

No. 30422-1

Washington State Court of Appeals

ROBERT CATSIFF,

Appellant,

vs.

TIM McCARTY and CITY
OF WALLA WALLA,

Respondents.

CLERK

2011 OCT 17 AM 8:05

E

REPLY BRIEF OF APPELLANT

Michael E. de Grasse
Counsel for Appellant
WSBA #5593

P. O. Box 494
59 So. Palouse St.
Walla Walla, WA 99362
509.522.2004

No. 30422-1

Washington State Court of Appeals

ROBERT CATSIFF,

Appellant,

vs.

TIM McCARTY and CITY
OF WALLA WALLA,

Respondents.

2011 OCT 17 AM 8:05
CLERK
b/h
E

REPLY BRIEF OF APPELLANT

Michael E. de Grasse
Counsel for Appellant
WSBA #5593

P. O. Box 494
59 So. Palouse St.
Walla Walla, WA 99362
509.522.2004

TABLE OF CONTENTS

	<u>Page</u>
<u>INTRODUCTION</u>	1
<u>ARGUMENT IN REPLY</u>	3
I. <u>THE CITY'S RELIANCE ON MARRIAGE OF RIDEOUT, 150 Wn. 2d 337, IS MISCONCEIVED; THE STANDARD OF REVIEW IS DE NOVO.</u>	3
II. <u>THE CITY'S RESTRICTION OF THE APPELLANT'S MURALS LACKS LEGAL FOUNDATION BECAUSE IT FAILS TO APPLY THE TEST FOR DETERMINING COMMERCIAL SPEECH, AND FAILS TO RECOGNIZE THE DISTINCTION BETWEEN ON-PREMISES AND OFF-PREMISES SIGNS.</u>	6
A. <u>Only Expressions that Propose Commercial Transactions are Commercial Speech; a Commercial Purpose is not Determinative.</u>	6
B. <u>The City's Effort to Restrict Robert Catsiff's Right of Free Expression is Grounded in Bill-board Law which has no Application to the On-premises Inland Octopus Murals.</u>	8
III. <u>THE CITY'S CONJECTURE CONCERNING ITS GOVERNMENTAL INTERESTS IS REFUTED BY THE EVIDENCE.</u>	12

IV. BY FAILING TO IMPOSE LIMITS ON THE DISCRETION OF THE CITY OFFICIAL CHARGED WITH GRANTING SIGN PERMITS, THE CITY HAS ENACTED AN UNCONSTITUTIONAL PRIOR RESTRAINT. 21

V. ON FAILING TO SHOW THAT ANY RESTRAINT OF ROBERT CATSIFF'S RIGHT OF FREE EXPRESSION PASSES CONSTITUTIONAL MUSTER, THE CITY MAY NOT INVOKE THE DOCTRINE OF SEVERABILITY. 24

CONCLUSION 25

TABLE OF AUTHORITY

Cases

	<u>Page</u>
<u>Ackerley Communications of the Northwest, Inc. v. Krochalis</u> , 108 F. 3d 1095 (9th Cir. 1997)	10
<u>Board of Trustees of State University of New York v. Fox</u> , 492 U.S. 469, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989)	6
<u>Bolger v. Youngs Drug Products Corp.</u> , 463 U.S. 60, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983)	7
<u>City Council v. Taxpayers for Vincent</u> , 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984)	16,18
<u>City of Lakewood v. Plain Dealer Publishing Co.</u> , 486 U.S. 750, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1998)	22
<u>City of Pasco v. Rhine</u> , 51 Wn. App. 354, 753 P. 2d 993 (1998)	6
<u>Collier v. Tacoma</u> , 121 Wn. 2d 737, 854 P. 2d 1046 (1993)	9,18,19, 20,24
<u>Desert Outdoor Advertising, Inc. v. City of Moreno Valley</u> , 103 F. 3d 814 (9th Cir. 1996)	10
<u>Edenfield v. Fane</u> , 507 U.S. 761, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993)	10
<u>Freedman v. Maryland</u> , 380 U.S. 51, 13 L. Ed. 2d 649, 85 S. Ct. 734 (1965)	22
<u>FW/PBS, Inc. v. City of Dallas</u> , 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990)	23
<u>Get Outdoors II, LLC v. City of San Diego</u> , 506 F. 3d 886 (9th Cir. 2007)	9,17,18
<u>In re Marriage of Rideout</u> , 150 Wn. 2d 337, 77 P. 3d 1174 (2003)	3,4

	<u>Page</u>
<u>In re Rosier</u> , 105 Wn. 2d 606, 717 P. 2d 1353 (1986)	3
<u>Kitsap County v. Mattress Outlet</u> , 153 Wn. 2d 506, 104 P. 3d 1280 (2005)	15
<u>Mahaney v. City of Englewood</u> , 226 P. 3d 1214 (Col. App. 2010)	23
<u>McGowan v. State</u> , 148 Wn. 2d 278, 60 P. 3d 67 (2002)	24
<u>Metromedia, Inc. v. San Diego</u> , 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981)	8
<u>State v. Lew</u> , 25 Wn. 2d 394, 174 P. 2d 291 (1946)	14
<u>State v. Lotze</u> , 92 Wn. 2d 52, 593 P. 2d 811, appeal dismissed, 444 U.S. 921 (1979)	19
<u>Municipal Ordinances</u>	
WWMC 20.06.030	12
WWMC 20.18.050	21, 24
WWMC 20.178.110	24
WWMC 20.204.040	19
WWMC 20.204.050	18, 19
WWMC 20.204.060	18
WWMC 20.204.250	24
WWMC 20.204.020(A)(2)	9
WWMC 20.204.020(A)(17)	9
WWMC 20.204.020(A)(27)	12
WWMC 20.204.080(A)(7)	19
<u>Journal Article</u>	
Menthe, "Writing on the Wall: The Impending Demise of Modern Sign Regulation Under the First Amendment and State Constitutions," <u>George Mason University Civil Rights Law Journal</u> 1 (2007)	8, 9

Statutes

	<u>Page</u>
42 USC 1983	25
42 USC 1988	25

SUPREME COURT OF THE STATE OF WASHINGTON

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

INTRODUCTION

The City of Walla Walla hopes to restrict Robert Catsiff's mural art because it conflicts with the city's effort to "create a shopping atmosphere" that the city's "Building Improvement Guide" favors. (City Brief at 2,5; CP 564) That guide exalts "'shopping' [which] becomes a celebration of color, shape, architecture and community." (CP 566) Whether downtown shopping is a governmental interest that is sufficiently substantial, significant or compelling to justify interference with Bob Catsiff's First Amendment right of free expression has become the central issue in this case.

A city may regulate off-premises signs (billboards) on grounds of traffic safety and aesthetics. Off-premises signs threaten traffic safety because they distract motorists. They offend aesthetic

standards because they clutter the landscape. First Amendment jurisprudence does not recognize downtown shopping as a governmental interest of constitutional gravity. Well established authority does not treat an interest in downtown shopping as equivalent to governmental interests in traffic safety or aesthetics.

No evidence suggests that Bob Catsiff's on-premises mural art distracts motorists or clutters the landscape. No evidence shows that Bob Catsiff's mural art insults downtown shoppers whom the city hopes to attract. As the Inland Octopus murals are similar to other mural art in the commercially successful neighborhood of his toy shop, Bob Catsiff, himself, might well be advancing the very interest asserted by the city. There is no evidence to the contrary. In any event, the trial court should be reversed because the city has failed to justify its infringement of Bob Catsiff's First Amendment right of free expression.

ARGUMENT IN REPLY

I. THE CITY'S RELIANCE ON MARRIAGE
OF RIDEOUT, 150 Wn. 2d 337, IS
MISCONCEIVED; THE STANDARD OF
REVIEW IS DE NOVO.

As a separate, independent ground for de novo review, Robert Catsiff has noted the nature of the proceedings in the trial court. 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). Reading the record below shows that the foregoing proposition soundly applies to this case.

In re Marriage of Rideout, 150 Wn. 2d 337, 77 P. 3d 1174 (2003) furnishes no grounds for applying the substantial evidence standard of review. In Rideout, 150 Wn. 2d at 350, neither party objected to the trial court's hearing the

matter solely on written submissions. Here, Mr. Catsiff anticipated a trial with live testimony, and, when the trial court refused to take testimony, Mr. Catsiff's counsel made "an offer of proof with respect to the witnesses I would have called." (3 RP 20-23) Moreover, Mr. Catsiff objected to the receipt of certain documentary evidence on grounds that it should have been received only in the course of a trial where live testimony would be presented. (10.RP 9-25) Thus, the fundamental nature of the trial court proceedings in Rideout differs from that found here.

Unlike Rideout, 150 Wn. 2d at 351, resolution of the instant case did not require assessments of credibility of witnesses. As noted by the trial court in its memorandum opinion (CP 929), "The Plaintiff acknowledges there are few, if any, disputed facts." After noting that it denied the plaintiff's request to present live testimony, the trial court states 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." (CP 930) Where, as here, disputed factual issues are inconsequential and credibility questions were, if present, of no importance, de novo review should be the standard.

II. THE CITY'S RESTRICTION OF THE APPELLANT'S MURALS LACKS LEGAL FOUNDATION BECAUSE IT FAILS TO APPLY THE TEST FOR DETERMINING COMMERCIAL SPEECH, AND FAILS TO RECOGNIZE THE DISTINCTION BETWEEN ON-PREMISES AND OFF-PREMISES SIGNS.

A. Only Expressions that Propose Commercial Transactions are Commercial Speech; a Commercial Purpose is not Determinative.

The city quotes City of Pasco v. Rhine, 51 Wn. App. 354,359, 753 P. 2d 993 (1998) for two tests for determining commercial speech:

- (1) expressions solely relating to economic interests of the speaker or its audience;
- (2) speech proposing a commercial transaction.

(City Brief at 34) As noted in the appellant's brief, an expression proposing 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). Notwithstanding the city's citation

of applicable tests for determining whether an expression is commercial speech, it applies neither test to the Inland Octopus murals.

Both the city and the trial court erred in asserting that the Inland Octopus murals are commercial speech because they have a commercial purpose or are used to identify and promote Bob Catsiff's toy shop. (City Brief 34-42; CP 931) The use of an image for commercial purposes or the creation of an image with a commercial intent does not make the expression commercial speech. Indeed, a commercial advertisement, in itself purely commercial in intent and purpose, may not be commercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60,66, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983).

Were a commercial intent or purpose the test of commercial speech, it would be difficult to find an artistic expression that was not commercial. Any film, painting, play, novel, short story produced or sold commercially would then be commercial speech. Their regulation would be allowed under the lesser standards governing restriction of commercial speech.

The simple, established test set forth above avoids this outcome, whereas any test dependent on intent or purpose does not. The city's argument should be rejected. The trial court should be reversed.

B. The City's Effort to Restrict Robert Catsiff's Right of Free Expression is Grounded in Billboard Law which has no Application to the On-Premises Inland Octopus Murals.

Whether the city's restrictions on free expression are constitutional depends on the type of expression the city attacks:

Each method of communicating ideas is a "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. Metromedia, Inc. v. San Diego, 453 U.S. 490, 501, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).

"Billboard" is a more florid term for an off-premises, or offsite sign. As observed by Darrel Menthe:

The key to sign regulation is the "onsite/offsite" distinction, widely believed to have the United States Supreme Court's explicit blessing in Metromedia, Inc. v. City of San Diego. (footnote omitted) Menthe, "Writing on the Wall: The Impending Demise of Modern Sign Regulation Under the First Amendment and State

Constitutions," 18 George Mason University Civil Rights Law Journal 1 (2007).

This distinction is an express component of the city's sign code which makes "off-premises sign" and "billboard" synonymous. WWMC 20.204.020(A)(17). A "billboard" is defined in the city's sign code as "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." WWMC 20.204.020(A)(2).

Notwithstanding the obvious truth that the Inland Octopus murals are not billboards, the city grounds its argument in billboard law. The city mainly relies on 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). The trial court expressly grounded its rationale on those cases. (CP 931) Yet, those cases concern only off-premises signs. Indeed, the sign regulations challenged in Collier, 121 Wn. 2d at 743 exempted all on-premises signs. Get Outdoors II, 506 F. 3d at 889, n. 2, recognizes the off-premises/on-premises distinction as "a familiar one in sign regulation." Like Collier, Get Outdoors II

dealt only with regulation of off-premises signs.

While governmental interests in traffic safety and aesthetics may justify sign regulation, the government must prove those interests with evidence.

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).

Only in cases of off-premises signs may the government establish interests in traffic safety and aesthetics merely by asserting them. Ackerley Communications of the Northwest, Inc. v. Krochalis, 108 F. 3d 1095, 1098 (9th Cir. 1997).

Here, the city has proven only that the Inland Octopus murals violate its size and height requirements. The city has neither proven that

the size and height of the murals threaten any governmental interest, nor that the size and height requirements advance any governmental interest when applied to the murals.

III. THE CITY'S CONJECTURE CONCERNING
ITS GOVERNMENTAL INTERESTS IS
REFUTED BY THE EVIDENCE.

Contrary to the city's assertion, Bob Catsiff does not contend that "his signs are murals as opposed to signs." (City Brief at 14-15) Bob Catsiff concedes that his murals fall within the capacious definition of "sign" found in the city code. WPMC 20.204.020(A)(27); 20.06.030. Though the definition of "sign" is broad, the city has failed to show a governmental interest justifying its restriction of Bob Catsiff's First Amendment right of free expression as it is found in the Inland Octopus murals. That a mural might also be a "sign" as defined in the city code, does not mean that it can, ipso facto, be restricted.

It should be remembered that Bob Catsiff's landlord, Michael M. May, satisfied himself through a conversation with a city employee that a mural covering the entire wall of the toy shop would not violate the city sign code. (CP 747-48) Though Mr. May incorrectly identified the city employee with whom he spoke, that

person confirmed making a distinction between signs and murals. (CP 883)

This "sign vs. mural" distinction is important not because Bob Catsiff contends here that his murals are not signs as defined by the city code. The distinction is important because the city appears to recognize the difference between ordinary commercial signage and mural art, in its enforcement practice. Bob Catsiff does not claim to be a victim of selective enforcement; no enforcement against mural art simply shows an absence of governmental interest in its regulation.

The city's absence of interest in regulating mural art is specifically shown by the lack of any enforcement action against other murals that were created without permits, and in violation of the very size and height restrictions that the city has raised against Bob Catsiff. (RP 8; Ex. 5, 6,7,8,9) Bob Catsiff saw no governmental interest that would be contravened by creating murals like others in his neighborhood. Thus, the Inland Octopus murals were created not to undermine any governmental interest of the city, but "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) Indeed, the absence of interest in regulating mural art is underscored by the absence of any complaint by the city for months after the first Inland Octopus mural was created without a permit. (CP 804,730) The city's allowance of mural art like the Inland Octopus murals constitutes an admission against interest by conduct. State v. Lew, 26 Wn. 2d 394,402, 174 P. 2d 291 (1946).

Just as the city's behavior demonstrates an absence of governmental interest in restricting the Inland Octopus murals, so does its evidence. Nothing more than a conjecture is advanced by the city to support its claim that a governmental interest justifies restricting the Inland Octopus murals. That conjecture arises from the city's promotion of downtown shopping. Assuming that an interest in downtown shopping may justify infringements on First Amendment rights, the city has neither shown that its size and height restrictions as applied to the Inland Octopus murals "directly and materially serve" that interest, nor has it shown that the restrictions are "no more extensive than necessary." Thus, the city has failed the test applicable to commercial speech.

Kitsap County v. Mattress Outlet, 153 Wn. 2d 506,512, 104 P. 3d 1280 (2005). By way of coda to the foregoing analysis, there is no legal authority for the proposition that downtown shopping is a governmental interest sufficient to justify infringement of the First Amendment right of free expression. Moreover, there is no authority for the proposition that a desire to appeal to shoppers is equivalent to a governmental interest in traffic safety and aesthetics (billboard clutter).

The city may not show that the Inland Octopus murals threaten a governmental interest in certain size and height requirements merely by proving that the murals exceed those requirements. Instead, the city must show that its size and height requirements advance a proper governmental interest. Size and height requirements in and of themselves are not governmental interests that justify First Amendment infringements. Nothing in First Amendment jurisprudence allows expression to be restricted solely because it is presented in a space that exceeds 150 square feet, or reaches a height greater than 30 feet above grade.

Cases on which the city relies concern

off-premises signs, and, therefore, do not apply here. More pointedly, the rationales set forth in cases cited by the city reveal that its conjecture concerning governmental interest is bereft of legally cognizable factual foundation.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984) involved off-premises signs, specifically signs on public property. In rejecting a First Amendment challenge to Los Angeles's prohibition of signs on public property, the court described the actuality of the aesthetic interest that justifies sign regulation. As stated by Justice Stevens:

We reaffirm the conclusion of the majority in Metromedia. The problem addressed by this ordinance--the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property--constitutes a significant substantive evil within the city's power to prohibit. Vincent, 466 U.S. at 807.

There is no evidence that the Inland Octopus murals are clutter, or a visual assault from public property on the citizens of Walla Walla. The city mistakenly assumes that its restriction of Bob Catsiff's on-premises mural art is the same as Los Angeles's restriction of off-premises signs on public property.

Similarly, the opinion in Get Outdoors II, LLC v. City of San Diego, 506 F. 3d 886 (9th Cir. 2007) exposes the factual deficiencies in the city's conjecture concerning governmental interest that it advances to justify its restriction of Bob Cat-siff's mural art. Unlike the instant case, Get Outdoors II involved billboards. Although certain size and height restrictions were held to be justified by San Diego's interest in traffic safety and aesthetics, those restrictions were "narrowly tailored to serve a significant governmental interest." Get Outdoors II, 506 F. 3d at 893-94. The very particularity of the billboard regulations in Get Outdoors II, 506 F. 3d at 894, contrasts starkly with those found here. In Get Outdoors II, San Diego "calibrated its size and height restrictions. . . to the width of the adjacent public rights-of-way and the speed limit." Get Outdoors II, 506 F. 3d at 894. No refinement of the city's sign regulations of this sort is found here. Rather, the city presents a conjecture that its sign code's infringements of free expression are justified because they "create a shopping atmosphere" that some may find appealing. (City Brief at 2,5) Assuming, arguendo, that appealing to a certain type of downtown shopper is a governmental interest

of constitutional gravity, the city has not shown how that interest is advanced by its restriction of the Inland Octopus murals.

The city's reliance on Collier v. Tacoma, 121 Wn. 2d 737, 854 P. 2d 1046 (1993) is misplaced in the same fashion as is its reliance on Vincent, supra and Get Outdoors II, supra. Like the two latter cases, Collier concerned only off-premises signs; the ordinance attacked in Collier exempted all on-premises signs from regulation. Collier, 121 Wn. 2d at 743. Putting aside this distinguishing feature, the rationale of Collier does not save the city here. Although Collier approved content-neutral regulation of the noncommunicative aspects of signs, the city sign code's cutting edge is not limited to content neutral, noncommunicative aspects of signs.

On its face, the city sign code is not content neutral. Some signs are prohibited based on content, e.g., tobacco and alcohol advertisements. WPMC 20.204.060. Some signs are entirely exempt from sign code regulation based on content, e.g., certain flags and holiday decorations. WPMC 20.204.050. Of those signs that are subject to sign code

regulation, some need no permit based on content, e.g., barber poles and historical site plaques. WPMC 20.204.040. Plainly, one planning to place a sign in Walla Walla is subject to a spectrum of regulation depending on the content of the sign. However this Court treats Collier's curtailment of State v. Lotze, 92 Wn. 2d 52, 593 P. 2d 811, appeal dismissed, 444 U.S. 921 (1979), it must conclude that the city's reliance on Collier is misplaced.

That the instant case does not involve content neutral sign code regulation is beyond dispute. The size and height requirements in themselves and considered apart from context appear content neutral. Yet, those size and height requirements apply only to some signs as defined in the code, i.e., nonexempt signs. WPMC 20.204.050. The signs to which they apply are determined by content. The city's effort to obtain content neutrality (City Brief at 31) through WPMC 20.204.080(A)(7) should be rejected. The instant case does not involve sign code provisions that "overlap or conflict with regard to size, number or placement of signs." This narrow provision of the code should not be deployed to cure problems of overbreadth and lack of content neutrality by

swallowing up fundamental distinctions among types of signs regulated.

In addition to failing to acknowledge distinguishing characteristics of its sign code involving off-premises signs and content neutrality, the city has failed to support its size and height regulations by showing that they affect only the noncommunicative aspects of the Inland Octopus murals. As stated by mural painter Aaron Randall (CP 801:17--802:4)

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."

An essential, communicative property of the larger Inland Octopus mural is that it must fill the wall. This view of the mural is unrefuted on the record. Therefore, the city's reliance on Collier, 121 Wn. 2d at 761 is misconceived.

IV. BY FAILING TO IMPOSE LIMITS ON
THE DISCRETION OF THE CITY
OFFICIAL CHARGED WITH GRANTING
SIGN PERMITS, THE CITY HAS
ENACTED AN UNCONSTITUTIONAL
PRIOR RESTRAINT.

The city conflates restrictions on signs found in its code and restrictions on the city official who decides whether to issue a sign permit. Restrictions on signs are myriad. Restrictions on the deciding official's discretion are missing.

The unbridled discretion given the deciding official (the "Director"), is explicit in the sign code.

The Director shall issue a development authorization when he determines that the proposal complies with the provisions of this Code and the Comprehensive Plan. WWMC 20.18.050

The Director's determination is expressly not confined to the dimensional and similar requirements suggested by the city as limitations on discretion. Only the Director determines compliance.

None of the code provisions that restrict signs, cited by the City in support of its assertion that the Director's discretion is limited, actually limits

discretion. (City Brief at 62-63) Although the permit form (CP 643) to which the city refers contains a grid for describing various aspects of the proposed sign, nothing in that form restricts the discretion of the Director in deciding whether to issue a sign permit. Finally, there are no deadlines or other time limits that require the Director to exercise his or her discretion within a certain period of time. Thus, under the sign code the Director need never decide whether to grant an application for a sign permit.

The authority cited in the appellant's opening brief controls. Nothing in the city's submissions is to the contrary. Where, as here, the permit scheme of the city vests the deciding official with the power to make determinations based on sign content, that 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 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. 2d 1214,1220 (Col. App. 2010), as to time limits. The trial court should be reversed.

V. ON FAILING TO SHOW THAT ANY RESTRAINT
OF ROBERT CATSIFF'S RIGHT OF FREE
EXPRESSION PASSES CONSTITUTIONAL MUSTER,
THE CITY MAY NOT INVOKE THE DOCTRINE OF
SEVERABILITY.

As the sign code is constitutionally deficient on its face as underinclusive, vague, overbroad and as a prior restraint, there is nothing to sever. Collier v. Tacoma, 121 Wn. 2d 737,761, 854 P. 2d 1046 (1993) is inapposite.

Whether the permitting process is mainly concerned with dimensional requirements (as the city contends), or has a broader sweep, as the sign code expressly provides (WWMC 20.18.050), permit requirements and dimensional restrictions are interrelated. The Walla Walla Municipal Code's structure shows that sign regulation is unitary. Indeed, the code's design standards provisions mimic the sign code's size and height restrictions. WWMC 20.204.250; 20.178.110. The design standards neither supersede nor conflict with any of the sign code requirements and restrictions that are challenged here. The interrelationship of all code provisions concerning signs preclude severance. McGowan v. State, 148 Wn. 2d 278,294, 60 P. 3d 67 (2002).

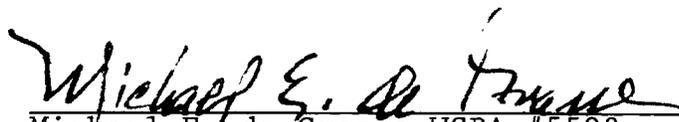
CONCLUSION

The trial court should be reversed.

The sign code of the City of Walla Walla should be held constitutionally deficient on its face, or, alternatively, all provisions the city seeks to enforce against Robert Catsiff should be invalidated on constitutional grounds. As the city has interfered with Robert Catsiff's civil rights, he should be awarded his attorney fees and expenses in accordance with 42 USC 1983, and 42 USC 1988.

Dated this 14th day of October, 2011.

Respectfully submitted,


Michael E. de Grasse WSBA #5593
Counsel for Appellant