

No. 30422-1

Washington State Court of Appeals

ROBERT CATSIFF,

Appellant,

vs.

TIM McCARTY AND CITY OF
WALLA WALLA,

Respondents.

BRIEF OF APPELLANT

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SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT CATSIFF,) No. 86126-9
)
 Appellant,)
)
 vs.) BRIEF OF APPELLANT
)
 TIM McCARTY AND CITY)
 OF WALLA WALLA,)
)
 Respondents.)

INTRODUCTION

Whether the city may prohibit mural art on the front of Robert Catsiff's toy shop, the Inland Octopus, because the mural is too big, is the main issue in this case. A related issue is whether the city may require permits before murals are painted.

In September, 2010, a Walla Walla muralist was commissioned by Bob Catsiff to paint a mural on the front of his toy shop. The mural was painted to cover a glaring white facade, to identify the toy shop, to complement other murals in downtown Walla Walla and to fulfill a purpose of the sign code which expressly favors "creative and innovative sign design." WPMC 20.204.010. The mural is similar, albeit larger, to a mural at the rear of the Inland Octopus. Neither mural proposes a commercial transaction.

The city argues that the murals are commercial speech, and may be prohibited or regulated as if they were billboards. The city contends that the front mural offends its governmental interests in traffic safety and aesthetics, because, among other transgressions, it is greater than 150 square feet in size. This contention is advanced notwithstanding a record of never enforcing its permit and size requirements against mural art that is legally indistinguishable from the Inland Octopus murals, or against any other sign, including billboards.

In Bob Catsiff's view, the law and the facts, including the city's own conduct, show a lack of governmental interest that could justify the city's infringement of his constitutional right of free expression. Therefore, he seeks a judgment invalidating the sign code both facially and as applied to the Inland Octopus murals.

ASSIGNMENTS OF ERROR, ISSUES
PERTAINING THERETO AND STANDARD OF REVIEW

Assignments of Error

1. The trial court erred by entering a judgment declaring that the City of Walla Walla's wall sign size and height restrictions are constitutional, valid and enforceable.
(CP 943)

2. The trial court erred by entering a judgment declaring that the City of Walla Walla's sign permitting requirements are constitutional, valid and enforceable.
(CP 943)

3. The trial court erred by denying the appellant's request for a permanent injunction against enforcement of the City of Walla Walla's sign ordinances. (CP 943)

4. The trial court erred by affirming the Hearing Examiner Decision and Order of November 18, 2010, in case number CEC-10-0572.
(CP 943)

5. The trial court erred by awarding

costs to the respondent. (CP 943)

6. The trial court erred in making finding of fact number 2.1. (CP 937)

7. The trial court erred in making finding of fact number 2.2. (CP 937-938)

8. The trial court erred in making finding of fact number 2.3. (CP 938)

9. The trial court erred in making finding of fact number 2.4. (CP 938)

10. The trial court erred in making finding of fact number 2.5. (CP 938)

11. The trial court erred in making finding of fact number 2.6. (CP 938)

12. The trial court erred in making finding of fact number 2.7. (CP 938)

13. The trial court erred in making finding of fact number 2.8. (CP 938-939)

14. The trial court erred in making finding of fact number 2.9. (CP 939)

15. The trial court erred in making finding of fact number 2.10. (CP 939)

16. The trial court erred in making

finding of fact number 2.11. (CP 939)

17. The trial court erred in making finding of fact number 2.12. (CP 939)

18. The trial court erred in making finding of fact number 2.13. (CP 939)

19. The trial court erred in making finding of fact number 2.14. (CP 939-940)

Issues Pertaining Thereto

1. Whether the City has the burden of proving that the ordinances challenged by the mural owner are constitutional.

2. Whether the murals in question are commercial speech.

3. Whether the City's ordinances imposing certain size and height requirements on the murals in question fail the test of constitutionality. In resolving this general question, specific, subsidiary issues are:

(a) Whether the City must show a compelling governmental interest to justify its regulation of Mr. Catsiff's right of expression.

- (b) If the City must show a compelling governmental interest, has it done so?
- (c) Whether the City must show a substantial governmental interest to justify its regulation of Mr. Catsiff's right of expression.
- (d) If the City need only show a substantial governmental interest, has it done so?

4. Assuming that the City has shown that its ordinances are supported by the requisite governmental interest, do the restrictions it seeks to impose on the size and height of the plaintiff's murals directly and materially serve the asserted governmental interest?

5. Assuming that the City has shown that its ordinances are supported by the requisite governmental interest and that the ordinances properly advance that interest, has the City shown that the ordinances restricting Mr. Catsiff's right of free expression are not more extensive than necessary?

6. Whether the ordinances in question constitute an invidious prior restraint on the

First Amendment right of free expression by vesting unbridled discretion in the city official charged with ruling on the application for a sign permit.

7. Whether the City sign code violates the Washington Constitution.

8. Whether the City sign code is unconstitutionally overbroad.

9. Whether the City sign code is void for vagueness.

10. Whether the plaintiff-appellant is entitled to an award of costs, including attorney fees, pursuant to 42 USC 1988.

Standard of Review

The substantive issues presented for review concern the constitutionality of certain ordinances of the City of Walla Walla. Therefore, the standard of review is de novo. Kitsap County v. Mattress Outlet, 153 Wn. 2d 506,509, 104 P. 3d 1280 (2005).

The factual foundation of the decision below establishes an additional ground for de novo review. Where, as here, the trial court based its decision on a record that "consists entirely of written and graphic material and

contains no trial court assessment of witnesses' credibility or competency," this Court is not "bound by the trial court's findings of fact." In re Rosier, 105 Wn. 2d 606,616, 717 P. 2d 1353 (1986). Review should be de novo because the trial court decided the case on the basis of documentary materials, and no live testimony. Brouillet v. Cowles Publishing Co., 114 Wn. 2d 788,793, 791 P. 2d 526 (1990).

Finally, review of a protected speech claim under the First Amendment "carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston, 515 U.S. 557,567, 132 L. Ed. 2d 487, 115 S. Ct. 2338 (1995).

STATEMENT OF THE CASE

Nature of the Case

The appellant, Robert Catsiff, sued the City of Walla Walla after the City issued a notice of civil violation finding that a mural on the front of Mr. Catsiff's toy shop, the Inland Octopus, violated the city sign code. (CP 722) Mr. Catsiff was directed to remove the mural. (CP 730) The mural on the front of Mr. Catsiff's toy shop was found to have been created without obtaining a sign permit, and was found to be in violation of certain requirements limiting the size and height of wall signs. (CP 731) (A photo of the front mural is found in the appendix) The mural at the rear of Mr. Catsiff's toy shop was found to have violated the City's sign permit requirement. (CP 731)

Mr. Catsiff was fined certain sums for failing to obtain permits. (CP 731) Also, he was subjected to a fine of \$100 per day, which fine accrues until the larger mural on

the front of his shop is removed. (CP 732)

Robert Catsiff sought a permanent injunction barring enforcement of the City's order requiring him to remove the mural on the front of his shop, and to pay various fines. (CP 729) Additionally, Mr. Catsiff sought a judgment declaring the ordinances in question void as unlawful infringements of his right of free expression guaranteed by the First Amendment of the U.S. Constitution. (CP 729) Finally, Mr. Catsiff sought an award of his costs, including attorney fees, pursuant to 42 USC 1988. (CP 729)

Course of Proceedings

By his initial complaint, Robert Catsiff sought declaratory and injunctive relief as well as attorney fees against the City of Walla Walla, and its executive official. (CP 3-9) Certain administrative proceedings were then completed following which the complaint was amended to add a claim for judicial review of the City Hearing Examiner's

Decision. (CP 728) A hearing on the merits was held in the trial court on April 19, 2011. (RP 1) The record there was composed, in part, of the papers submitted to the City Hearing Examiner who heard no testimony. The Hearing Examiner issued his decision in favor of the City based on a stipulation by the parties that reserved all rights to contest constitutionality. (CP 792) In addition to the administrative materials, the trial court considered certain declarations, documentary exhibits and deposition transcripts. No live testimony was heard.

Statement of Facts

THE INLAND OCTOPUS TOY SHOP

In 2004, Robert Catsiff moved to Walla Walla and established the Inland Octopus, "A toy shop as it was meant to be." (Ex. 15, 13:20-22; 10:14-15) Bob Catsiff wanted his toy shop to be different from mass market

retailers:

- Q. Have you heard the phrase before, "A toy shop as it was meant to be"?
- A. Yes.
- Q. Where does that phrase come from?
- A. I use it on -- as a slogan, as a -- on my business. I run it in ads. It was initially uttered to me by a customer, and I'm not sure who it was, within the first few months after I opened. And I said to her, "I'm going to use that," so I've been using that.
- Q. What does it mean?
- A. It means that it's a toy shop that has toys that I feel are the kind of toys that children should play with, that should be entertaining and that are missing from the rest of the retail area.
- Q. What is different between your toy shop and other toy shops?
- A. Primarily the difference is the merchandise in it. It's not merchandise that's found in mass retail. I specifically buy merchandise that I believe has redeeming value to it.
- Q. I'm going to have to ask you to explain what you mean, merchandise that has redeeming value.
- A. When I opened the store, I had

the idea, and I call it a mission statement, toys that inspire thought[,] activity and happiness through accomplishment. And my goal is to fulfill that, along with not getting too serious about it, since it is a toy store. (Ex. 15, 10:14--11:16) (comma added)

Thus, Bob's purpose was not that of an ordinary retailer. The deliberation shown by Bob's description of his toy shop is also seen in his choice of location.

Bob Catsiff chose Walla Walla as the town for his toy shop. Though not a native Walla Wallan, Bob knew the town through his prior work in food processing. (Ex. 15, 8:23-24; 3-5) He considered the Oregon coast but settled on Walla Walla:

Because I was more familiar with the area and I knew that it was growing at the time, that the Main Street had won awards, that the wine industry was burgeoning, and that it would be a good place to open a retail business because of the growth. (Ex. 15, 15:1-5)

Bob named his toy shop "Inland Octopus" to suggest an interesting place while conveying a counterintuitive idea in the view of a conventional marketing specialist. (Ex. 15, 11:21--13-2)

Not only was the selection of Walla Walla as the town for Bob's toy shop the product of careful thought, but so was his choice of location within Walla Walla. Bob went to Main Street. The mall was dying. (Ex. 15, 16:9-11) Main Street was where activity and growth were to be found. (Ex. 16, 16:5-8) At first, Bob leased premises at 220 E. Main Street. (Ex. 15, 17) In 2010, he moved to 17 E. Main Street, closer to the heart of downtown, and next to Bright's Candies. (Ex. 15, 18)

THE MURAL

While the new address was an improvement, the building at 7 E. Main had a deficiency--"the glaring white facade." (Ex. 15, 52:6) Undeterred, Bob planned to paint a mural on that wall; he "saw that something really beautiful could be done there." (Ex. 15, 51:3-5; 52:6-7) Michael M. May, Bob's landlord, favored a mural. (Ex. 15, 51:21-22) In fact, Mr. May had satisfied himself through a conversation with a city employee that a mural covering the entire wall

of the toy shop would not violate city ordinances regulating signs. (Ex. 15, dep. ex. 16)

As plans for a mural on the front wall of the Inland Octopus were developing, Bob painted an octopus-rainbow mural on the rear wall. (Ex. 15, dep. ex. 17) This mural was completed in April, 2010. (Ibid.) No sign permit was obtained for the first mural, and no complaint from the city about the lack of a sign permit or the look of the mural was heard until after the larger mural on the front of the shop was painted in September, 2010. (CP 730)

A primary purpose of the Inland Octopus murals is "to contribute a whimsical depiction to the delightful mix of murals, sculpture and other art works that are found in downtown Walla Walla." (Ex. 15, dep. ex. 17, 2:13-15) As stated by Bob Catsiff, he established the murals to identify his toy shop, but "[n]either mural contains the name of my shop, depicts goods sold in my shop or proposes any sort of commercial transaction." (Ex. 15, dep. ex. 17, 2:16-20) Bob, through his murals, is communicating happiness

and "[t]hat it's a wonderful experience to come into my store and a wonderful place to buy toys." (Ex. 15, 29:9-19) As was reported in the press, "I wanted the outside to show how cool the inside of the store is." (Ex. 15, 58:4-9)

To help create the large mural on the front of his shop, Bob engaged a Walla Walla artist. Aaron Randall, whose day job is in social work, had experience and interest in mural painting. (Ex. 16, 6:17, 8:5-9; 13-14) Mr. Randall's conception was a mural of the classic type, i.e., covering the entire wall. (CP 801) Mr. Randall elaborated:

The creation as completed, is a mural of the classic type. That is to say, it covers the entire surface of the upper exterior wall of the plaintiff's toy shop. It also has the effect of a trompe-l'oeil. That is to say, the mural I created provides an illusion of a real, albeit fantastic, scene. To achieve the integrity required by this form of artistic expression, it was necessary that the entire surface of the facade at 7 East Main Street be used. A limitation to 150 square feet or less would have

undermined and compromised my ability as an artist to achieve the desired type of expression. In this regard, it should be noted that "mural" comes from the French. The word for wall in French is "mur." The word for "mural" in French is "mural."
(CP 801:17--802:4)

Just as Bob Catsiff and Aaron Randall were committed to the creation of the mural, they were concerned that the mural be seen as a positive contribution to downtown Walla Walla.

As stated above, Bob Catsiff's landlord discussed the permissibility of a large, classic mural with whom he thought was the responsible city official. (Ex. 15, dep. ex. 16, 2:15-23) Apparently, the city official whom Mr. May believed was Gary Mabley was not that person. (CP 880) Nevertheless, the city official with whom he spoke (Jon Maland) recalled the conversation with Mr. May. Specifically, Mr. Maland recounted making a distinction between signs and murals. (CP 883)

The sign versus mural distinction was reportedly noted by Elio Agostini, Executive Director of the Walla Walla Downtown Foundation. (Ex. 15, dep. ex. 19) It was through Mr. Agostini that Bob Catsiff attempted to determine whether his mural comported with city rules and downtown mores. (Ex. 15, 39:23--40:1) According to Bob Catsiff, the Walla Walla City Manager, through the Downtown Foundation, stated that the mural would not be allowed, specifically, because it was "too cartoonish." (Ex. 15, dep. ex. 11)

Faced with conflicting and inconclusive reports regarding the city's position, Bob Catsiff moved ahead and painted the mural on Labor Day weekend 2010. (Ex. 15, 45:10) As Bob explained his decision to paint without permission, "I realized that there was probably nothing on the books to prevent this, but if I kept going there would be." (Ex. 15, dep. ex. 11) The response of the public and downtown merchants was favorable. Downtown business-

woman Rachel Klein was quoted:

"Bob did exactly the right thing," she said. "The way it's painted gives it depth. It couldn't have been more tastefully done." (Ex. 15, dep. ex. 19)

Downtown businessman Jim McGuinn reportedly thought that the mural was "a breath of fresh air." (Ex. 15, dep. ex. 19) City Hall was not amused.

THE OFFENSES

With respect to the large mural on the front of his toy shop, the City of Walla Walla fined Bob Catsiff \$100 for failing to obtain a sign permit before painting the mural, and \$100 for failing to obtain authorization to use the sidewalk from which the painting was done. (CP 731) More chilling, the front mural was deemed to exceed certain dimensional and height requirements that limited wall signs to an area not more than 150 square feet, a coverage of not more than twenty-five percent of the wall area and a height of not more than 30 feet above grade. WWMC 20.204.250(A)(5), (4),(8). These three violations were deemed

to be continuing and resulted in a fine of \$100 per day to accrue until the larger mural was removed. (CP 732) With respect to the small mural, the city imposed a fine of \$100 for failing to obtain a sign permit. (CP 731)

THE SIGN CODE

The purpose of the City of Walla Walla's sign code is explicit, WPMC 20.204.010:

The purpose of this section is to accommodate and promote: sign placement consistent with the character and intent of the zoning district; proper sign maintenance; elimination of visual clutter; and creative and innovative sign design. To accomplish this purpose, the posting, displaying, erecting, use and maintenance of signs shall occur in accordance with this Chapter.

Nothing in the purpose directly addresses aesthetics, traffic safety or economic vitality. A "sign" is defined as "any device, structure, fixture (including the supporting structure) or any other surface that identifies, advertises and/or promotes an activity, product, service, place, business, political or social

point of view, or any other thing." WPMC
20.204.020(A)(27); 20.06.030.

Bob Catsiff agrees that his murals fall within the City's definition of "sign." Yet, history and practice in Walla Walla are contrary to imposing sign code restrictions on murals.

In downtown Walla Walla, several murals are found that have never been subject to permit requirements, dimensional requirements or height requirements of the sort that have been imposed on Bob Catsiff. (RP 8 ; Ex. 5,6, 7,8,9) The murals in downtown Walla Walla depicted in Exhibits 5-9 all violate provisions of the sign code concerning permits and size that the Inland Octopus murals have been found to offend. While Bob Catsiff concedes that his murals are "signs" as defined in the sign code, he asserts that the City's nonapplication of its sign code to murals that are legally indistinguishable from his murals proves an absence of governmental interest in restricting on-premises art murals like those at the Inland

Octopus, and elsewhere in downtown Walla Walla. (RP 26) Photos of signs submitted by the city to show that its sign code is enforced (Ex. 17,18), illustrate Bob's point. The City's photos are of mere conventional, commercial signage; no art murals are shown. There is no evidence that the City through enforcement action has ever claimed an interest in regulating art murals.

Within the large set of signs as defined by the sign code, there are subsets of signs that are subject to different degrees of regulation, from prohibition to exemption. Signs that are prohibited by the sign code include, WPMC 20.204.060:

6. Signs, together with their supports, braces, guys and anchors, which are not maintained in a neat, clean and attractive condition, free from rust, corrosion, peeling paint or other surface deterioration;
8. Flashing signs;
12. Exterior signs which advertise alcohol and tobacco products;
16. Billboards and other off-premises signs, except off-premises directional signs

and special district signs;

17. Any other sign not meeting the provisions of this chapter.

Billboards are defined as off-premises signs, and are prohibited everywhere in Walla Walla. WWMC 20.204.020(A)(2),(17); 20.204.170. Yet, billboards, as defined by the sign code, flourish in downtown Walla Walla. (Ex. 10, 11, 13, 14; RP 8,31-32)

Some signs are entirely exempt from sign code regulation. These include the "following signs," WWMC 20.204.050:

4. Official flags of the United States of America, states of the United States, counties, municipalities, official flags of foreign nations, and flags of internationally and nationally recognized organizations.
6. Holiday decorations or other materials temporarily displayed on traditionally accepted civic, patriotic or religious holidays.

Clearly, these exemptions are based on content. The sign code contains no criteria for determining whether an organization is "internationally," or "nationally recognized." The sign code contains no criteria for determining

whether a holiday is "traditionally accepted."

Between the sign code poles of prohibited signs and exempt signs lie two subsets of "sign." Some signs require a permit and are governed by the sign code. WPMC 20.240.030. The other subset contains all signs that are governed by the sign code but for which no permit is required. WPMC 20.204.040. Signs for which no permit is required include barber poles and historical site plaques. WPMC 20.204.040(4), (5).

Under the City's regime, one planning to create a sign that is not prohibited, that is not exempt and that is not of a type for which no permit is required, must apply for a permit. The permit requirements that the City argues should be applied to the plaintiff are categorized in the sign code as Level I Review. WPMC 20.18. In Level I Review the deciding official is the "Director." The Director may approve, disapprove or request more information concerning the application for a sign permit. WPMC 20.18.040. The Director "shall issue a

Development Authorization when he determines that the proposal complies with the provisions of this Code and Comprehensive Plan." WPMC 20.18.050. The Director's discretion is not limited merely to determining whether applications for signs conform to size and height requirements. The Director is allowed to base his or her decision on a determination that the proposed sign complies with the "provisions of this Code and Comprehensive Plan." Thus, a permit could be denied because a proposed sign is insufficiently "creative and innovative," and, therefore, does not comply with WPMC 20.204.010.

The sign code does not contain clearly specified time limits within which the Director must act on a sign permit application. Finally, any applicant who wishes to appeal a denial of a sign permit application bears the burden of proof. WPMC 20.38.060(C).

THE GOVERNMENTAL INTERESTS

The trial court described the governmental interests that it found sufficient to justify the City's restraint of Bob Catsiff's right of free expression in a single sentence.

Of the four (4) part test set forth in Kitsap County v. Mattress

Outlet, 153 Wn. 2d 506 (2005),
the first prong is not an
issue. As to the second prong
of the test, the City of Walla
Walla has demonstrated a com-
pelling interest in its aesthe-
tics and traffic safety. See
Walker Declaration and pages
17-21 of City's Response Brief.
(CP 932)

The only finding of fact specifically addressing
a governmental interest to support restraint of
First Amendment rights is Finding of Fact 2.8
(CP 938):

The City of Walla Walla has
significant, substantial and
compelling aesthetic and
traffic safety interests which
justify its wall sign size and
height restrictions and per-
mitting requirements.

The record below exposes the grounds for these
findings.

The City's actual governmental interest
asserted as the grounds for restraining Bob
Catsiff appears to be economic vitality. Forty
years ago there was trouble:

In the 1970s and early 1980s,
downtown Walla Walla was in a
state of decline. Three of four
department stores left downtown
and two malls opened on the out-
skirts of the City. The vacancy

rate in the business district was almost 30% in the early 1980s. (CP 614)

The remedy to revitalize the downtown, according to the City, was the "Main Street Approach:"

The Main Street Approach is a comprehensive, incremental approach to revitalization that builds upon a community's unique heritage and attributes. The traditional assets of a downtown area, unique architecture and locally owned businesses, are used as a catalyst for economic growth and community pride. This approach focuses on four key elements: design, economic restructuring, promotion and putting a sustainable Main Street revitalization organization in place. (CP 614)

According to the City, this approach has been a success. (CP 858) Indeed, it "has attracted new businesses to locate downtown, including the Inland Octopus toy store." (CP 859)

The City's governmental interests in aesthetics and traffic safety appear to be inferred from its economic revitalization plan of more than twenty years ago. (CP 856) Signs were a component of its recommended plan. On

reading the "Walla Walla Main Street Building Improvement Guide," one finds:

With a sign, you call attention to your business and create an individual image. (CP 578)

Thus, the City's guide suggests that in creating a sign, the owner should "let the personality" of his or her "store or office shine through." (CP 578) More powerfully than the City's guide, is the City sign code's purpose which expressly is:

. . . to accommodate and promote:
. . . creative and innovative sign design. WWMC 20.204.010

Thus, individual businesses are encouraged and authorized, through signs, to "let the personality". . . "shine through," by means of "creative and innovative sign design."

The record below supports the City's claim that downtown business vitality is desired. Whether that economic good is a substantial or compelling governmental interest in First Amendment analysis is another question. Whether the City's support of that economic good proves a proper governmental interest in aesthetics and traffic safety is yet another question. More important is whether the City's interest in promoting individual

businesses in its own downtown justifies restraint of individual business owner Bob Catsiff's right of free expression.

Disposition Below

The trial court decided the case based on the administrative record before the City Hearing Examiner, together with certain declarations, deposition transcripts and exhibits. No live testimony was heard.

The trial court's letter opinion of April 28, 2011, resolved all issues against Robert Catsiff. (CP 929). A copy of that letter opinion is found in the appendix. Essentially, the trial court ruled that Mr. Catsiff failed to prove that the challenged ordinances were unconstitutional beyond a reasonable doubt. (CP 931) The trial court relied on the reasoning in Collier v. Tacoma, 121 Wn. 2d 737, 854 P. 2d 1046 (1993), and Get Outdoors II, LLC v. City of San Diego, 506 F. 3d 886 (9th Cir. 2007) in concluding "that Plaintiff's artistic expression argument is not relevant here." (CP 931)

The trial court found that the plaintiff's murals were commercial speech. (CP 931) The trial court concluded that the City justified its regulation of the Inland Octopus murals by demonstrating "a compelling interest in its [City's] aesthetics and traffic safety." (CP 932)

On the basis of the trial court's letter opinion, findings of fact, conclusions of law and a judgment were entered in favor of the respondents on all points. (CP 936-944)

ARGUMENT

I. WHERE, AS HERE, THE CITY IS ENFORCING A RESTRICTION ON SPEECH, IT BEARS THE BURDEN OF PROVING THE CONSTITUTIONALITY OF ITS CONDUCT.

The burden of proof is on the city with respect to all of the appellant's theories. Any regulation of First Amendment freedoms is presumed unconstitutional. State v. Conifer Enterprises, Inc., 82 Wn. 2d 94,99, 508 P. 2d 149 (1973). This presumption does not vanish or change as a result of how the legislative enactment violates the First Amendment.

The presumption of unconstitutionality was recognized and applied in Adams v. Hinkle, 51 Wn. 2d 763,768,775,780,783, 322 P. 2d 844 (1958). In Adams a statute purporting to regulate free expression as found in comic books was held to be constitutionally deficient. The challenged statute was successfully attacked as a prior restraint, as overbroad and as void for vagueness. With respect to all of these lines of attack, the government was held to have a "heavy burden" to show its regulation of free expression

constitutional. Adams, 51 Wn. 2d at 769.

The general rule imposing the burden of proof on the party challenging the constitutionality of a legislative enactment does not apply in this case. This general rule concerning the burden of proof is mentioned by Justice Ireland in Kitsap County v. Mattress Outlet, 153 Wn. 2d at 509, but, in actuality, the burden was placed on the government. Thus, "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." Kitsap County, 153 Wn. 2d at 512.

II. WHERE, AS HERE, THE MURALS
IN QUESTION NEITHER RELATE SOLELY
TO THE ECONOMIC INTERESTS OF THE
SPEAKER AND HIS AUDIENCE NOR PRO-
POSE NOTHING MORE THAN A COMMERCIAL
TRANSACTION, THEY ARE NOT COMMERCIAL
SPEECH.

Artistic or symbolic expression is protected speech under the First Amendment. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569, 132 L. Ed. 2d 487, 115 S. Ct. 2338 (1995).

Whether an expression is commercial or noncommercial speech will determine the level of scrutiny that a court must give to the challenged ordinance or statute. Thus, noncommercial speech is subject to the strict scrutiny test; to uphold a restriction on noncommercial speech, the government must show that the restriction "is narrowly tailored to serve a compelling state interest." See: Austin v. Michigan Chamber of Commerce, 494 U.S. 652,657, 108 L. Ed 2d 652, 110 S. Ct. 1391 (1990). With respect to commercial speech, the level of scrutiny is intermediate; the government need show only a "substantial" interest to justify the regulation. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557,564, 65 L. Ed 2d 341, 100 S. Ct. 2343 (1980).

As noted by Justice Stevens concurring with Justice Brennan in Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S 557, 579 (1980):

Because "commercial speech" is

afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed. (footnote omitted)

This caution is implicit in later cases dealing with the definition of commercial speech. That expressions are advertisements "does not compel the conclusion that they are commercial speech." Bolger v. Youngs Drug Products Corp., 463 U.S. 60,66, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983). "Similarly, the reference to a specific product does not by itself render" an expression commercial speech. Ibid. More important, "economic motivation" does not "turn" a seller's expression into commercial speech. Ibid. at 67.

The trial court accepted the city's contention that the murals are commercial speech. (CP 931,852-854) The trial court concluded that commerce was the only "logical purpose for the sign or the image it depicts." (CP 931) But controlling authority does not permit a determination that an expression is commercial based on purpose; content

controls.

The city cited City of Pasco v. Rhine, 51 Wn. App. 354,359, 753 P. 2d 993 (1988) for the alternative definitions, i.e., "expression related solely to the economic interests of the speaker and its audience," or "speech proposing a commercial transaction." (citing Central Hudson, 447 U.S. at 561, and quotations) (CP 852) Since Rhine, these alternative definitions have been reduced to one.

As stated by Justice Scalia, whether an expression proposes a commercial transaction "is the test for identifying commercial speech." Board of Trustees of State University of New York v. Fox, 492 U.S. 469,473-74, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989) (emphasis supplied). It is beyond dispute that Bob Catsiff's murals propose no commercial transaction. Though not a test for commercial speech, the murals do not relate solely to the economic interests of anyone. Therefore, they are not commercial speech.

III. THE ORDINANCES IN QUESTION FAIL
ALL TESTS OF CONSTITUTIONALITY
UNDER THE FIRST AMENDMENT.

A. The Murals are Fully Protected
Noncommercial Speech.

As noted above, the city asserted and the trial court found that Bob Catsiff's murals are commercial speech. (CP 937-38) All agree that a city may restrict some types of commercial speech, e.g., billboards, on grounds of aesthetics and traffic safety. Ackerley Communications of the Northwest v. Krochalis, 108 F. 3d 1095 (9th Cir. 1997) The trial court applied billboard law to the Inland Octopus murals, and concluded that the city ordinances requiring a permit and restricting size and height passed constitutional muster under the criteria of Central Hudson, 447 U.S. at 564, followed in Kitsap County v. Mattress Outlet, 153 Wn. 2d 506, 512, 104 P. 3d 1280 (2005). (CP 931-932)

In addition to the erroneous determination that the Inland Octopus murals are

commercial speech, the trial court accepted the city's assertion that the size and height restrictions concerned "only the noncommunicative aspects of wall signs." (CP 931) This determination is also erroneous because the very nature of the mural in question necessitated full coverage of the front facade. The size and height of a mural are, in themselves, communicative. According to the artist Aaron Randall:

To achieve the integrity required by this form of artistic expression, it was necessary that the entire surface of the facade at 7 East Main Street be used. A limitation to 150 square feet or less would have undermined and compromised my ability as an artist to achieve the desired type of expression. (CP 801:21--802:1)

As observed by Justice Souter, "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message'. . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." Hurley, 515 U.S.

at 569. Just as the noncommercial artistic expressions of Jackson Pollock are speech that is completely shielded by the First Amendment, so are the murals of Bob Catsiff and Aaron Randall.

B. The City has Failed to Fulfill Certain Constitutional Criteria that Limit its Power to Regulate the Inland Octopus Murals as Commercial Speech.

Assuming that the Inland Octopus murals are commercial speech, the city ordinances in question fail the test of constitutionality. As recognized in Kitsap County, 153 Wn. 2d at 512, "[a] four-part test determines whether commercial speech restrictions are permissible." That test was established as authoritative in Central Hudson, 447 U.S. at 557, and requires affirmative answers to four questions lest an ordinance be held to infringe the First Amendment right of free expression:

- (1) Does the speech concern a lawful activity and is not misleading?
- (2) Does the city assert a substantial governmental interest that will be advanced by restricting

the plaintiff's commercial speech?

(3) Does the restriction directly and materially serve the asserted governmental interest?

(4) Is the restriction no more extensive than necessary?

As the appellant's murals are neither concerned with an unlawful activity nor misleading, only questions (2), (3) and (4) need consideration. As noted above, the city, as the proponent of the restrictions on the appellant's right of free speech, must carry the burden of justifying them.

Cases since Central Hudson have refined the inquiry that must be conducted concerning the nature and proof of the governmental interest that must be shown before commercial speech may be restrained.

A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Edenfield v. Fane, 507 U.S. 761, 770-771, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993).

Where, as here, the city "can deny a permit without offering any evidence to support the conclusion that a particular structure or sign is detrimental to the community," . . . "the

permit requirement is unconstitutional." Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F. 3d 814,819 (9th Cir. 1996).

The city's contention that its height and size requirements advance a substantial governmental interest when applied to the larger Inland Octopus mural is contrary to fact and law. There is no evidence that the mural on front of Bob Catsiff's toy shop threatens any interest of the city. Nothing in First Amendment jurisprudence allows expression to be prohibited simply because it is presented in a space that exceeds 150 square feet, or reaches a height greater than 30 feet above grade.

The city has shown that its downtown was commercially declining in the 1970s and 1980s, that it recovered in the 1990s and was thriving in the 2000s. (CP 856-859) This account might be historically accurate, but has no probative value in this case. Neither law nor fact shows that the city has a substantial

governmental interest in promoting commercial retail success in its downtown district. Assuming, arguendo, that the city of Walla Walla has proven that it properly has that interest, it is of no consequence here.

There is no evidence that the city's downtown decline was caused by murals like that found on the front of the Inland Octopus. Indeed, there is no evidence that the decline was caused by any sign that exceeded the size and height limitations that the city has imposed on Bob Catsiff. More important, there is no evidence that the downtown revitalization of the 1990s resulted from the absence of murals like that found on the front of the Inland Octopus. Assuming that downtown commercial development may serve as a proxy for a governmental interest in traffic safety and aesthetics, there is no evidence showing that the Inland Octopus murals, inarguably on-premises "signs," jeopardize those interests in any fashion.

The seminal case on which the city has relied is, by its own terms, not in point.

As stated by Justice White quoting Justice Jackson in Kovacs v. Cooper, 336 U.S. 77,97 (1949):

Each method of communicating ideas is "a law unto itself" and that law must reflect the "differing natures, values, abuses and danger" of each method. We deal here with the law of billboards. Metro-media, Inc. v. San Diego, 453 U.S. 490,501 (1981).

Indisputably, the Inland Octopus murals are not billboards. They are not off-premises signs. They are not on public property. They plainly and clearly fall outside the category of expression that is addressed by Metromedia and its progeny.

The city failed to prove a substantial governmental interest that is furthered by its regulation of the Inland Octopus murals. Given the lack of any evidence that actually shows a substantial governmental interest, the city asserts that its interest is entitled to be recognized as a matter of law. A substantial governmental interest in traffic safety and aesthetics may be recognized as a matter of law, but only with respect to certain types of signs.

These types are usually billboards or have the same effect as billboards. They are all off-premises signs.

The city's misplaced reliance on billboard law for its assertion that the city need not prove "its governmental interests in an evidentiary sense to justify sign size and height restrictions," (CP 851) is shown by its citation of Ackerley Communications of the Northwest, Inc. v. Krochalis, 108 F. 3d 1095 (9th Cir. 1997). Krochalis upheld Seattle's billboard ordinance. The court cited Metro-media, supra, for the principle that it is:

". . . a matter of law that an ordinance that limits billboards designed to be viewed from the streets and highways reasonably relates to traffic safety." Krochalis, 108 F. 3d at 1098 quoting Metromedia, 453 U.S. at 508.

Crucially, a governmental interest in traffic safety and aesthetics may be recognized as a matter of law only with respect to off-premises signs or billboards.

Assuming only for purposes of this argument that the city has proven a substantial governmental interest, it cannot show that the restrictions

it wishes to enforce against Bob Catsiff's sign directly and materially serve that interest. Likewise, the city cannot show that the ordinances restricting Robert Catsiff's right of free expression are not more extensive than necessary.

Where, as here, the city sign code exempts from its permit requirement signs that are legally indistinguishable from Bob Catsiff's murals, the city ordinances fail the third element of the Central Hudson test. As articulated by Judge O'Scannlain in Metro Lights v. City of Los Angeles, 551 F. 3d 898, 904-05, 906 (9th Cir. 2009) the doctrine of unconstitutional underinclusivity applies here and shows that the city's restrictions do not directly and materially advance any conceivable governmental interest. Given any conceivable interest asserted by the city, it cannot satisfy the third element of the Central Hudson test by not requiring permits for barber poles, historical site plaques, certain political signs and certain real estate signs. Yet, no permit is required for any of these signs. WPMC 20.204.040(A)(4),(5),(7),(10). The city only

reinforces its failure to meet the third element of the Central Hudson test by exempting certain signs altogether. WPMC 20.204.050(A)(4) and (6).

Where, as here, the city sign code exempts from regulation certain signs based on content, the city ordinances fail the fourth element of the Central Hudson test. Judge Tallman's analysis in Ballen v. City of Redmond, 466 F. 3d 736,743 (9th Cir. 2006) should guide the Court here:

Here, the governmental interests served by the Ordinance include promoting vehicular and pedestrian safety and preserving community aesthetics. The exceptions to the City's portable sign Ordinance are all content based. Different signs are treated differently under the Ordinance based entirely on a sign's content. The City has failed to show how the exempted signs reduce vehicular and pedestrian safety or besmirch community aesthetics any less than the prohibited signs.

The city's exemption of some flags, but not all flags, found in WPMC 20.204.050(A)(4) is a glaring example of underinclusivity, but, more important for this analysis, an exemption based on content. Here, certain flags are exempt from any regulation. Certain other flags are,

presumably, subject to complete regulation. Thus, a sign consisting of the official flag of North Korea could be displayed without permit and without compliance with size and height restrictions. A flag not exempted by the aforementioned ordinance, e.g., a local youth club flag, would be fully regulated. Clearly, the exemption is based on content and fails the fourth element of the Central Hudson test.

Where, as here, the sign code restricts expression based on content, the city must prove a compelling governmental interest to justify the restriction. Dimmitt v. City of Clearwater, 985 F. 2d 1565,1570 (11th Cir. 1993). There is no doubt that the sign code's restrictions are content-based. For example, some signs may not be established without a permit. WPMC 20.204.040. This distinction between signs that require permits and signs that do not is content-based. Thus, no permit is required for barber poles, historical site plaques, certain political signs and certain real estate signs. Moreover, some signs are exempt from any regulation by the sign code. These exempt signs

include certain, but not all flags. WWMC 20.204.050(A)(4). As these "exceptions to the restriction on noncommercial speech are based on content, the restriction itself is based on content." National Advertising Co. v. City of Orange, 861 F. 2d 246,249 (9th Cir. 1988) citing Metromedia, Inc. v. San Diego, 453 U.S. 490, 520. Content-based regulation of speech of this type cannot be justified by a governmental interest in aesthetics or traffic safety. Dimmitt, 985 F. 2d at 1570. Finally, assuming the Inland Octopus murals were mere commercial speech and properly restricted by the sign code, Bob Catsiff may, nonetheless, challenge the code's constitutional deficiencies. Dimmitt, 985 F. 2d at 1571.

C. Notwithstanding its Contentions Concerning Government Interests, the City's own Conduct Supports Bob Catsiff.

When Bob Catsiff leased the premises at 7 East Main Street, he was struck by "the glaring white facade." (Ex. 15, 52:6; Ex. 3) He remedied this defect with a mural. His mural was created to complement the downtown

scene:

The purpose of each mural was to contribute a whimsical depiction to the delightful mix of murals, sculpture and other art works that are found in downtown Walla Walla. (CP 804:13-15)

The Inland Octopus murals were to the purpose of the sign code which explicitly identifies "creative and innovative sign design" as goals. WPMC 20.204.010.

The first Inland Octopus mural was painted on the rear of the toy shop in April 2010. (CP 804:12) No permit was obtained for that "sign." No complaint was heard from the city until October 2010, after the larger mural was finished, when the city notified Bob Catsiff of sign code violations by both murals. (CP 730)

Downtown Walla Walla is a congenial home to mural art. As shown in Exhibits five through nine, murals adorn the walls of at least four other buildings in the Inland Octopus neighborhood. Each of these murals violates some or all of the very size and height regulations that the city has prosecuted Bob Catsiff for violating. The mural on the Rose Street building (Ex. 5)

exceeds 150 square feet in area, and covers more than 25% of the wall surface. (RP 26)

The mural on the Colville Street building (Ex. 6) violates the same two sign code provisions as the mural on Rose Street. (RP 26)

The murals on two buildings on Main Street (Ex. 7), as well as the Skylite Gallery mural (Ex. 8) violate the same two code provisions as the Rose Street and Colville Street murals; also, they violate the sign code's height limit. (RP 26)

There is no evidence that any of these murals was ever subjected to the city's sign permit requirement. There is no evidence that any of these murals, all of which continue to violate some or all of the same sign code provisions for which Bob Catsiff has been prosecuted, was ever subjected to enforcement action. The city has not contended to the contrary. (RP 26)

The city's own conduct with respect to mural art and billboards belies its asserted governmental interests. As shown by the foregoing discussion of other murals, the city would appear to have no interest in regulating

mural art. That certain owners of traditional commercial signs, not mural art, applied for sign permits (Ex. 17-20) proves nothing material to this case. With respect to "signs" like the Inland Octopus murals (Ex. 5-9), there is no evidence that permits were ever required, and no evidence that enforcement action was ever taken. This absence of concern about mural art is consistent with the sign code's purpose, and is an admission by conduct that militates against the city's professed interest. State v. Lew, 26 Wn. 2d 394,402, 174 P. 2d 291 (1946).

A logical coda to the city's conduct concerning mural art, is its conduct concerning billboards. The legal authority on which the city has relied is billboard law. As the Inland Octopus murals are on-premises signs, they cannot be "billboards" in common parlance, or by sign code definition. WPMC 20.204.020(A)(2), (17). Billboard law should not determine the legal fate of on-premises murals. Moreover, the city's conduct concerning billboards exposes an absence of interest in enforcing its sign code against clear violators. Billboards are absolutely

prohibited throughout Walla Walla. WWC
20.204.170. Yet, billboards flourish there.
(Ex. 11,14)

IV. WHERE, AS HERE, THE CITY REQUIRES
A PERMIT BEFORE A MURAL MAY BE
PAINTED AND DOES NOT LIMIT THE
DISCRETION OF THE CITY OFFICIAL
VESTED WITH THE AUTHORITY TO DECIDE
WHETHER TO GRANT THE PERMIT, THE
CITY HAS IMPOSED AN INVIDIOUS
PRIOR RESTRAINT ON THE FIRST AMEND-
MENT RIGHT OF FREE EXPRESSION.

The parties agree that the permit require-
ments the city argues should be applied to the
Bob Catsiff are categorized as Level I Review.
Level I Review is found in WWC 20.18. Crucial
features of Level I Review demonstrate that the
city's permit requirement is an invidious prior
restraint of Bob Catsiff's First Amendment
right of free expression.

In Level I Review the deciding official is
the "Director." The Director may approve, dis-
approve or request more information concerning
an application. WWC 20.18.040. The Director

"shall issue a Development Authorization when he determines that the proposal complies with the provisions of the Code and Comprehensive Plan." WWMC 20.18.050. The Director is not limited merely to determining whether applications for signs conform to size and height requirements. He is allowed to base his decision on a determination that the proposal complies with the "provisions of this Code and Comprehensive Plan." The Director's discretion is completely unrestricted.

Not only is the Director's discretion in deciding whether to issue a sign permit completely unrestricted, it is without any time limit. There is no period in the city sign code within which the Director must grant or deny a sign permit application. Other sections of the municipal code (WWMC 20.14,20.18) do not set forth clear time limits for action on sign permit applications. Additionally, any applicant who wishes to appeal a denial of a permit application bears the burden of proof. WWMC 20.38.060(C).

Where, as here, the permit scheme of the city involves content-based determinations, the

permitting authority is subject to severe restrictions. Freedman v. Maryland, 380 U.S. 51,58, 13 L. Ed 2d 649, 85 S. Ct. 734 (1965). These procedural strictures are designed to overcome the fundamental problem with the city's scheme, unbridled discretion. No regulation of First Amendment rights may be subject to the unbridled discretion of the deciding official. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750,759, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1998). Moreover, failure to impose time limits within which the permitting authority must act, in itself, is a form of unbridled discretion. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). With respect to the instant case, this Court should follow the holding and rationale in Mahaney v. City of Englewood, 226 P. 3d 1214,1220 (Col. App. 2010), as to time limits.

V. IN THE ALTERNATIVE TO THE FIRST AMENDMENT ANALYSIS CONCERNING PRIOR RESTRAINTS, THE CITY SIGN CODE CONTRAVENES MORE STRINGENT SPEECH GUARANTEES OF THE WASHINGTON CONSTITUTION.

In accordance with Justice Guy's instruction in Collier v. Tacoma, 121 Wn. 2d 737, 747-48, n. 5, 854 P. 2d 1046 (1993), the applicability of a Washington Constitution provision must be introduced by a discussion of "the factors enunciated in State v. Gunwall, 106 Wn. 2d 54, 720 P. 2d 808, 76 ALR 4th 517 (1986)." Since Collier, those factors have been addressed in a case involving Article 1, §5, Ino, Inc. v. Bellevue, 132 Wn. 2d 103, 116-122, 937 P. 2d 154 (1997). Based on that analysis this Court may review the city sign code provisions found here under Washington Constitutional tests that are more demanding than those of the First Amendment.

Under Article 1, §5 of the Washington Constitution:

Every person may freely speak,
write and publish on all sub-
jects, being responsible for
the abuse of that right.

The city sign code presents a classic prior restraint by requiring Bob Catsiff to obtain a permit before engaging in the production and display of mural art on his own property. There is no abuse of his right shown. The city's prior

restraint fails the demanding test of the Washington Constitution. State v. Coe, 101 Wn. 2d 364,374-375, 679 P. 2d 353 (1984); O'Day v. King County, 109 Wn. 2d 796,804, 749 P. 2d 142 (1988).

As with classic prior restraints, the Washington Constitution provides more protection against overbroad restrictions of speech, at least where those restrictions, as found here, "rise to the level of a prior restraint." Ino Ino, 132 Wn. 2d at 117. Finally, it should be noted that traffic safety and aesthetics are not compelling governmental interests, contrary to State v. Lotze, 92 Wn. 2d 52,29, 593 P. 2d 811, appeal dismissed, 444 U.S. 921 (1970). Collier, 121 Wn. 2d at 756.

VI. THE CITY SIGN CODE IS UNCONSTITUTIONALLY OVERBROAD.

In addition to failing specific tests applicable to noncommercial speech, commercial speech and permitting decisions by city officials, the city sign code is constitutionally infirm for overbreadth. Curtis v. Seattle, 97 Wn. 2d 59,63, 639 P. 2d 1370 (1982). A challenge

may be brought by a party whose own conduct could be subject to restriction. Dimmitt v. City of Clearwater, 985 F. 2d 1565,1571 (11th Cir. 1993). The city sign code is not limited to commercial speech. As quoted above, the definition of "sign" includes political expression. Thus, the city sign code purports to regulate noncommercial speech, as well as commercial speech.

VII. THE CITY SIGN CODE IS VOID FOR VAGUENESS.

To determine whether a legislative enactment, like the city ordinances found in this case, is unconstitutionally vague, only two questions need be asked. First, does the ordinance give sufficient notice of what it purports to regulate or prohibit? Second, does the ordinance provide a "clear and objective guide to law enforcement?" City of Bellevue v. Lorang, 140 Wn. 2d 19, 30, 992 P. 2d 496 (2000). The city sign code defines a sign as:

Any device, structure, fixture (including the supporting structure) or any other surface that identifies, advertises and/or promotes an activity, product, service, place, business, political

or social point of view, or
any other thing. WPMC
20.204.020(A)(27); WPMC
20.06.030.

Obviously, there is no standard for determining what is a "sign," and what is not. This vague quality of the city sign code definition unconstitutionally precludes a citizen from knowledgeable compliance. Just as certainly, it precludes a city official from intelligent enforcement. This Court should follow the rationale of Justice Chambers in his concurring opinion and hold the city sign code void for vagueness. Kitsap County, 153 Wn. 2d at 517-518.

VIII. THE APPELLANT SHOULD BE AWARDED
HIS ATTORNEY FEES AND EXPENSES.

Among the grounds for Bob Catsiff's suit against the city is a federal civil rights statute, 42 USC 1983. To prevail in a suit under that statute, a plaintiff must show that the defendant acted under color of state law, and the defendant caused the plaintiff to be deprived of a right secured by the United States Constitution or the Laws of the United States. Nurre v. Whitehead, 580 F. 3d 1087,1092 (9th Cir. 2009).

Where a plaintiff prevails in a suit grounded

in 42 USC 1983, he is entitled to an award of attorney fees pursuant to 42 USC 1988. Hensley v. Eckerhart, 461 U.S. 424,429, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983); Blanchard v. Bergeron, 489 U.S. 87,89 n. 1, 103 L. Ed. 2d 67, 109 S. Ct. 939 (1989); Ballen v. City of Redmond, 466 F. 3d 736,745-746 (9th Cir. 2006). On the basis of the foregoing authority, Bob Catsiff should be awarded his attorney fees, as well statutory costs and related expenses of this litigation.

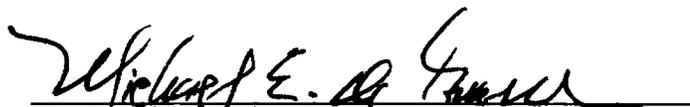
CONCLUSION

On the basis of the foregoing argument, the trial court should be reversed.

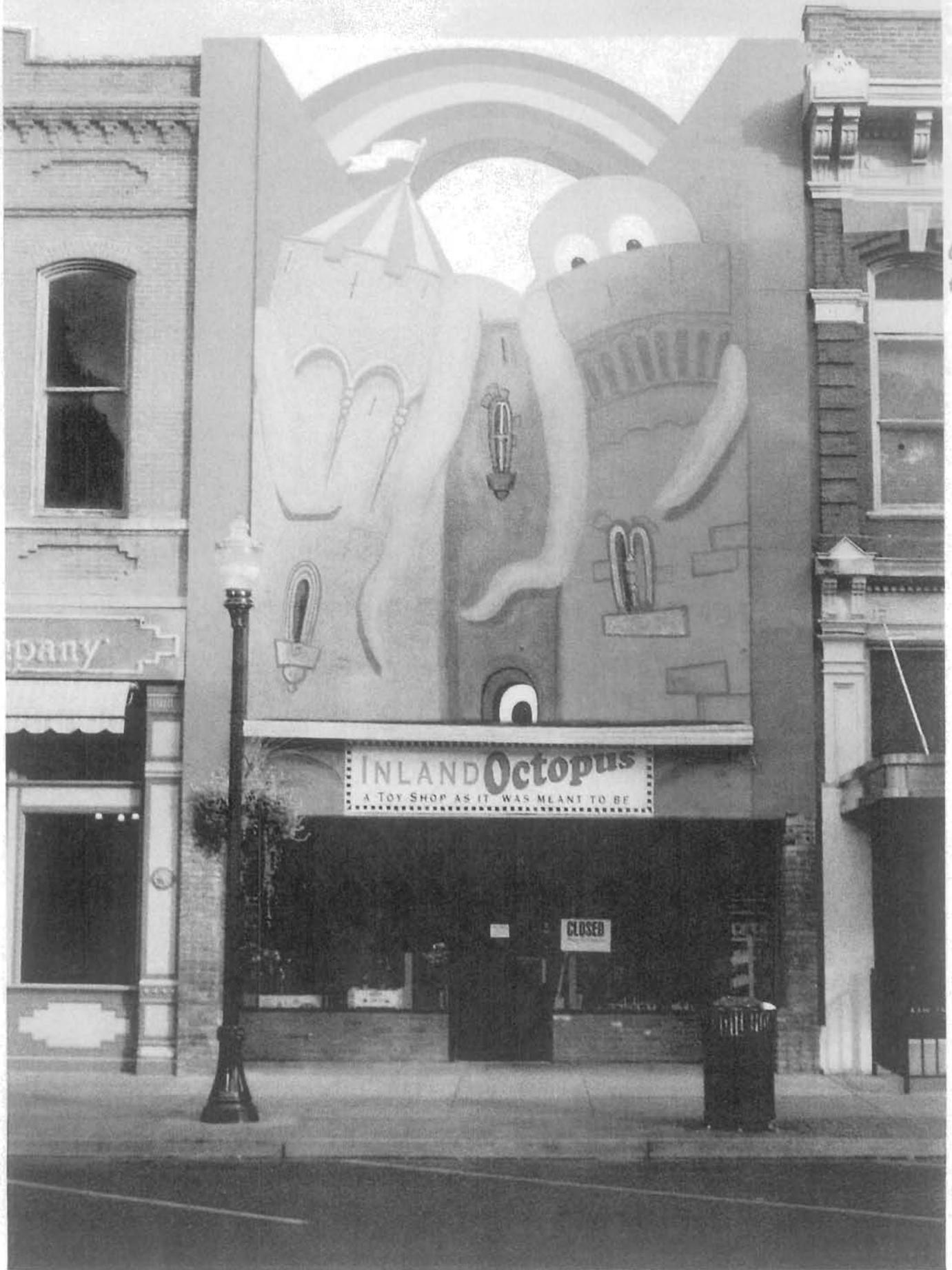
Judgment should be granted in favor of the appellant with an award of attorney fees, costs and expenses of this litigation. Specifically, certain provisions of the sign code of the City of Walla Walla prohibiting or regulating mural art on grounds of size and height should be invalidated as unconstitutional infringements of the appellant's right of free expression. Additionally, the permit requirements of the sign code of the City of Walla Walla should be held to be constitutionally deficient.

Dated this 12TH day of August, 2011.

Respectfully submitted,


Michael E. de Grasse WSBA #5593
Counsel for Appellant

Photograph of Mural on front of Inland Octopus



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SEP.
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Letter Opinion of Trial Court

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF WALLA WALLA

P.O. Box 836

WALLA WALLA, WASHINGTON 99362

April 28, 2011

CHAMBERS OF
JUDGE DONALD W. SCHACHT
DEPARTMENT No. II

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WALLA COUNTY
WASHINGTON

Martin

Mr. Michael deGrasse
Attorney at Law
P.O. Box 494
Walla Walla, WA 99362

Mr. Tim Donaldson
Attorney at Law
15 North 3rd
Walla Walla, WA 99362

Re: Catsiff v. Tim McCarty and City of Walla Walla Walla County
Walla Walla County Cause Number 10-2-01046-8

Dear Counsel:

40
The Plaintiff filed an amended complaint herein seeking judicial review of the City Hearing Examiner's decision upholding the civil violation concerning Plaintiff's purple octopus sign over the entry way to Plaintiff's toy shop on Main Street. Plaintiff's amended complaint also seeks a permanent injunction barring enforcement of the Hearing Examiner's order. In addition, Plaintiff seeks a judgment finding the ordinances involved here to be unconstitutionally void. Finally, Plaintiff seeks an award of costs and attorney fees, pursuant to 42 USC 1988.

The Court has reviewed the files and memorandums herein and listened to the arguments of counsel. The city ordinances at issues here are commonly and collectively known as the "sign code." The Plaintiff acknowledges there are few, if any, disputed facts.

There is a hand painted, multi-color mural on the overhead wall space above the Main Street entrance to the Plaintiff's Inland Octopus toy shop. The mural was painted on the wall during the 2010 Labor Day weekend. The mural exceeds 150 square feet in size, covers more than 25% of the wall upon which it is painted and the top of the mural is higher than 30 feet above grade.

The Plaintiff concedes he created both the front mural and a similar but smaller sized rear mural (over the back shop door) without first obtaining a sign permit as required by city ordinance. Likewise, the Plaintiff concedes the front mural is a "sign," as defined by the

0-00000929

city code. Plaintiff also concedes the mural does not comply with city ordinances limiting the size and height of wall signs. Plaintiff apparently also does not contest that his toy shop is in Walla Walla's central commercial zoning district.

The history of the issuance of the notice of civil violation and the hearing examiner process is well set forth in the file and memorandums and will not be set forth in detail here. Prior to the November 18, 2010, hearing before the Walla Walla Hearing Examiner, this Court denied Plaintiff's motion for a temporary injunction.

Both parties apparently agree that all issues before the Court can be resolved by addressing those issues in the context of the larger, front door mural.

At the hearing on April 19, 2011, Plaintiff requested the opportunity to present three live witnesses, to provide testimony to supplement the record. Generally, a hearing of this type is not a trial de novo. The Court denied this request. After Plaintiff's offer of proof in support of his motion, the Court reaffirmed its conclusion that the proffered testimony was substantially covered by the prehearing declarations of each of the witnesses, already filed here and made part of the record. However, the Court did allow each party to supplement the administrative record with additional exhibits, which in part were complimentary to the proposed testimony. Supplementing the record is discretionary with the Court.

Finally, the Court has reviewed and considered the complete administrative record which the City duly filed here. The Court overrules Plaintiff's objection to all or portions of that record from being considered by the Court based on hearsay and relevancy objections. Said objection is not only without legal basis, it is untimely, procedurally inconsistent with these proceedings, and flies in the face of Plaintiff's earlier stipulation in regards to Plaintiff's appeal of the Hearing Examiner's decision.

The primary issue before the Court is whether the Walla Walla Hearing Examiner's decision upholding the notice of civil violation issued to Plaintiff should be affirmed. Plaintiff has challenged that decision by appeal to this Court and additionally by filing a civil complaint seeking a permanent injunction barring enforcement of the civil violation penalty, a judgment by this Court declaring the various city ordinances at issue herein unconstitutional, and an award of attorney fees and costs pursuant to 42 USC 1988.

The Court answers these claims and challenges as follows. The Walla Walla Hearing Examiner's decision affirming the civil violations is affirmed. The city ordinances (sign code) are (is) not an unconstitutional infringement on Plaintiff's first amendment freedom of expression. There is no legal basis to grant a permanent injunction. Since the Plaintiff

did not prevail on its challenge, claims and appeal, Plaintiff is not entitled to an award of costs and attorney fees.

Factually, the issue in this case is simple and uncontested. Plaintiff has a sign on the front facade of his toy store that covers the entire wall (more than 25% of the wall), is over 30 feet high and exceeds 150 square feet in size. The size and height figures exceed the requirements of the Walla Walla Municipal Code (sign code).

The Court accepts the City's explanation of respective burdens of the parties at page 7 of the City's Response Brief. "On issues of law involving a constitutional challenge, the City bears the burden of justifying a restriction on speech. ... At the same time, however, '[a] duly enacted ordinance is presumed constitutional and the party challenging it must demonstrate that the ordinance is unconstitutional beyond a reasonable doubt.'" The City here has demonstrated that the disputed ordinances were duly enacted. The Plaintiff has failed in its burden of showing unconstitutionality beyond a reasonable doubt. To the extent that size and height restrictions are a restriction on freedom of speech or expression, the City has met its burden of justifying the restriction.

The general concept that a municipal government may regulate the physical characteristics of signs (such as size, area and height) through restrictions or limitations is well accepted and established. The Court finds these ordinances do not bar or even restrict expression.

The Court agrees with the reasoning in both *Collier v. Tacoma*, 121 Wn.2d 732 (1993) and *Get Ourdoors II, LLC v. City of San Diego*, 506 F.3rd 886 (2007), that Plaintiff's artistic expression argument is not relevant here. This sign, mural, painting or however it is described is a picture of a rainbow and a purple octopus. There is no message or writing on the sign. The Court accepts the City's assertion that "Walla Walla's size and height restrictions regulate only the noncommunicative aspects of wall signs." In this Court's opinion that is the very issue in this case.

Likewise, the Court rejects Plaintiff's argument that the height and size requirements are content based restrictions. *Neighborhood Enterprises v. City of St. Louis*, 718 F.Supp 2d 1025 (2010), is controlling. The Court accepts the City's argument regarding the purpose section of the sign code and its traffic safety concern. Contrary to Plaintiff's claim, the octopus sign is visible to motorists and pedestrians. The City is not required to prove "its governmental interests in an evidentiary sense to justify sign size and height restrictions."

Next, the Court concludes that Plaintiff's sign(s) is commercial speech. There is no other logical purpose for the sign or the image it depicts. See City's Response Brief, pages 14-16.

While the Court does not find that “the City must offer detailed proof to justify the non-communicative aspects of sign size and height in its central commercial zoning district,” the Court agrees with the City’s analysis that the commercial speech standard applies.

Of the four (4) part test set forth in *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506 (2005), the first prong is not an issue. As to the second prong of the test, the City of Walla Walla has demonstrated a compelling interest in its aesthetics and traffic safety. See Walker Declaration and pages 17-21 of City’s Response Brief.

Plaintiff argues, with supportive supplemental exhibits (pictures of other city-wide signs and painted images), that the City’s claimed compelling interest is called in to question by all of these other non-complying signs. The City documents its continuing efforts to improve and enforce its sign code. While not every alleged or perceived violation has been addressed, Plaintiff has not undermined the City’s interest in regulating these signs.

The third (3rd) prong of the test is satisfied because the City’s size and height requirements are not speculative. They are direct and specific and support the City’s interest in downtown visual quality. The Court rejects Plaintiff’s underinclusivity argument.

The fourth (4th) prong of the test is controlled by *Mattress Outlet*, 153 Wn.3d at 515. In this case, the size and area restrictions do not ban speech or expression. Nor are they substantially broader than is necessary. They do not infringe on other means of communication. The Court finds the City has met all four prongs of the test for commercial speech restrictions.

Plaintiff challenges the sign code alleging the size and height requirements are overbroad. It does appear Plaintiff’s arguments of underinclusivity and overbreadth are inconsistent. In any event, the Court finds the sign code is not overbroad. When the only requirements are size and height, the Court fails to see a compromise of First Amendment protections.

As stated in the City’s response, wall sign size and height requirements can be applied to noncommercial speech. See *Collier* and *Get Outdoors II* cases. See also City’s Response Brief, pages 28-30.

Next, Plaintiff raises a vagueness argument. The Court rejects this claim. These restrictions are applicable to wall signs and in this Court’s opinion, very clear and specific on their face. The definition of “sign” is plain. The Court agrees with the City’s statement in its City Response Brief, page 31, “The City sign code contains specificity in five different respects which notify citizens what is subject to wall sign size restrictions: (1) it must be a ‘device, structure, fixture (including the supporting structure) or any other surface [;]’ (2) it must be ‘attached to or painted directly on the wall, or erected against

Mr. Michael deGrasse
Mr. Tim Donaldson

- 5 -

April 28, 2011

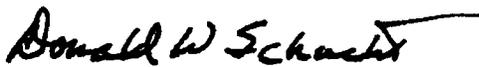
and parallel to the wall of a building, not extending more than twelve (12) inches from the wall [;] (3) it must be something that 'identifies, advertises and/or promotes[;]' (4) the identification, advertisement and/or promotion must be about 'an activity, product, service, place, business, political or social point of view, or any other thing [;]' and (5) it must be 'visible to motorists or pedestrians.'" The City's sign code is not vague. It is specific enough that a person of ordinary intelligence and understanding could comply with it. Plaintiff has failed to prove vagueness beyond a reasonable doubt.

The Court additionally accepts the City's argument that invalidation of the entire sign code is not appropriate, even if there is an ambiguity.

Finally, Plaintiff argues the City's permitting system constitutes unlawful prior restraint. Plaintiff has the burden here. As set forth in *World Wide Video v. Spokane*, 125 Wn.App. 289, 204 (2005), "[A] regulation does not qualify as a prior restraint if it merely restricts the time, place and manner of expression." The City's permitting process and Level 1 review does not constitute prior restraint. Plaintiff has not shown otherwise. Plaintiff's argument concerning time limits does not invalidate the permitting scheme, nor result in unbridled discretion. In any event, the height and size restrictions would still be applicable.

The Court affirms the Walla Walla Hearing Examiner's decision and order, denies Plaintiff's request for a permanent injunction, denies and dismisses Plaintiff's claim for overbreadth, vagueness and prior restraint, denies and dismisses Plaintiff's claims alleging the unconstitutionality of the sign code ordinances, and denies Plaintiff's request for an award of attorney fees and costs.

Very truly yours,


DONALD W. SCHACHT

DWS/tmd

0-000000933

Findings of Fact and Conclusions of Law

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WALLA COUNTY
WASHINGTON

SUPERIOR COURT OF WASHINGTON
FOR WALLA WALLA COUNTY

ORIGINAL

Robert Catsiff,

Plaintiff,

v.

Tim McCarty and City of Walla Walla,

Defendants.

No. 10-2-01046-8

FINDINGS & CONCLUSIONS

I. HEARING

1.1 Date. April 19, 2011.

1.2 Appearances. Plaintiff appeared personally and through his attorney Michael E. de Grasse. Defendants appeared through their attorney, Tim Donaldson.

1.3 Materials considered. The CITY CLERK DECLARATION, WALKER DECLARATION, and BUMP DECLARATION filed herein on November 9, 2010; the AMENDED COMPLAINT FOR INJUNCTIVE RELIEF, ATTORNEY FEES, DECLARATORY JUDGMENT AND JUDICIAL REVIEW (APPEAL OF HEARING

FINDINGS & CONCLUSIONS
No. 10-2-01046-8:

Tim Donaldson
Walla Walla City Attorney
15 N. Third Ave.
Walla Walla, WA 99362
(509) 522-2843

45

EXAMINER'S DECISION filed herein on December 2, 2010; the STIPULATION RE: APPEAL OF HEARING EXAMINER'S DECISION filed herein on December 6, 2010; the DECLARATION OF MICHAEL M. MAY filed herein on December 17, 2010; the ADMINISTRATIVE RECORD DECLARATION filed herein on December 22, 2010; the DECLARATION OF AARON RANDALL filed herein on January 4, 2011; the DECLARATION OF PLAINTIFF filed herein on January 10, 2011; the ANSWER & AFFIRMATIVE DEFENSES filed herein on February 3, 2011; the SUPPLEMENTAL CITY CLERK DECLARATION, the MABLEY RESPONSE DECLARATION, and the MALAND DECLARATION filed herein on April 6, 2011; the SECOND SUPPLEMENTAL CITY CLERK DECLARATION filed herein on April 11, 2011; Exhibits 1-20 and the RECORDS AUTHENTICATION declaration filed at the time of hearing on April 19, 2011; the legal memoranda filed by the parties; and the arguments made by counsel.

1.4 The Court filed a memorandum decision herein on April 28, 2011.

II. FINDINGS

2.1 Substantial evidence supports the Hearing Examiner Decision and Order entered on November 18, 2010 in Walla Walla City Hearing Examiner case number CEC-10-0572.

2.2 The front and back exterior octopus wall signs painted during 2010 at 7 E. Main St. in Walla Walla are used to propose commercial transactions by attracting customers to the Inland Octopus toy store and relate solely to the economic interests of toy store owner

Robert Catsiff and his prospective customers. They concern a lawful commercial activity and are not misleading.

2.3 The City of Walla Walla duly enacted wall sign size and height restrictions which are codified as amended in Walla Walla Municipal Code section 20.204.250 that apply to the front and back exterior octopus wall signs painted during 2010 at 7 E. Main St. in Walla Walla.

2.4 The City of Walla Walla duly enacted wall sign size and height restrictions which are codified as amended in Walla Walla Municipal Code section 20.178.110 that apply to the front and back exterior octopus wall signs painted during 2010 at 7 E. Main St. in Walla Walla.

2.5 The City of Walla Walla duly enacted permitting requirements which are codified as amended in Walla Walla Municipal Code chapters 20.06, 20.14, 20.18, 20.38, 20.178 and 20.204 that apply to the erection of the front and back exterior octopus wall signs painted during 2010 at 7 E. Main St. in Walla Walla.

2.6 The City of Walla Walla does not ban wall signs, differentiate between the subject matter of wall signs based on content, regulate the subject matter or message conveyed in wall signs, or have censorial regulatory motives.

2.7 The City of Walla Walla's size and height restrictions and permitting requirements reasonably regulate only the noncommunicative aspects of wall signs.

2.8 The City of Walla Walla has significant, substantial and compelling aesthetic and

traffic safety interests which justify its wall sign size and height restrictions and permitting requirements.

2.9 The City of Walla Walla's wall sign size and height restrictions and permitting requirements directly and materially serve its aesthetic and traffic safety interests.

2.10 The City of Walla Walla's wall sign size and height restrictions and permitting requirements are narrowly tailored, are neither broader nor more extensive than necessary, and leave open ample alternative channels of communication.

2.11 The City of Walla Walla's wall sign regulations provide fair notice to citizens of common intelligence as to what conduct is thereby proscribed and standards of specificity sufficient to prevent arbitrary law enforcement.

2.12 There is no realistic danger that the City of Walla Walla's wall sign regulations will prevent, make unlawful, chill, or significantly compromise a substantial amount of constitutionally protected speech or the recognized free speech activities of parties not before the Court.

2.13 The City of Walla Walla's permitting requirements incorporate adequate standards to guide the decisions of permit officials which are objective, narrow, and reasonably specific; adequate time limits within which officials must act; and procedural safeguards which provide for effective judicial review.

2.14 The wall sign size and height restrictions codified as amended in Walla Walla Municipal Code sections 20.178.110 and 20.204.250 are grammatically, functionally, and

volitionally severable from permitting requirements and each other.

III. CONCLUSIONS

3.1 The Hearing Examiner Decision and Order entered on November 18, 2010 in Walla Walla City Hearing Examiner case number CEC-10-0572 correctly applied the law.

3.2 The front and back exterior octopus wall signs painted during 2010 at 7 E. Main St. in Walla Walla constitute commercial speech.

3.3 The City of Walla Walla wall sign size and height restrictions are content neutral.

3.4 The City of Walla Walla wall sign size and height restrictions do not impermissibly interfere with or unlawfully infringe upon constitutionally protected speech either facially or as applied.

3.5 The City of Walla Walla sign permitting requirements do not impermissibly interfere with or unlawfully infringe upon constitutionally protected speech either facially or as applied.

3.6 The City of Walla Walla wall sign size and height restrictions are not dependent upon sign permitting requirements for their application, and the size and height restrictions would separately apply to the front and back exterior octopus wall signs painted during 2010 at 7 E. Main St. in Walla Walla even if the permitting requirements did not.

3.7 The City of Walla Walla sign regulations are not unconstitutionally vague.

3.8 The City of Walla Walla sign regulations are not unconstitutionally overbroad.

3.9 The City of Walla Walla sign regulations do not impose an unlawful prior restraint

on speech.

3.10 Defendants, Tim McCarty and the City of Walla Walla, are the prevailing parties in these proceedings.

DATED June 1, 2011

Donald W Schacht
HON. DONALD SCHACHT

Presented by



TIM DONALDSON, WSBA #17128
Walla Walla City Attorney
15 N. Third Ave.
Walla Walla, WA 99362
(509) 522-2843

Sign Code Excerpts (pertinent provisions marked)

Chapter 20.18 LEVEL I REVIEW

Sections:

- 20.18.010 Purpose.
- 20.18.020 When required.
- 20.18.030 Development authorization application – Level I.
- 20.18.040 Review procedures, decision – Level I.
- 20.18.050 Approval.
- 20.18.060 Denial.
- 20.18.070 Appeal.
- 20.18.080 SEPA review.

20.18.010 Purpose.

The purpose of Level I procedure is to handle applications which are listed as outright permitted uses which involve no deviation from ordinance development standards. Level I applications receive administrative staff review only, with development authorization issued by the director or designee. (Ord. 2008-06 § 38, 2008).

20.18.020 When required.

Level I development authorization applications are required for:

- A. Utility extension agreements;
- B. Boundary adjustments (see Walla Walla Municipal Code, Title 19, Subdivision Code);
- C. Uses listed as Level I in Chapter 20.100, Table of Permitted Land Uses;
- D. Home occupations listed as Level I in Chapter 20.123, Table of Permitted Home Occupations;
- E. Certain building, mechanical and plumbing permits;
- F. Right-of-way permits; and
- G. All other proposals determined by the director to be Level I uses. (Ord. 2008-06 § 39, 2008; Ord. 00-06 § 2(part), 2000; Ord. 95-5 § 1(part), 1995).

20.18.030 Development authorization application – Level I.

Level I applications shall be made in writing to the Department on forms supplied by the Department. The application shall contain the information required in Section 20.14.040. A general or detailed site plan as may be required shall accompany the application. The Director or his designee may request any other information necessary to clarify the application or determine compliance with, and provide for the enforcement of this Code.

20.18.040 Review procedures, decision – Level I.

A. Upon acceptance of a completed application for a Level I development authorization, the department shall determine whether the proposal is categorically exempt under

SEPA or subject to threshold determination requirements.

B. Site Plan Review Committee. Proposals requiring site plan review will be sent to the site plan review committee by the director no later than fourteen days after the application has been determined to be complete. The site plan review process shall be as set forth in Chapter 20.46, Site Plan Review Committee.

C. The director may also, but is not required to, solicit comments from other resource persons or public agencies he or she may determine may be affected by a proposal that is categorically exempt under SEPA.

D. SEPA Review. All development authorization applications will be reviewed by the department and if SEPA review is required, such review will be conducted by the responsible official in accordance with the provisions of Chapter 20.14 and Title 21 of this code and Chapter 197-11 WAC. No approval or permit shall be issued on the proposal until SEPA review is complete.

→ E. Director's Decision. After considering the proposal and all relevant materials and timely comments, if any, the director shall take one or more of the following actions:

1. Approve the proposal and issue a development authorization;
2. Establish conditions for approval, or require other changes in the proposed site plan;
3. Request additional or more detailed information including, but not limited to, a written program for development;
4. Determine a higher review level is needed and/or refer the proposal to the city council, planning commission or hearing examiner for review and direction; or
5. Disapprove the proposal. (Ord. 2008-06 § 40, 2008: Ord. 00-06 § 2(part), 2000: Ord. 97-14 § 19, 1997).

→ **20.18.050 Approval.**

The Director shall issue a Development Authorization when he determines that the proposal complies with the provisions of this Code and the Comprehensive Plan.

20.18.060 Denial.

When an application is denied, the Director shall state the specific reasons and shall cite the specific Chapters and Sections of this Code upon which the denial is based.

20.18.070 Appeal.

Any decision by the director to grant or deny issuance of a Level I development authorization use may be appealed to the hearing examiner under the provisions of Chapter 20.38, Closed Record Decisions and Appeals. Requests for additional or more detailed information and determinations that a higher review level is needed are not appealable. (Ord. 2008-06 § 41, 2008).

20.18.080 SEPA review.

All development applications will be reviewed by the Department for SEPA compliance. If SEPA review is required, such review will be conducted by the Responsible Official in accordance with the provisions of Chapter 20.14 and Title 21 of this Code and WAC 197-11. No approval or permit shall be issued on the proposal until SEPA review is complete.

This page of the Walla Walla Municipal Code is current through Ordinance 2011-01, passed January 12, 2011.

Disclaimer: The City Clerk's Office has the official version of the Walla Walla Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

City Website: <http://www.ci.walla-walla.wa.us/>
Telephone number: (509) 527-4424
Code Publishing Company

Division VI. Sign Regulations

Chapter 20.204 SIGNS

Sections:

- 20.204.010 Purpose.
- 20.204.020 Definitions.
- 20.204.030 Development authorization required.
- 20.204.040 Signs subject to ordinance – No permit required.
- 20.204.050 Exempt signs.
- 20.204.060 Prohibited signs.
- 20.204.070 Sign standards.
- 20.204.080 General provisions.
- 20.204.090 Projecting signs.
- 20.204.100 Freestanding signs.
- 20.204.110 Roof signs.
- 20.204.120 Wall signs.
- 20.204.130 Temporary signs.
- 20.204.140 Portable signs.
- 20.204.150 On-premises directional signs.
- 20.204.160 Off-premises directional signs.
- 20.204.170 Billboards.
- 20.204.180 Co-sponsored signs.
- 20.204.190 Multiple building complexes and multiple tenant building signs.
- 20.204.200 Special district signs.
- 20.204.210 Freeway signs.
- 20.204.220 Sign faces and measurements.
- 20.204.230 Signs allowed in the R-96, R-72 and R-60 (Single-Family Residential) zones.
- 20.204.240 Signs allowed in the RM zones.
- 20.204.250 Signs allowed in the CC zones.
- 20.204.260 Signs allowed in the CH zones.
- 20.204.270 Signs allowed in the IL/C (Light Industrial/Commercial) zones.
- 20.204.280 Signs allowed in the IH zones.
- 20.204.290 Signs allowed in the PR zones.
- 20.204.300 Signs allowed in the AD zones.
- 20.204.310 Legal nonconforming signs.
- 20.204.320 Minor variance of sign standards.
- 20.204.330 Design plan.
- 20.204.340 Variances.
- 20.204.350 Abatement required.

 **20.204.010 Purpose.**

The purpose of this section is to accommodate and promote: sign placement consistent with the character and intent of the zoning district; proper sign maintenance; elimination

of visual clutter; and creative and innovative sign design. To accomplish this purpose, the posting, displaying, erecting, use, and maintenance of signs shall occur in accordance with this Chapter.

20.204.020 Definitions.

A. For the purposes of this chapter, certain abbreviations, terms, phrases, words and derivatives shall be construed as follows:

1. "Abandoned sign" means any sign located on property that is vacant and unoccupied for a period of six months or more; or any sign which pertains to any occupant, business or event unrelated to the present occupant or use; or any sign in ill repair for more than thirty days.

 2. "Billboard" means a sign which advertises or promotes merchandise, service, goods, or entertainment which are sold, produced, manufactured or furnished at a place other than on the property on which said sign is located.

3. "Changing message center sign" means an electronically controlled sign where different automatic changing messages are shown, including animated signs containing action, motion, changing graphics (including those that flash or oscillate) or the illusion of action or motion, or color changes of all or any part of a sign facing. This definition does not include electric reader board signs.

4. "Construction sign" or "project ID sign" means any sign used to identify the architects, engineers, contractors or other individuals or firms involved with the construction of a building and to show the design of the building or the purpose for which the building or development project is intended.

5. "Co-sponsored sign" means a sign supplied by a second party, not the proprietor of the business, which advertises the product of the sign supplier.

6. Directional Sign. See subsection (A)(18) of this section, off-premises directional sign, and subsection (A)(20) of this section, on-premises directional sign.

7. "Electrical sign" means a sign or sign structure in which electrical wiring, connections, and/or fixtures are used as part of the sign proper.

8. "Electric reader board sign" means a permanent sign or part of a sign showing text only on which the letters are readily replaceable or changeable such that the copy can be changed from time to time manually, or a comparable electronic sign displaying information such as time, temperature, or a message which changes not more than once within a one-minute time period.

9. "Flashing sign" means an electric sign or a portion thereof (except changing message centers) which changes light intensity in a sudden transitory burst, or which switches on and off in a constant pattern. This definition includes strobe lights.

10. "Freestanding sign" means any sign supported by one or more uprights, poles or braces in or upon the ground.

11. "Freeway sign" means an on-premises freestanding sign designed and placed to attract the attention of freeway traffic. For purposes of this chapter, "freeway" means Highway 12 and SR 125 from the Plaza Way intersection westerly to the city limits.

12. "Grand opening sign" means temporary signs, posters, banners, strings of lights, clusters of flags, balloons and searchlights used to announce the opening of a completely new enterprise or the opening of an enterprise under new management.

13. "Motorist information sign" means a supplemental sign located in the public right-of-way, for those businesses or activities that qualify for a tourist-oriented directional sign, issued by the state highway department.

14. "Multiple building complex" is a group of structures housing two or more retail, office, or commercial uses sharing the same lot, access and/or parking facilities, or a coordinated site plan. For purposes of this section, each multiple building complex shall be considered a single use.

15. "Multiple tenant building" is a single structure housing two or more retail, office or commercial uses. For purposes of this section, each multiple tenant building shall be considered a single use.

16. "Name plate" means a sign identifying the name, street address, occupation and/or profession of the occupant of the premises only.

→ 17. Off-Premises Sign. In this code, the term "off-premises sign" is synonymous with the term "billboard."

18. "Off-premises directional sign" means an off-premises sign with only directions to a particular business.

19. "On-premises sign" means a sign incidental to a lawful use of the premises on which it is located, advertising the business transacted, services rendered, goods sold or products produced on the premises or the name of the business, or the name of the person, firm or corporation occupying the premises.

20. "On-premises directional sign" means a sign directing pedestrian or vehicular traffic to parking, entrances, exits, service areas, or other on-site locations.

21. "Political sign" means a sign advertising a candidate or candidates for public elective offices, or a political party, or a sign urging a particular vote on a public issue decided by ballot.

22. "Portable sign" means a sign made of wood, metal, plastic, or other durable material, which is not attached to the ground or a structure. This definition includes freestanding sidewalk signs, sandwich boards and portable reader boards.

23. Project ID Sign. See "Construction sign."

24. "Projecting sign" means a sign, other than a wall sign, that is attached to and projects from a structure or building face.

25. "Public sign" means an information device placed by duly constituted units or agencies of federal, state, or local government. Also included as public are signs placed by utility companies, railroads, cable TV franchises, and similar quasi-public service providers for traffic control and public safety.

26. "Real estate sign" means any sign pertaining to the sale, lease or rental of land or buildings.

→ 27. "Sign" means any device, structure, fixture (including the supporting structure) or any other surface that identifies, advertises and/or promotes an activity, product, service, place, business, political or social point of view, or any other thing.

28. "Sign area" means that area contained within a single continuous perimeter which encloses the entire surface, but excluding any support or framing structure that does not convey a message.

29. "Sign height" means the vertical distance measured from either the grade below the sign or upper surface of the nearest street curb (whichever permits the greatest sign height) to the highest point of the sign.

30. "Sign setback" means the horizontal distance from the property line to the nearest edge of the sign cabinet.

31. "Special district sign" means a sign pertaining to a specific business area or shopping district, or tourist attraction.

32. "Street frontage" means the length in feet of a property line(s) or lot line(s) bordering a public street. For corner lots each street side property line shall be a separate street frontage. The frontage for a single use or development on two or more lots shall be the sum of the individual lot frontages.

33. "Subdivision sign" means any sign used to identify a land development which is to be or was accomplished at essentially one time.

34. "Temporary sign" means any sign, banner, pennant, valance, or advertising display constructed of cloth, paper, canvas, cardboard, or other light, nondurable materials which may or may not be attached to a building or in the ground. Types of displays included in this category are: grand opening, special sales, special event, and garage sales signs.

35. "Tourist-oriented directional sign" means a sign issued by the state highway department, meeting the requirements of Chapter 488-70 WAC.

36. "Unique sign" means any building, structure, fixture or other device that functions as a sign and which is unique in its material or shape. Examples include inflatable objects or signs imitating the shapes of persons, places or things. Unique signs may or may not have lettering.

→ 37. "Wall sign" means any sign attached to or painted directly on the wall, or erected against and parallel to the wall of the building, not extending more than twelve

inches from the wall.

38. "Window sign" means any sign in or on a window. (Ord. 2010-26 § 1, 2010: Ord. 2001-17 § 13, 2001).

→ **20.204.030 Development authorization required.**

A. Except as allowed by Section 20.204.040 (Signs Subject to Ordinance – No Permit Required), no sign governed by the provisions of this Code shall be erected, structurally altered or relocated after the adoption of this Code without first receiving a Development Authorization from the Development Services office.

→ 1. For New Uses – All on-premises signs readable from the public right-of-way are accessory uses and shall be subject to Level I review subsequent to approval of the principal use.

2. For Changes or Replacement of an Existing Sign – Structural changes to, or replacement of, an existing sign require level I review and approval by the Building Official; except, minor repairs do not require a sign permit.

→ **20.204.040 Signs subject to ordinance – No permit required.**

A. The following signs are exempt from the application, permit and fee requirements of this Code. These signs are required to meet all other applicable standards of this Code.

1. Window signs which are the temporary nature for commercial businesses for a period not exceeding 30 days. Signs in or on the window which are utilized for more than 30 days are permanent and will be considered part of the overall signing permitted for the business. Such permanent window signs shall require permits;

2. Point of purchase displays, such as product dispensers;

3. Gravestones;

→ 4. Barber poles;

→ 5. Historical site plaques;

6. Structures intended for a separate use such as phone booths, Goodwill containers, etc.;

7. Political signs less than 32 square feet which during a campaign, advertise a candidate or candidates, or ballot issue, provided such signs shall not be posted more than 90 days before the election to which they relate and are removed within five days following the election;

8. Construction signs not exceeding 32 square feet in sign area;

→ 9. Canopies and awnings, except those which incorporate lettering or a design to identify, advertise or otherwise function as a sign. Canopies and awnings which function as a sign are required to meet all applicable standards of the Code;

→ 10. Real estate signs not exceeding seven square feet;

11. Name plates not exceeding two square feet;

12. Temporary signs.

→ **20.204.050 Exempt signs.**

A. This Code does not apply to any on-premises sign which is not visible to motorists or pedestrians on any public right-of-way. The Code does not apply to any public sign and does not regulate the size, lighting or spacing of public signs. In addition, the following signs are exempt from this ordinance, and do not require permits for placement or modification; these signs are permitted in any zone:

1. Traffic control signs and instruments of the State, County, or Municipality, provided for public safety, information, or assistance.
2. Signs of public utility companies or railroads which aid public safety, or which show the location of underground utilities or of public facilities.
3. Official and legal notices issued by any court, public body, person or officer in performance of a public duty or in giving any legal notice.

→ 4. Official flags of the United States of America, states of the United States, counties, municipalities, official flags of foreign nations, and flags of internationally and nationally recognized organizations.

5. On-premises directional signs not exceeding two square feet.

6. Holiday decorations or other materials temporarily displayed on traditionally accepted civic, patriotic or religious holidays.

→ **20.204.060 Prohibited signs.**

A. The following signs are prohibited:

1. Signs on any vehicle or trailer that is parked on public or private property and visible from a public right-of-way for the purpose of circumventing the provisions of this chapter. This provision shall not prohibit signs which are painted on or magnetically attached to any vehicle operating in the normal course of business;
2. Signs which purport to be, are an imitation of, or resemble an official traffic sign or signal, could cause confusion with any official signs, or which obstruct the visibility of any traffic/street sign or signal;
3. Signs attached to utility, street light, and traffic control standard poles;
4. Signs attached to trees or rocks;
5. Swinging projecting signs;
6. Signs, together with their supports, braces, guys and anchors, which are not maintained in a neat, clean and attractive condition, free from rust, corrosion, peeling paint or other surface deterioration;

7. Abandoned signs;
8. Flashing signs;
9. Signs which are unsafe or hazardous;
10. Signs on doors, windows, or fire escapes that restrict free ingress or egress;
11. Unique signs unless specifically approved by the director or by Level II review, or Level III review when deemed necessary by the director. Permits may be approved if the effect of the proposed sign would not contribute to a cluttered, confusing or unsafe condition, or would not be in conflict with the character of the zoning district;
12. Exterior signs which advertise alcohol and tobacco products;
13. Signs on public property without prior approval;
14. Searchlights or beacons;
15. Changing message center signs;
16. Billboards and other off-premises signs, except off-premises directional signs and special district signs;
- 17. Any other sign not meeting the provisions of this chapter. (Ord. 2010-26 § 2, 2010: Ord. 2000-6 § 2(part), 2000: Ord. 95-5 § 1(part), 1995).

20.204.070 Sign standards.

A. The provisions of this Chapter regulate the "Type and Number of Signs Permitted," the "Maximum Sign Area" and the "Sign Height and Setbacks" for all signs in each zoning district. All permitted signs are subject to the review procedures of this Code and the standards of this section. Signs for Level I, II, III and IV approved principal uses shall be permitted as a Level I use, subject to the specific limitations of approval of the principal use, if any.

20.204.080 General provisions.

A. All signs shall comply with the following provisions:

1. Construction shall satisfy the requirements of the Uniform Building Code;
2. Installation shall conform to the State Electrical Code where applicable. An electrical permit must be obtained prior to issuance of a permit to erect a sign which has electrical components;
3. All signs shall comply with the setback requirements of the applicable district; except, when the side or rear yard is a street frontage, then the front setback shall apply;
4. Lighting directed on or internal to any sign shall be shaded, screened or directed in so that the light's intensity or brightness shall not adversely affect neighboring

A. Off-premises directional signs are permitted where indicated in Section 20.204.250 through 20.204.300; provided, that:

1. Each approved use is permitted one off-premises directional sign;
2. The off-premises directional sign contains only directional information and does not exceed 15 square feet in area nor 15 feet in height;
3. The off-premises directional signs are permanently installed on private property;
4. Only one off-premises directional sign is permitted on a parcel.
5. Off-premises signs will be included in calculations to determine the number of signs and the allowable sign area on the parcel upon which the sign is located.

B. The Walla Walla City Manager may permit placement of a motorist information sign in a public right-of-way of the City of Walla Walla where indicated in Section 20.204.250 through 20.204.300 as follows:

1. An application must file a Development Authorization request with the City of Walla Walla.
2. An activity for which a motorist information sign is requested must be eligible as provided in WAC 468-70-050(1).
3. The motorist information sign must comply with the signing detail requirements of WAC 468-70-060 and the signing detail requirements of this Chapter to the extent that it does not conflict with WAC 468-70-060.
4. A motorist information sign must be located at least three hundred feet, and not further than one mile, away from the activity to which it gives direction.
5. Where there is insufficient spacing for both official traffic control signs and motorist information sign panels, the official traffic control signs only shall be installed.
6. Where there is insufficient space available to install all of the motorist information signs requested by applicants, priority shall be given to existing authorized signs, then, to the earliest complete application filed. (Ord. 2001-17 § 14, 2001; Ord. 2000-6 § 2(part), 2000; Ord. 99-22 § 1, 1999).

 **20.204.170 Billboards.**

Billboards are not permitted in any district.

20.204.180 Co-sponsored signs.

A. Co-sponsored signs advertising a product or service which is not the primary product or service of the subject business, shall conform to the following:

1. The second party sponsor's name or logo shall occupy no more than ten (10) percent of the total sign face area.

- b. Subdivision/Project ID Sign – One (1) on each street frontage.
- c. Free-standing, projecting, or portable signs – One (1) per permitted use.
- d. Wall sign – One (1) per permitted use.
- e. Multi-building complexes and multiple tenant building signs (See subsection (A)(5)(e) of this section).

5. Maximum area per sign in an RM zone, provided no combination of sign areas shall exceed thirty-two (32) square feet:

- a. Name plate – up to two (2) square feet.
- b. Subdivision/Project ID Sign – up to thirty-two (32) square feet.
- c. Free-standing, projecting, or portable sign – up to sixteen (16) square feet.
- d. Wall sign – up to sixteen (16) square feet.
- e. Multi-building complexes and multiple tenant building signs – up to thirty-two (32) square feet.

Street frontages in excess of four hundred (400) feet may have two (2) multi-building complex/multiple tenant building signs.

6. Setbacks from property line in a RM zone (See Chapter 20.114):

- a. Name plate – none.
- b. All other permitted signs:
 - Fifteen (15) feet front yard.
 - Fifteen (15) feet side yard.
 - Fifteen (15) feet back yard.

7. Minimum height above grade (to bottom of sign) in a RM zone: Not applicable.

8. Maximum height above grade (to top of sign) in a RM zone: 10 feet.

9. Maximum projection beyond property line in a RM zone: Not permitted. (Ord. 2000-6 § 2(part), 2000: Ord. 95-5 § 1(part), 1995).

 **20.204.250 Signs allowed in the CC zones.**

A. The following regulations apply to signs in a CC zone:

- 1. Permitted as an accessory use to an approved principal use.
 - a. Name plate.

- b. Project ID signs.
 - c. Roof signs.
 - d. Wall signs.
 - e. Freestanding signs/projecting signs.
 - f. Portable signs (including sidewalk).
 - g. Off-premises directional.
 - h. Multi-building complexes and multiple tenant building signs as per Section 20.204.190.
 - i. Special District signs pertaining to the CC district.
2. Permitted as an accessory use to an approved Level II, Level III or Level IV use, subject to the specific limitations of the Level II, III or IV approval.
- a. Permitted sign types are the same as for level I permitted uses listed in Section subsection (A)(1) of this section.
3. Not permitted in a CC zone:
- a. Billboards or off-premises signs, except off-premises directional signs and Special District signs as per subsection (A)(1)(i) of this section.
 - b. All signs prohibited by Section 20.204.060.
4. Number of signs permitted in a CC zone:
- a. Name Plate – 1 per business/occupants.
 - b. Project ID signs – 1 per business/occupant.
 - c. Roof signs – one per parcel.
 -  d. Wall – number not limited; coverage limited to 25 percent.
 - e. Freestanding/projecting – one per each street frontage.
 - f. Portable signs (including sidewalk signs) – one per each street frontage.
 - g. Off-premises directional – one per parcel.
 - h. Multi-building complexes and multiple tenant building signs (see subsection (A)(5)(g) of this section).
 - i. Special District signs – to signs pertaining to the CC zone.
-  5. Maximum area per sign, provided no combination of sign areas shall exceed 150

square feet per street frontage, excluding multiple building complexes and multiple tenant buildings:

- a. Name Plate – up to 2 square feet.
- b. Project ID signs – up to 32 square feet.
- c. Roof/Projecting/Freestanding signs – 1 square foot of sign area per lineal feet of frontage, up to 150 square feet.
- d. Wall signs – up to 25 percent of wall area.
- e. Portable signs – up to 16 square feet.
- f. Off-premises directional signs – up to 15 square feet.
- g. Multi-building complexes and multiple tenant building signs – up to 32 square feet.

Street frontages in excess of 400 feet may have two multi-building complex/multiple tenant building signs or one signs no greater than 200 square feet.

- h. Special District signs – up to 32 square feet.

6. Setbacks from property line in a CC zone – none (See Chapter 20.114).

7. Minimum height above grade (to bottom of sign) in a CC zone: Not applicable.

→ 8. Maximum height above grade (to top of sign) in a CC zone: Thirty (30) feet; fifteen (15) feet for off-premises directional signs. (See Section 20.204.160(A)(2).)

9. Maximum projection beyond property line in a CC zone: See Section 20.204.090, Projecting signs. (Ord. 2000-6 § 2(part), 2000: Ord. 95-5 § 1(part), 1995).

20.204.260 Signs allowed in the CH zones.

A. The following regulations apply to signs in a CH zone:

1. Permitted as an accessory use to an approved principal use, subject to the same review and procedural requirements as the principal use in a CH zone.

- a. Name plate.
- b. Project ID signs.
- c. Roof signs.
- d. Wall signs.
- e. Freestanding signs/projecting signs.
- f. Portable signs (including portable sidewalk signs).