwork but has refrained from doing so out of fear of the potential civil and criminal penalties.

98. Wag More Dogs has also refrained from unveiling its artwork and communicating its message to the public due to the fact that its certificate of occupancy will be automatically revoked should it do so.

99. Defendants regard Wag More Dogs' artwork as a sign because it shows dogs, bones, and paw prints.

100. Defining a piece of art as a "sign" imposes substantial burdens on anyone wanting to display that artwork.

101. If Wag More Dogs' artwork displayed flowers, dragons, or ponies, it would not be a sign.

102. If Wag More Dogs' artwork displayed flowers, dragons, or ponies, the burdens described in paragraphs 49 through 80 would not be imposed.

103. If this Court enjoins Defendants from penalizing Wag More Dogs for displaying its unaltered mural, Wag More Dogs will immediately remove the tarps that now obscure its artwork.

CONSTITUTIONAL VIOLATIONS

Count One: Freedom of Speech

104. Plaintiff incorporates and re-alleges each and every allegation contained in Paragraphs 1 through 103 of this Complaint as if fully set forth herein.

105. Count One is brought pursuant to the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

106. The First Amendment protects Plaintiff's right to express itself through visual media such as paintings, artwork, and murals.

107. Because Wag More Dogs' business is the boarding and grooming of dogs, Defendants require it to either apply for and secure a comprehensive sign plan; replace the dogs, bones, and paw prints in its artwork with different images (like flowers, dragons, or ponies); add the words "Welcome to Shirlington Park's Community Canine Area" in four-foot high letters; or remain silent.

108. Upon information and belief, Defendants possess no evidence that restricting Wag More Dogs' speech protects the public safety.

109. Upon information and belief, Defendants possess no evidence that restricting Wag More Dogs' speech protects the public health.

110. Defendants do not have sufficient justification for their infringement on Wag More Dogs' right to display its innocuous artwork to the public.

111. Wag More Dogs has suffered and will continue to suffer irreparable harm from Defendants' refusal to let it share its message.

**Arlington County's Sign Code is Both Unconstitutionally Vague
and a Content-Based Restriction on Speech**

112. Arlington County's zoning ordinance does not define the terms "direct," "identify," or "inform."

113. A person of ordinary intelligence cannot determine whether a piece of art in any particular circumstance will be deemed to "direct, identify, or inform the public."

114. Defendants, in order to decide whether a piece of art directs, identifies, or informs the public, must conduct a probing inquiry both into the artwork's message and the identity of the person or business that wishes to speak.

115. Burdening Wag More Dogs' artwork based on the fact that it focuses on one message, rather than another message, is a content-based restriction on speech.

**Defendants Artman's Implementation of Arlington County's Sign Code is
Unconstitutionally Vague and a Content-Based Restriction on Speech**

116. As interpreted and enforced by Defendant Artman, the Arlington County, Virginia, Zoning Ordinance means that an image with "any relationship" to an on-site business is a "sign."

117. If Wag More Dogs had chosen to paint a mural of flowers, dragons, or ponies, Defendants would not have considered that mural a sign under their subjective determination of whether those subjects have a relationship with Wag More Dogs' business.

118. A person of ordinary intelligence cannot determine ahead of time whether Defendant Artman will consider a piece of art in any particular circumstance to have a relationship with his or her business.

119. Defendant Artman's determination of whether a piece of art has "any relationship" with Wag More Dogs' business turns on both the artwork's specific content and message as well as the identity of the person or business who wishes to speak.

**Defendants' Comprehensive Sign Plan Amounts
to an Unconstitutional Prior Restraint on Speech**

120. The Arlington County, Virginia, Zoning Ordinance contains no objective criteria that guide the Arlington County Board in approving or rejecting an application for a comprehensive sign plan.

121. Arlington County, Virginia, Zoning Ordinance Section 36(G)(1) states only that the County Board "may" grant a plan if it finds that the use will not "(1) affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use; (2) be detrimental to the public welfare or injurious to property or improvements in the neighborhood; (3) be in conflict with the purposes of the master plans of the County."

122. The Arlington County Board is not, however, required to grant the use permit even if the proposed comprehensive sign plan does not affect these factors. Instead, it can use its discretion to deny the application, defer it until a later date, or take no action on it whatsoever.

123. Requiring Wag More Dogs to apply for a comprehensive sign plan in order to display its artwork, which costs thousands of dollars, requires the filling out of numerous forms, and rests on the arbitrary decision of government officials, is an unconstitutional burden on Plaintiff's speech.

Defendants' Welcome Sign Option Compels Plaintiff to Mouth Defendants' Message

124. Requiring Wag More Dogs to change the content of its mural or add "Welcome to Shirlington Park's Community Canine Area" above its artwork amounts to compelling Wag More Dogs to speak in a way Defendants deem fit.

125. Wag More Dogs is required to submit a sketch for Defendants' prior approval of any lettering it might place above its artwork.

126. Upon information and belief, no objective standards exist by which Wag More Dogs can predict whether Defendants would approve or reject any sketch that it submitted.

127. Defendants' actions would effectively appropriate Plaintiff's speech and convert the goodwill Plaintiff would have earned for putting up the artwork to Defendants.

REQUEST FOR RELIEF

Wherefore, Plaintiff respectfully requests relief as follows:

A. A declaratory judgment by the Court, pursuant to 28 U.S.C. § 2201, declaring that, facially and as applied to Plaintiff, Arlington County's definition of a "sign" under section 34 of the Arlington County Zoning Code violates the First and Fourteenth Amendments to the United States Constitution;


B. A preliminary injunction prohibiting Defendant Arlington County and its agents from rescinding Wag More Dogs' certificate of occupancy or otherwise penalizing Plaintiff for removing the tarps that currently cover Plaintiff's artwork.

C. A permanent injunction prohibiting Arlington County and its agents from enforcing Section 34 of the Arlington County, Virginia, Zoning Ordinance against Wag More Dogs or other similarly situated persons;

- D. An award of nominal damages in the amount of \$1.00 for the violation of Plaintiff's constitutional rights;
- E. An award of attorney's fees, costs, and expenses pursuant to 42 U.S.C. § 1988; and;
- F. Such further legal and equitable relief as the Court may deem just and proper.

Dated this 2nd day of December, 2010.

Respectfully submitted,



William H. Mellor (DC Bar No. 462072)*
Robert McNamara (VA Bar No. 73208)
Robert P. Frommer (VA Bar No. 70086)
Attorneys for Plaintiff
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320; Fax: (703) 682-9321
Email: wmellor@ij.org, rmcnamara@ij.org,
rfrommer@ij.org
**Pro Hac Vice Pending*