

No. 30422-1

Washington State Court of Appeals

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ROBERT CATSIFF,

*Appellant,*

v.

TIM MCCARTY and CITY OF WALLA WALLA,

*Respondents.*

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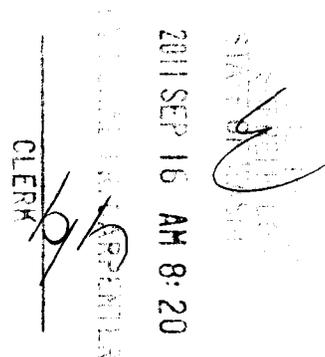
BRIEF OF RESPONDENTS

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### **3. Counter-statement of the Case**

Appellant, Robert Catsiff, owns and operates the Inland Octopus toy store and gift shop in Walla Walla. CP 789, ¶1.1. Mr. Catsiff stipulated in the administrative proceedings below that he painted a wall sign depicting a hiding octopus on the exterior back wall of his store on or about April 28, 2010. CP 789-90, ¶¶ 1.3 & 1.3.1. He further stipulated that he did not obtain a permit for the sign. CP 790, ¶ 1.3.2. Mr. Catsiff also stipulated in the proceedings below that he painted a wall sign depicting a hiding octopus on the exterior front wall of his store between September 4-6, 2010. CP 790-91, ¶¶ 1.4 & 1.4.1. He stipulated that he also did not obtain a permit for that sign. CP 792, ¶ 1.4.5. He further stipulated that the front wall sign exceeds the size and height limits established by the Walla Walla Municipal Code. CP 792, ¶¶ 1.4.2 & 1.4.3. Mr. Catsiff did not factually challenge his violations below. He instead challenged the constitutionality of the sign ordinances that he admittedly violated. CP 792, ¶ 2.1.

The City of Walla Walla enacted a sign ordinance in 1991 as part of a coordinated downtown revitalization plan. Downtown Walla Walla was in a state of decline during the 1970s and early 1980s with businesses leaving and vacancy rates soaring. CP 614. As early as 1981, the City began looking at ways to encourage redevelopment and renovation of its central business

district (CBD) and to preserve and restore its historic resources. CP 341-48.

The City adopted policies to:

Make the CBD more accessible through improvements in the circulation in, through, and around the CBD while providing adequate parking which is convenient to the people it serves.

....

Improve the appearance of the downtown area by recognizing that the City is responsible for the visual quality of the CBD. This can be achieved in developing programs for all types of landscaping (for shade, benches, public restrooms, and esthetic values), improving pedestrian movements and access, and by working with downtown businessmen to develop a workable sign code specifically for the downtown area.

CP 345. These remained goals of the City throughout the 1980s. CP 349-60.

The City recognized in 1988 that "[p]articular attention needs to be given to signing in the Central Business District. . . ." CP 360.

In 1989, downtown business owners commissioned a redevelopment plan which recommended enhancements to create a shopping atmosphere that responded to the historic character of Walla Walla by making visual improvements to downtown. CP 521-31. The plan adopted a comprehensive and incremental strategy to revitalization referred to as the "Main Street Approach." CP 614. The plan proposed featuring the historic character of downtown buildings, and encouraging individual businesses to uncover façades that had been hidden over the years by modern remodeling. CP 521-22. It recommended an integrated streetscape and historic restoration

program which would improve the appearance and functionality of the downtown area, control traffic, and increase economic development. CP 447; CP 521. The redevelopment plan also recommended that a local improvement district be formed to finance public improvements needed to implement the plan. CP 541-44.

The plan recognized that a "[k]ey to Downtown redevelopment is fully occupied buildings reflecting their original historic character." CP 524. It further advised that "[f]ollowing Main Street's 1987 'Building Improvement Guide' provides excellent guidelines for the private sector to use in building restoration, refinishing and signage." CP 524.

The City began taking major steps to implement the downtown redevelopment plan in 1991. On March 27, 1991, the Walla Walla City Council passed a resolution giving notice of intention to form a local improvement district to finance the installation of downtown revitalization improvements. CP 93-98. The City Council passed a complementary zoning ordinance at its next meeting on April 10, 1991 which included the City's Sign Code. CP 99-136. At its next meeting on April 24, 1991, the Walla Walla City Council formed the downtown local improvement district for purposes of financing downtown revitalization improvements. CP 137-44. The City later sold \$2,211,241.50 of municipal bonds for the local

improvement district on June 9, 1993 to help finance the \$2,545,485.78 revitalization project. CP 145-67. The City remains committed to the plan, and it continues to pursue downtown master planning, design standards, and other implementation strategies. CP 614-17.

The 1991 Sign Code confirmed that its purpose is to improve the City's visual quality by accommodating and promoting 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." CP 104, § 20.204.010. It adopted wall sign size and height requirements for Walla Walla's central commercial zoning district. Wall signs are limited to 25% of a wall area, and no combination of sign areas may exceed 150 square feet per street frontage. CP 123, § 20.204.250(A)(4) & (5). In addition, signs cannot extend higher than 30 feet above grade. CP 124 § 20.204.250(A)(8). Those provisions remain part of the Walla Walla Municipal Code (WWMC). CP 73-74, WWMC § 20.204.250.

The revitalization program has been a success. Many downtown buildings have been rehabilitated. CP 614-15. Many historic façades have been uncovered and restored, including the one next door to where the Inland Octopus toy store is located. *See* Ex. 3 (pre-restoration photo); Ex. 15, deposition exhibit 9 (post-restoration photo used to "photoshop" the octopus

sign sketch originally drawn by Mr. Catsiff. Ex. 15, p. 33, line 11 through p. 34, line 15). "As a result of rehabilitation projects and aggressive business recruitment efforts, downtown Walla Walla is now considered one of the nation's best examples of a restored downtown." CP 615. Walla Walla's downtown has received dozens of awards, CP 614, including the 2001 Great American Main Street award. CP 218.

Walla Walla undertook to protect and build on the success of the downtown revitalization program in 2002. CP 269-76. The City designated a "downtown area" as a subset of its central commercial zoning district. CP 241; CP 260. It thereafter adopted design standards in 2003 which contain additional signage requirements that apply to the downtown area instead of the Sign Code to the extent there is any conflict. CP 286-87, § 20.178.110. As originally adopted, the Downtown Design Standards limited the size of wall signs to thirty (30) square feet. CP 286, § 20.178.110(B). However, the City soon thereafter determined that the size change was inadvertent, and it restored requirements consistent with those in the existing Sign Code which disallow extending wall signs higher than 30 feet above grade, provide that wall signs shall not exceed 25% of a wall area, and limit sign areas to 150 square feet per street frontage. CP 298-300. Those provisions remain part of the WWMC. CP 57, § 20.178.110.

The success of the revitalization program has attracted many new businesses to downtown Walla Walla including the Inland Octopus toy store in 2004. Ex. 15, p. 13, lines 20-22. Mr. Catsiff admits that he "[w]anted to be on Main Street because that's where the activity, that's where the growth was, that's what had won the award. Just seemed like the right place to be. Location, location, location." Ex. 15, p. 16, lines 5-8. In March of that year, Mr. Catsiff opened the Inland Octopus toy store at its original location at 220 E. Main St. Ex. 15, p. 15, lines 6-9. He chose his store name as a counter-intuitive marketing technique. Ex. 15, p. 11, line 17 through p. 12, line 7. He applied for, and was issued, a sign permit for that location. Ex. 15, p. 47, line 25 through p. 48, line 16, and deposition exhibit 13.

Sometime during January of 2010, Mr. Catsiff began negotiations to move his store to 7 E. Main St. Ex. 15, p. 19, lines 2-5. The building at 7 E. Main St. is located within the City's central commercial zoning district and its downtown area. CP 633-34, ¶ 1.3. In mid-February, Mr. Catsiff proposed lease language to the building owner allowing "the painting of signage and murals on the entire height of the outside front of the building above the premises and on the outside east walla [sic] of the premises to the distance of eight (8) feet north of the rear entrance, provided, such signage and murals are legal and are not deemed offensive." Ex. 15, p. 54, line 12 through p. 55,

line 7, and deposition exhibit 2, p. 8. On February 25, 2010, Mr. Catsiff entered into a written lease "for the operation of Retail store. . . ." with the signage addendum. Ex. 15, p. 18, line 16 through p. 19, line 1, and deposition exhibit 2, pp. 1 & 8.

In February or March, Mr. Catsiff made drawings depicting the octopus sign that was eventually painted on the front façade of that location. Ex. 15, p. 33, lines 11-20, and deposition exhibit 9. He also began looking for someone to paint the façade. Ex. 15, p. 38, line 16 through p. 39, line 11. Around March 17, an acquaintance "photoshopped" Mr. Catsiff's drawing onto a photograph of the building façade at 7 E. Main. St. Ex. 15, p. 32, line 3 through p. 33, line 2. The "photoshopped" image is depicted below:



Ex. 15, deposition exhibit 9 (the record therein contains a color image).

On March 18, Mr. Catsiff submitted a business registration application to the City for the 7 E. Main St. location. CP 634, ¶ 1.6; CP 644. Mr. Catsiff had personally signed the application around March 17. Ex. 15, p. 30, lines 8-22, and deposition exhibit 7. Immediately above his signature, Mr. Catsiff is notified: "You will need to obtain a sign permit prior to construction or installation of any exterior sign. Sidewalk signs also need prior approval." CP 644; Ex. 15, deposition exhibit 7. Mr. Catsiff was issued a business permit on March 29 which contained a condition that he "[o]btain a Sign permit prior to construction or installation of any exterior signage." CP 634, ¶ 1.7; CP 647.

Around March 26, Mr. Catsiff did apply to the City for a sidewalk sign permit. CP 634-35, ¶ 1.8; CP 648; Ex. 15, p. 48, line 21 through p. 49, line 10, and deposition exhibit 14. He was issued the permit for his sidewalk sign on April 1. CP 634-35, ¶ 1.8; CP 649.

On or about April 28, 2010, Mr. Catsiff painted a wall sign depicting an octopus hiding behind a rainbow over the rear entrance of the Inland Octopus toy store. CP 789-90, ¶¶ 1.3 & 1.3.1. Mr. Catsiff personally painted it with the assistance of his daughter's boyfriend. Ex. 15, p. 42, lines 20-24. He did not apply for a permit before painting it, and no permit was issued. CP 790, ¶ 1.3.2. The octopus sign painted on the rear façade of the Inland

Octopus toy store on or about April 28 is depicted below:



CP 790, ¶ 1.3 (the record therein contains a color image).

In May or June of 2010, Mr. Catsiff was introduced to Aaron Randall by Mr. Randall's wife who happened to be a store customer. Ex. 15, p. 36, lines 9-21. Mr. Catsiff gave Mr. Randall a copy of his drawing "photoshopped" onto the store façade. Ex. 15, p. 36, lines 1-8; Ex. 16, p. 16, line 23 through p. 18, line 18. Mr. Randall took that drawing and made revisions to it. Ex. 15, p. 35, line 10 through p. 36, line 8, and deposition exhibits 9 & 10; Ex. 16, p. 19, line 19 through p. 21, line 11, and deposition exhibits 1 & 2. "But the basic elements of the medieval towers, the rainbow, and the octopus, remained constant throughout. They never changed." Ex. 16, p. 21, lines 12-14.

During the 2010 Labor Day weekend, Mr. Catsiff assisted Mr.

Randall to paint a wall sign depicting an octopus hiding in a castle over the front entrance of the Inland Octopus toy store. Ex. 15, p. 45, lines 1-10, and deposition exhibit 12; Ex. 16, p. 24, line 19 through 26, line 11. The public sidewalk in front of the store was used as a staging area. CP 792, ¶ 1.4.4; *see also* CP 696. Mr. Catsiff did not apply to the City for any permits, and no permits were issued. CP 792, ¶ 1.4.5. The octopus sign painted on the front façade of the Inland Octopus toy store between September 4-6, 2010 is depicted below:



CP 791, ¶ 1.4 (the record therein contains a color image). It covers the whole wall area and is approximately 22' 6" X 27' 6" (618.75 square feet) in size

and over 36' high. *See* CP 635, ¶ 1.10; CP 659. Days after completion of the sign, Mr. Catsiff began using a photo of it in print advertisements to promote his store. Ex. 15, p. 55, line 10 through p. 57, line 2, and deposition exhibit 18; CP 639-40, ¶ 1.21; CP 714-21.

**A. Case procedure**

Acting Walla Walla City Manager Tim McCarty issued a notice of civil violation to Mr. Catsiff and his landlord on October 14, 2010 for violating City right-of-way occupancy requirements, Sign Code permitting requirements, and the sign size and height requirements of the Sign Code and the Downtown Design Standards. CP 757-63. The notice scheduled an administrative hearing before the Walla Walla City Hearing Examiner to take place on November 18, 2010. CP 759.

Mr. Catsiff filed an action in Walla Walla County Superior Court on November 5, 2010 to enjoin the administrative hearing. CP 3-20. The City served and filed materials in Superior Court on November 9 that it had initially prepared for the administrative proceeding. CP 21-721. Those materials were also filed in the administrative proceeding. CP 750-51, ¶ 1.3; CP 771 & 21-327; CP 772 & 328-632; CP 773 & 633-721.

The administrative hearing was held on November 18. CP 774-88. At the time of the hearing, Mr. Catsiff stipulated factually to his violations

while contesting the constitutionality of the City's sign regulations and reserving his rights of appeal and other remedies. CP 789-93. The Walla Walla Hearing Examiner entered a decision and order holding that Mr. Catsiff violated the Walla Walla Municipal Code by failing to get sign permits before painting his back and front wall signs and by failing to get a right-of-way permit before using the public sidewalk as a staging area to paint the front sign. CP 796, ¶¶ 3.1-3.3. The Hearing Examiner further held that the front sign constitutes a continuing violation of the size and height requirements of both the Sign Code and the Downtown Design Standards. CP 796-97, ¶ 3.4. Mr. Catsiff was assessed a \$200 fine for failing to get sign permits and a \$100 fine for failing to get a right-of-way permit. CP 797, ¶¶ 4.2-4.4. Mr. Catsiff and his landlord were additionally ordered to take corrective action to bring the front wall sign into compliance with the size and height requirements of the Sign Code and the Downtown Design Standards. CP 798, ¶ 4.6. Mr. Catsiff was also assessed a fine in the amount of \$100 per day until such time that the front sign is brought into compliance. CP 797-98, ¶ 4.5.

The City stipulated that Mr. Catsiff could add his appeal of the Hearing Examiner decision to the action that he had already filed in Superior Court. CP 746. Mr. Catsiff filed an amended complaint in that action on

December 2 which added such appeal. CP 722-45. On December 22, the City filed the remainder of the administrative record which had not already been previously filed. CP 750-99. Mr. Catsiff filed additional declarations of his landlord (CP 747-49), himself (CP 803-04), and Mr. Randall (CP 800-02) (with whom Mr. Catsiff had painted the front sign). The City thereafter took the depositions of Mr. Catsiff (Ex. 15) and Mr. Randall (Ex. 16), and it filed declarations responding to the declaration made by Mr. Catsiff's landlord (CP 878-83).

The matter proceeded to hearing before the Superior Court on April 19, 2011. RP 1-60. The Superior Court considered the materials that had been filed and permitted filing of additional documentary materials at the time of hearing, but it declined to allow live testimony. RP 1-36. The Court thereafter issued a letter decision on April 28 rejecting Mr. Catsiff's constitutional claims and affirming the Hearing Examiner decision and order. CP 929-33. On June 1, 2010, the Superior Court entered findings & conclusions (CP 936-41) and a judgment (CP 942-44).

Mr. Catsiff timely appealed and requested that the Washington Supreme Court take direct review of the matter. Respondents City of Walla Walla and Tim McCarty (hereinafter referred to as the City) contest Mr. Catsiff's appeal, but they join in Mr. Catsiff's request for direct review.

#### **4. Argument**

##### **A. Standard of Review**

This Court held in *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005) that "[t]he constitutionality of a statute or ordinance is an issue of law, which we review de novo." The City therefore agrees with Mr. Catsiff that the standard of review for the pertinent legal issues is de novo. The City submits that its ordinances withstand de novo review of factual issues, but it disagrees with Mr. Catsiff's assertion that such standard applies. It additionally disputes Mr. Catsiff's attempt to thereunder re-litigate factual issues to which he stipulated in the administrative hearing and to entirely disregard the work of the Superior Court in this matter.

Respondents submit that this Court sits in the same position as the Superior Court with respect to administrative determinations made by the Walla Walla Hearing Examiner and gives deference to hearing examiner findings and regulatory interpretations. *Silverstreak, Inc. v. Labor & Indus.*, 159 Wn.2d 868, 879-80, 154 P.3d 891 (2007). As a general rule, "review is of the administrative record developed at the hearing before the hearing examiner." *Lanzce G. Douglass, Inc. v. Spokane Vly.*, 154 Wn.App. 408, 417, 225 P.3d 448, *review denied* 169 Wn.2d 1014 (2010).

Mr. Catsiff devotes much of his brief arguing that his signs are murals

as opposed to signs. He relies on declarations filed after the conclusion of the administrative proceeding which recount a mis-remembered informal conversation and which further assert biased subjective artistic reasons why the octopus signs were painted above the customer entrances to the Inland Octopus toy store. Mr. Catsiff's landlord stated in a declaration that he met with City planner, Gary Mabley, sometime in February 2010 and posed a hypothetical question whether the façade of his building could be used to paint a hunting scene. CP 748. He remembers Mr. Mabley saying that "the only restriction that would govern this sort of sign involved words." CP 748. Mr. Catsiff offers the declaration of Mr. Randall to explain how he considers what was painted to be a "visual art form known as a mural." CP 801. Mr. Catsiff argues in his own declaration that his signs are merely "murals." CP 803-04. He asserts, "[w]hile the murals at the front and rear of my shop served, in at least a broad sense, to identify that shop, they were not placed there to promote any commercial activity or transaction." CP 804.

The alleged February 2010 conversation between Mr. Catsiff's future landlord and Mr. Mabley never took place. CP 880-81. Mr. Catsiff's landlord did have an informal conversation with another planner named Jon Maland who acknowledges expressing some thoughts about what might be differences between signs and murals. CP 883, ¶¶ 1.5-1.6. However, no

definitive proposal was made, the Walla Walla Municipal Code was not consulted for guidance, no formal interpretation was requested, and Mr. Maland does not remember the conversation in the same way as Mr. Catsiff's landlord in many material respects. CP 882-83, ¶¶ 1.3-1.8.

More importantly, Mr. Catsiff admits thereafter submitting a business registration application in March 2010 which gave notice that:

- **You will need to obtain a sign permit prior to construction or installation of any exterior sign. Sidewalk signs also need prior approval.**

Ex. 15, p. 30, lines 8-22, and deposition exhibit 7; CP 644. Not only was the notice located immediately above his signature, Mr. Catsiff demonstrated by his actions a week later that he was aware of it when he filed an application for a sidewalk sign permit. CP 634-35, ¶ 1.8; CP 648; Ex. 15, p. 48, line 21 through p. 49, line 10, and deposition exhibit 14.

The Walla Walla Municipal Code contains a mechanism for someone to request a code interpretation. CP 878-79, WWMC § 20.02.090. Mr. Catsiff's landlord did not avail himself of that process. CP 883, ¶ 1.8. It has sign permit processing procedures which provide avenues for review and appeal. CP 62, WWMC § 20.204.030(A)(1); CP 884-910, WWMC §§ 20.14.010-100; CP 48-50, WWMC §§ 20.18.010-080, CP 50-54, WWMC §§ 20.38.020-080. Mr. Catsiff did not avail himself of those processes with

respect to his wall signs. CP 790, ¶ 1.3.2; CP 792, ¶ 1.4.5. The Code also provides a hearing process for parties to contest civil violation notices. CP 85-87, WWMC § 8.07.070. Mr. Catsiff stipulated in just such a proceeding that each octopus sign painted at his Inland Octopus toy store "is a wall sign as defined by Walla Walla Municipal Code sections 20.204.020 and 20.06.030." CP 790, ¶ 1.3.1; CP 791, ¶ 1.4.1. The Walla Walla Hearing Examiner found that each is a wall sign. CP 795, ¶¶ 2.2.3 & 2.2.5.

"A written stipulation signed by counsel for both parties is binding on the parties and the court." *Reilly v. State*, 18 Wn.App. 245, 253, 566 P.2d 1283 (1977); *Cook v. Vennigerholz*, 44 Wn.2d 612, 615, 269 P.2d 824 (1954). Whatever informal conversation may have taken place in February 2010, and no matter what subjective reasons were later contrived in an attempt to justify the octopus signs under the category of art, Mr. Catsiff is bound by his actions, inaction and stipulations at the administrative level.

To the extent that Mr. Catsiff is playing word games in an attempt to cleverly circumvent his stipulation, the City submits that Mr. Catsiff is not entitled to simply ignore the proceedings in Superior Court. "Ordinarily, an appellate court reviews the administrative decision on the record of the administrative tribunal, not of the superior court operating in its appellate capacity[.]" but this Court has recognized some exceptions. *Hilltop Terrace*

*Ass'n v. Island County*, 126 Wn.2d 22, 29-30, 891 P.2d 29 (1995); *see also Insurance Co. of N. Am. v. Kueckelhan*, 70 Wn.2d 822, 833-36, 425 P.2d 669 (1967). When a request for judicial review of an administrative decision "raises constitutional questions, the court may consider evidence outside the record." *Responsible Urban Growth v. Kent*, 123 Wn.2d 376, 384, 868 P.2d 861 (1994). The City agreed below that it had no objection to such procedure; provided, that it was not deprived of its ability to rely on the administrative record. CP 843. The Superior Court did herein consider evidence outside the administrative record. CP 930. In such instances, the City submits that a corollary to the exception also applies, and appellate courts consider the record and findings of the superior court. *Waste Management v. WUTC*, 123 Wn.2d 621, 633-34, 869 P.2d 1034 (1994).

The City acknowledges that the Superior Court based its findings regarding the constitutional issues on documentary evidence. It submits however that Mr. Catsiff misplaces reliance on *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 793, 791 P.2d 526 (1990) and the case that it cites, *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), to argue for de novo review of the Superior Court's findings. *Brouillet*, *Rosier*, and a case that *Rosier* cites, *Smith v. Skagit Cy.*, 75 Wn.2d 715, 453 P.2d 832 (1969), comprise a line of cases in which this Court has held that appellate courts are

in as good a position as a trial court to conduct de novo review in some documentary cases. However, this Court later explained that line of cases in *Marriage of Rideout*, 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003) in response to Sarah Rideout's contention that she was entitled to de novo review of factual findings in a documentary case:

Sara correctly observes that there are cases that stand for the proposition that appellate courts are in as good a position as trial courts to review written submissions and, thus, may generally review de novo decisions of trial courts that were based on affidavits and other documentary evidence. . . . The aforementioned cases differ from the instant in that they did not require a determination of the credibility of a party. Here, credibility is very much at issue.

We agree with the Court of Appeals that no Washington appellate court reviewing documentary records has weighed credibility. Indeed, the general rule relating to de novo review applies only when the trial court has not *seen* or heard testimony requiring it to assess the credibility of the witnesses. . . . Here, where the proceeding at the trial court turned on credibility determinations and a factual finding of bad faith, it seems entirely appropriate for a reviewing court to apply a substantial evidence standard of review.

(citations omitted). Mr. Catsiff correctly asserts that live testimony wasn't heard in this case by the Superior Court, but he cannot contend that testimony wasn't *seen* or that credibility wasn't an issue. Ex. 15; Ex. 16.

As shown by his appellate brief, Mr. Catsiff continues to argue based on self-serving declarations that his signs are murals instead of signs and art instead of commercial speech. The City took and submitted depositions in

Superior Court for the express purpose of rebutting those declarations. RP 9, lines 5-22. For example, Mr. Catsiff stated in his declaration that "[n]either mural contains the name of my shop, depicts goods sold in my shop or proposes any sort of commercial transaction." CP 804. During his deposition, however, Mr. Catsiff admitted, among other things, that his store sells "postcards that have a picture of the mural on them." Ex. 15, p. 42, lines 11-14. Mr. Catsiff made credibility an issue and continues to do so by his insistence that the Court must accept his word regarding his alleged subjective artistic reasons for having the signs despite his commercial use of them. The Superior Court did not believe Mr. Catsiff's assertion that he had no commercial purpose, noting in its letter ruling that "[t]here is no other logical purpose for the sign or the image it depicts." CP 931. It found that the signs "are used to propose commercial transactions by attracting customers to the Inland Octopus toy store. . . ." CP 937, ¶ 2.2. The City submits that Mr. Catsiff's unbelievable continuing arguments to the contrary demonstrate why the substantial evidence standard of review applies.

This Court recently confirmed that "where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate." *Dolan v. King County*, No. 82842-3, slip op. at 11, 258 P.3d 20, 27 (Wash. Sup. Ct. Aug. 18, 2011). Mr. Catsiff also

continues to devote much of his argument on appeal to examples of other alleged violations of Sign Code requirements besides his own. He offered pictures below to make his point. Ex. 5-14. Mr. Catsiff's arguments do not rise to the level of a selective enforcement claim. *See Burlington v. Kutzer*, 23 Wn.App. 677, 681-82, 597 P.2d 1387, *review denied* 92 Wn.2d 1036 (1979). Mr. Catsiff conceded through counsel below that he doesn't assert such a claim, and instead argues that the existence of the other alleged violations disproves the City's governmental interest in the visual quality of its downtown. RP 52, line 10 through RP 53, line 12. The City rebutted that contention with documents proving that the City has a demonstrable continuing regulatory concern about its visual quality, and, in particular downtown signs. CP 613-18; CP 626-32. It also submitted documentary proof that it does enforce its sign code, Ex. 17-20, and in particular its sign size requirements and Downtown Design Standards. Ex. 20, exhibit pp. 669-70. The Superior Court weighed this competing evidence and determined, "[w]hile not every alleged or perceived violation has been addressed, Plaintiff has not undermined the City's interest in regulating these signs." CP 932. It found that the City "has significant, substantial and compelling aesthetic and traffic safety interests which justify its wall sign size and height restrictions and permitting requirements." CP 938-39, ¶ 2.8. The City

submits that this is another core example where proof credibility was resolved below, and why the substantial evidence standard is appropriate.

Mr. Catsiff lastly cites *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) for the proposition that no deference is given to trial courts in free speech cases. *Hurley* repeats an appellate review standard recognized in the federal system by the Supreme Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498-511, 104 S. Ct. 1949, 80 L. Ed 2d 502 (1984) to reconcile an apparent conflict between FED. R. CIV. P. 52(a) which adopts a "clearly erroneous" standard and the obligation of appellate courts to independently review the whole record in First Amendment cases. *Bose* explains that the "independent review function is not equivalent to a "*de novo*" review. . . ." *Bose*, 466 U.S. at 514 n. 31. The sentence in *Hurley* immediately following the one quoted at p. 8 of Mr. Catsiff's brief also expressly notes that the standard does not limit deference to the trial court on matters of credibility. *Hurley*, 515 U.S. at 567.

The City agrees that this Court conducts an independent review of the record in free speech cases with respect to "crucial facts" so intermingled with the legal issue to make it necessary to analyze the facts to pass on a constitutional question. *State v. Kilburn*, 151 Wn.2d 36, 49-52, 84 P.3d 1215

(2004). "The rule of independent appellate review does not extend to factual determinations such as findings on credibility, however." *State v. Johnston*, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006). It is "not complete de novo review." *Kilburn*, 151 Wn.2d at 51.

The City therefore submits that: (1) This Court sits in the same position as the Superior Court with respect to the facts constituting Mr. Catsiff's code violations and reviews the Hearing Examiner's decision and order, CP 794-99, using a deferential standard. At the current stage of this case, though, the Hearing Examiner's findings are verities, because no error was assigned to them. *Hilltop Terrace*, 126 Wn.2d at 30. (2) The Court reviews the Superior Court's findings of facts pertaining to constitutional issues, CP 937-40, on a substantial evidence standard. (3) The Court conducts an independent review of the record with respect to the Superior Court's findings on "crucial facts" while deferring to the Superior Court on matters of credibility. (4) The Court reviews legal questions de novo.

#### **B. Burden of Proof**

The City agrees with Mr. Catsiff that the City bears the burden of justifying a restriction on speech. *Resident Action Council v. Seattle Housing Authority*, 162 Wn.2d 773, 778, 174 P.3d 84 (2008). In this case, the City acknowledges that it restricts the size and height of wall signs in its

downtown. CP 73-74, WWMC § 20.204.250(A)(4), (5) & (8); CP 57, WWMC § 20.178.110(B). It respectfully disagrees however with Mr. Catsiff's assertion that this shifts to the City the burden of disproving every other tentacle in his octopus of legal theories.

Mr. Catsiff cites *State v. Conifer Enterprises, Inc.*, 82 Wn.2d 94, 508 P.2d 149 (1973) and *Adams v. Hinkle*, 51 Wn.2d 763, 322 P.2d 844 (1958) for the proposition that an ordinance is stripped of any presumption of legality for all purposes if it touches on speech. Subsequent decisions demonstrate that Mr. Catsiff's proposition is an overstatement. In *Seattle v. Huff*, 111 Wn.2d 923, 767 P.2d 572 (1989), a Seattle ordinance was challenged on free speech grounds and as being unconstitutionally vague. This Court wrote with respect to the vagueness claim that "[a]n ordinance is presumed constitutional and the party challenging the constitutionality of the law has the burden of proving it is unconstitutionally vague beyond a reasonable doubt. . . . This presumption "should be overcome only in exceptional cases." *Huff*, 111 Wn.2d at 928-29. In *State v. Halstein*, 122 Wn.2d 109, 122-23, 857 P.2d 270 (1993), this Court confirmed that "[a]pplication of the overbreadth doctrine is strong medicine. . . , and should be employed by a court sparingly and only as a last resort. . . . If possible, a statute must be interpreted in a manner that upholds its constitutionality."

The court in *State v. Rosul*, 95 Wn.App. 175, 181-82, 974 P.2d 916 (1999), *review denied* 139 Wn.2d 1006 (1999), further explained:

A litigant charging substantial overbreadth must "demonstrate from the text of [the challenged law] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." In the First Amendment context, this requires a showing of a realistic danger that the statute will significantly compromise recognized First Amendment protections of persons not before the court.

The rules regarding application of the overbreadth doctrine are applied to ordinances as well as statutes. *See O'Day v. King County*, 109 Wn.2d 796, 802-07, 749 P.2d 142 (1988). This Court has also held in the context of protected speech/expression that the person raising a prior restraint claim "must show that the challenged regulation rises to the level of prior restraint, and thus is subject to the more protective rules against prior restraints than those against regulations affecting only the time, place, or manner of expression." *Ino Ino, Inc. v. Belleuve*, 132 Wn.2d 103, 126, 937 P.2d 154 (1997), *cert. denied* 522 U.S. 1077 (1998). The City therefore submits that *Conifer Enterprises* and *Adams* state a general principle that applies when evaluating restrictions on speech, but neither shifts Mr. Catsiff's burdens with respect to his vagueness, overbreadth, or prior restraint claims to the City.

While a party seeking to uphold a restriction on speech carries the burden of justifying it, "[a] duly enacted ordinance is presumed

constitutional, and the party challenging it must demonstrate that the ordinance is unconstitutional beyond a reasonable doubt." *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005). The City therefore acknowledges that the City bears the burden of justifying its sign size and height restrictions, but it submits Mr. Catsiff, as the party challenging the City's ordinances, bears the burden of demonstrating unconstitutionality beyond a reasonable doubt on other aspects of his claims.

**C. The size and height restrictions validly regulate the noncommunicative aspects of wall signs**

The lynchpin in Mr. Catsiff's argument is his claim that his signs are murals. From there, he asserts that his signs are art and therefore entitled to greater constitutional protection than commercial speech. Mr. Catsiff chases the issue as if it was a great white whale, but the City respectfully submits that it is really a red herring instead of a "crucial fact."

Political speech also enjoys favored status over commercial speech. *Collier v. Tacoma*, 121 Wn.2d 737, 752, 854 P.2d 1046 (1993). In *Collier*, this Court found that a limitation imposed by Tacoma on the length of time that political signs could be displayed was not adequately justified by Tacoma's interests in traffic safety and aesthetics. *Collier*, 121 Wn.2d 753-60. This Court however rejected an argument that all of Tacoma's

restrictions on political signs were therefore invalid, writing that "Tacoma's interests in aesthetics and traffic safety are sufficient to justify reasonable, content-neutral regulation of the *noncommunicative* aspects of political signs, such as size, spacing, and consent of the private property owner." *Collier*, 121 Wn.2d at 761. The Ninth Circuit similarly explained in *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 893-94 (9th Cir. 2007) that a city's interests in aesthetics and traffic safety establish a significant governmental interest sufficient to sustain sign size and height restrictions even if they are evaluated under the time, place and manner test for noncommercial speech. *See also Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 819 (6th Cir. 2005). Walla Walla's size and height restrictions regulate only the *noncommunicative* aspects of wall signs. The City therefore submits that the distinction plaintiff seeks to make between review standards by type of speech is irrelevant.

The criteria outlined by this Court in *Collier* for evaluating regulations upon the *noncommunicative* aspects of signs are virtually identical to the standards enunciated by the U.S. Supreme Court in *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S.Ct. 2038, 129 L. Ed. 2d 36 (1993):

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up

space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.

Under *Collier* and *Ladue*, restrictions upon the *noncommunicative* aspects of signs, *i.e.* the physical characteristics of signs, must be (1) content neutral, *i.e.* absent censorial purpose, (2) reasonable, and (3) supported by a legitimate regulatory interest. The City submits that this test applies, and its restrictions satisfy this test. To avoid repetition, the City addresses its governmental interests and the reasonableness of its wall sign size and height restrictions later in this brief in the context of a commercial speech analysis. For the following reasons, the City also submits that its wall sign size and height restrictions are content neutral.

- (1) The wall sign size and height restrictions are content neutral

In *Collier*, this Court explained that restrictions are content neutral if they do not regulate on the basis of viewpoint or classify speech in terms of subject matter. *Collier*, 121 Wn.2d at 748-53. Walla Walla's wall sign size and height restrictions do not limit at all what someone can say or depict in a wall sign. The requirements in the Sign Code regulate only:

4. Number of signs permitted in a CC zone:

d. Wall - number not limited; coverage limited to 25 percent.

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:

....

d. Wall signs – up to 25 percent of wall area.

....

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).)

CP 73-74, WWMC § 20.204.250. The Downtown Design Standards similarly state solely that:

Wall signs must be either painted upon the wall, mounted flat against the building, or erected against and parallel to the wall not extending out more than twelve inches (12") therefrom. Wall signs shall be located no higher than 30 feet above grade, measured from grade to the top of the sign. Wall signs may be externally illuminated provided no glare is apparent from off site. Wall signs shall not cover any architectural details of the building, and may not extend beyond the wall on which they are mounted. The maximum combined area of all wall signs per street frontage shall not exceed twenty-five percent (25%) of the wall area. No combination of sign areas of any kind shall exceed one hundred fifty (150) square feet per street frontage, excluding multiple building complexes and multiple tenant buildings.

CP 57, WWMC § 20.178.110(B). Nothing in either provision regulates viewpoint or message. To the contrary, the Sign Code expressly encourages "creative and innovative sign design." CP 59, WWMC § 20.204.010. Only size and height is limited. In addition, neither classifies speech by subject matter. Each applies to all wall signs. Wall signs are defined by the Sign

Code as "any sign attached to or painted directly on the wall, or erected against and parallel to the wall of a building, not extending more than twelve (12) inches from the wall." CP 61, WWMC § 20.204.020(A)(37). In turn, 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." CP 61, WWMC § 20.204.020(A)(27). The Downtown Design Standards utilize an identical "sign" definition. CP 43, § 20.06.030. In summary, the size and height restrictions apply to all wall signs without classification and without reference to content.

Mr. Catsiff attempts to manufacture a content problem by misreading and mixing Sign Code exemptions with wall sign requirements. For example, Mr. Catsiff points to an exemption which says that the Sign Code does not apply to "official flags," CP 63, § 20.204.050(4), and postulates that sign size and height requirements are therefore under-inclusive because someone could theoretically erect a Korean flag of unlimited size but not an oversized youth group flag. He further takes issue with a permit exemption section for certain minor uses, such as gravestones and barber poles, and temporary uses, such as construction signs and real estate signs, CP 62, § 20.204.040, and argues that such exemptions convert the entire Sign Code,

including wall sign size and height requirements, into content based regulations. The City submits that Mr. Catsiff's selectively omits pertinent provisions which disprove his attempted misuse of code exemptions.

The City acknowledges that it does not require permits for some minor uses, such as gravestones and barber poles, and temporary uses, such as construction signs and real estate signs, for which it would be overkill and nearly impossible to provide for permit processing. CP 62, § 20.204.040. However, this permit exemption section explains that "[t]hese signs are required to meet all other applicable standards of this Code." CP 62, § 20.204.040(A). The City also acknowledges that it exempts certain things from its Sign Code such as official flags and temporary holiday decorations. CP 63, § 20.204.050. The Sign Code also contains a general provision, though, that explains "[w]henver two provisions of this Code overlap or conflict with regard to the size, number or placement of a sign, the more restrictive shall apply." CP 65, § 20.204.080(A)(7). Therefore, the wall sign size and height restrictions continue to apply regardless of any of the exemptions that Mr. Catsiff says create a problem. A wall sign containing a picture of a Korean flag, a youth group flag, a barber pole, etc. would have to satisfy the same size and height requirements applicable to every other wall sign. Mr. Catsiff asks this Court to forget the actual restrictions at issue

here, look elsewhere in the Sign Code for some other alleged problem, and attribute it back to the content neutral size and height requirements despite express code provisions which prevent such manipulation. The City submits that Mr. Catsiff's beach combing method asks the Court to invert its affirmation *O'Day* that "[w]here possible and appropriate, we will strive to construe a statute to uphold its constitutionality." *O'Day*, 109 Wn.2d at 806.

The City also submits that Mr. Catsiff asks this Court to disregard another rule applicable in sign cases. If the Sign Code exemptions are determined to be problematic, "[a]s a general rule 'only the part of an enactment that is constitutionally infirm will be invalidated, leaving the rest intact.'" *Collier*, 121 Wn.2d at 761. The Sign Code ordinance included a severability clause, stating:

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed as a separate, distinct independent provision and such holding shall not affect the validity of the remaining portions hereof.

CP 99, section 2. In *McGowan v. State*, 148 Wn.2d 278, 294-97, 60 P.3d 67 (2002), this Court explained that unconstitutional and constitutional portions of a law may be separated through a severability clause unless they are so interrelated that it cannot be reasonably believed that the legislative body would have passed them without each other. As noted above, the Sign Code

size and height restrictions are not dependent on the exemptions. It is just the opposite. The wall sign size and height restrictions apply despite any exemptions. It also cannot be reasonably believed that the City would have adopted the Sign Code's wall sign size and height restrictions only if the exemptions were included, because the City in fact additionally adopted the wall sign size and height restrictions without them in its Downtown Design Standards. CP 283-88; CP 299-301. The City submits that the Sign Code exemptions don't sink other parts of the code if they are determined to be unconstitutional. They are instead severed.

Finally, even if Mr. Catsiff could somehow find a way to manipulate exemptions in the Sign Code and convert its size and height requirements into content based regulations, he cannot do the same with respect to Downtown Design Standard requirements. Mr. Catsiff's front sign was found to have violated both the size and height restrictions of the Sign Code and the Design Standards. CP 796-97, ¶ 3.4. As the Superior Court concluded, the size and height requirements in each are grammatically, functionally, and volitionally severable from one another. CP 939-40, ¶ 2.14. The signage section of the Design Standards expressly provides "[w]ith respect to the Downtown area, this section shall apply instead of sections 20.204.090 and 20.204.250 to the extent of any conflict therewith." The Design Standards

do not contain any of the exemptions that Mr. Catsiff says make the Sign Code suspect. *See* CP 54-58, WWMC §§ 20.178.010-120. The City in short submits that the size and height requirements in WWMC 20.178.110(B) remain content neutral even if WWMC 20.204.250 is found to be content based due to something found elsewhere in the Sign Code.

**D. The Inland Octopus signs are commercial speech**

While the validity of sign size and height restrictions do not turn on the classification of the speech involved, the City submits that plaintiff's signs are commercial speech. Two formulations have been recognized to distinguish between commercial and noncommercial speech.

While no definitive test has been devised to distinguish commercial from noncommercial speech, the Supreme Court has said commercial speech is "expression related solely to the economic interests of the speaker and its audience". *Central Hudson*, 447 U.S. at 561. Another definition is "speech proposing a commercial transaction", *Central Hudson*, 447 U.S. at 562. . . .

*City of Pasco v. Rhine*, 51 Wn.App. 354, 359, 753 P.2d 993 (1988); *see also* *Mattress Outlet*, 153 Wn.2d at 511. The City submits that Mr. Catsiff's octopus signs meet both formulations.

The City also submits that Mr. Catsiff's voluntary decision to identify and promote his store with images that he and Mr. Randall consider art does not change the classification of his signs from commercial to noncommercial.

In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989), a university regulation was challenged which prevented American Future Systems, Inc. (AFS) from holding product demonstrations, known as "Tupperware parties," on campus. The Supreme Court rejected argument that the educational aspects of the demonstrations removed them from the commercial speech category, writing:

There is no doubt that the AFS "Tupperware parties" the students seek to hold "propose a commercial transaction," . . . which is the test for identifying commercial speech. . . . They also touch on other subjects, however, such as how to be financially responsible and how to run an efficient home. Relying on *Riley v. National Federation of Blind of North Carolina, Inc.*, 487 U.S. 781, 796, 108 S.Ct. 2667, 2677, 101 L.Ed.2d 669 (1988), respondents contend that here pure speech and commercial speech are "inextricably intertwined," and that the entirety must therefore be classified as noncommercial. We disagree.

*Riley* involved a state-law requirement that in conducting fundraising for charitable organizations (which we have held to be fully protected speech) professional fundraisers must insert in their presentations a statement setting forth the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charities (instead of retained as commissions). In response to the State's contention that the statement was merely compelled commercial speech, we responded that, if so, it was "inextricably intertwined with otherwise fully protected speech," and that the level of First Amendment scrutiny must depend upon "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Ibid.* There, of course, the commercial speech (if it was that) was "inextricably intertwined" because the state law required it to be included. By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell

housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Including these home economics elements no more converted AFS' presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67-68, 103 S.Ct. 2875, 2880-2881, 77 L.Ed.2d 469 (1983), communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . . We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech. . . ." We discuss this case, then, on the basis that commercial speech is at issue.

*Fox*, 492 U.S. at 473-75 (citations omitted).

Mr. Catsiff named his toy store "Inland Octopus" as a counter-intuitive marketing technique. Ex. 15, p. 11, line 17 through p. 12, line 7. He designed a logo for his store that "depicts an octopus hiding behind a tree, showing an octopus that is inland." Ex. 15, p. 20, lines 6-20, and deposition exhibit 3. He displayed images of his "inland octopus" logo and rainbows on his original storefront. Ex. 15, p. 26, lines 18-22, and deposition exhibit 6. The rainbow was suggested by a vinyl decal salesman to tie the exterior of the store together with a rainbow displayed in the interior of the store. Ex. 15, p. 27, lines 11-24. Mr. Catsiff admits that he used the "inland octopus"

and rainbow images on his original storefront to convey "[t]hat it's a wonderful experience to come into my store and a wonderful place to buy toys." Ex. 15, p. 29, lines 18-19.

Mr. Catsiff began negotiating with his future landlord in January 2010 to move his store to its current location. Ex. 15, p. 19, lines 2-5. He discussed painting the façade of that location only in connection with moving his business there. Ex. 15, p. 52, lines 10-13. He proposed an addendum to his commercial lease before signing it to allow him to paint his octopus signs. Ex. 15, p. 54, line 18 through p. 55, line 7, and deposition exhibit 2. He didn't paint octopus scenes anywhere else in town other than his business location. Ex. 15, p. 52, lines 14-19. He painted the octopus scenes only over the public customer entrances to his store and did not paint any over another private entrance. Ex. 15, p. 43, line 19 through p. 44, line 12. He admits that the hiding octopus depicted in his front sign of his new location is also an octopus that is above land. Ex. 15, p. 40, lines 18-22. He admits probably saying that the front sign showing a hiding octopus under a rainbow was painted, because he "wanted the outside to show how cool the inside of the store is." Ex. 15, p. 58, lines 6-10. He admits that his new location also has an interior rainbow. Ex. 15, p. 27, line 25 through p. 28, line 3. He admits that the inside of his store is open to the public only when he is open for

business. Ex. 15, p. 47, lines 2-4. He also admits that no public activities are conducted at his store at a time that he is not also selling toys. Ex. 15, p. 47, lines 20-22.

Immediately after the front octopus sign was painted, Mr. Catsiff placed the photo ad for his store depicted below in the TIDBiTS circular:



Ex. 15, p. 55, line 10 through p. 56, line 13, and deposition exhibit 18 (the record therein contains a color image). He continues to use photographs of the front sign in his print advertisements. Ex. 15, p. 57, lines 3-9; CP 639, ¶ 1.21; CP 714-21. At his deposition, Mr. Catsiff was asked and admitted:

Q. What was your purpose for placing that ad?

A. Well, the purpose for all my advertising is to promote my business. I particularly put this one in because I was upset by the picture that the Union-Bulletin had put on the front of the newspaper which was terribly distorted, and wanted to make sure a good

depiction was out there for everyone to see.

Ex. 15, p. 56, line 21 through p. 57, line 2.

Mr. Catsiff admits selling octopus themed products in his store. In addition to postcards of the front octopus sign, Mr. Catsiff sells t-shirts, flip flops, and beach hats depicting octopi. Ex. 15, p. 42, lines 1-19. He admits posting pictures of both the front and back octopus signs on an Internet web site with a picture of octopi t-shirts for sale in his store. Ex. 15, p. 41, line 1 through p. 42, line 7, and deposition exhibit 11. His web page invitation to "[c]ome check out the new Octopus Mural!" is located directly above his sales pitch that customers can "[f]ind the best puppets, toys and sundries at Inland Octopus." Ex. 15, deposition exhibit 11, p. 558.

Mr. Catsiff places great emphasis on his use of an artist to help him paint the front sign. However, both Mr. Catsiff and Mr. Randall admit that Mr. Catsiff, alone, came up with the initial design and the principal elements of the design never changed. Ex. 15, p. 33, lines 11-20, and deposition exhibit 9; Ex. 16, p. 17, lines 7-9, p. 21, lines 2-14, and deposition exhibit 1. The rainbow image used in the sign was first suggested by a decal salesman to draw people into the store, Ex. 15, p. 27, lines 11-24, and the rainbows painted in each sign use the same colors in the same order as those in the original vinyl rainbow decals. *Compare* Ex. 15, deposition exhibit 6 *with* CP

790-91. Mr. Catsiff had to approve all changes to his original design. Ex. 16, p. 26, line 12 through p. 27, line 4. Mr. Catsiff chose to cover the entire front façade of his new location before ever meeting Mr. Randall. Ex. 15, p. 33, lines 11-20, p. 36, lines 9-21, and deposition exhibit 9.

Mr. Catsiff also places emphasis on an alleged lack of words in his front octopus sign. However, his design from the outset included addition of a "logo" to the octopus painting. Ex. 15, p. 33, line 11 through p. 34, line 15, and deposition exhibit 9. Mr. Randall admits that the front octopus sign was painted around a banner containing the "Inland Octopus" store name. Ex. 16, p. 23, line 8 through p. 24 line 10, and deposition exhibit 3. He further admits that he "filled either side to kind of give continuity to the mural above. . . ." Ex. 16, p. 24, lines 13-14.

The City moreover submits that Mr. Catsiff's reliance on the absence of sign verbiage to argue an alleged lack of commercial intent is belied by his own actions. Mr. Catsiff so closely associated his store with an image of an octopus hiding on land that he many times placed ads containing nothing other than the symbol to identify his store name. Ex. 15, p. 25, line 3 through p. 26, line 11, and deposition exhibit 5; CP 637-38, ¶ 1.17; 685-87. His admitted purpose for all of his advertising was to promote his business. Ex. 15, p. 56, line 21 through p. 57, line 2. Mr. Catsiff's use of images of octopi

hiding on land to promote the "Inland Octopus" toy store is no less effective or commercial than Nike's use of a "swoosh" in its signs to identify and promote its business. *See Eller Media Co., v. Mayor and City Council of Baltimore*, 141 Md. App. 76, 86, 784 A.2d 614 (2001).

The City submits that Mr. Catsiff's suggestion that he had noncommercial reasons for painting the signs are disingenuous. Mr. Catsiff's admitted use of similar images on the storefront of his original location to convey that his store is "wonderful place to buy toys," his admitted use of symbols alone to advertise his store, his inclusion of an addendum for murals and signs in his commercial lease, his painting of octopus signs only over the customer entrances of his commercial location, his admissions that the signs are meant to show how "cool" it is inside his store and that the only activities taking place inside his store are combined with commercial activities, his inclusion of a place for a store logo in his original sign design and the integration of such a logo into the actual painting of the front sign, his use of the signs on an Internet website to make a sales pitch to prospective customers, his sale of octopi merchandise including photo postcards of the front octopus sign, and his use of a photograph of the front sign in advertisements that he admits placing to promote his business, all disprove Mr. Catsiff's contention that the signs were painted for any other reason than

his economic interests and to propose commercial transactions.

**E. The wall sign size and height requirements satisfy the commercial speech test**

The City submits that the test outlined in *Collier* should apply to evaluate sign size and height restrictions. The City recognizes however that this Court has most recently in *Mattress Outlet* utilized the *Central Hudson* commercial speech test to evaluate a Kitsap County restriction on the use of raincoat signs. *Mattress Outlet*, 153 Wn.2d at 512. In addition, the Ninth Circuit in *Get Outdoors II* evaluated sign size and height restrictions under the federal test for time, place and manner restrictions. *Get Outdoors II*, 506 F.3d at 893. To avoid repetition, the City therefore analyzes the Walla Walla restrictions under the commercial speech test as augmented by the criteria used in *Get Outdoors II*, because the *Central Hudson* "framework for analyzing regulations of commercial speech [ ] is 'substantially similar' to the test for time, place and manner restrictions[.]" *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001). It also incorporates its analysis below of governmental interest and "fit" into its prior discussion on the *Collier* test for restrictions on the *noncommunicative* aspects of signs.

The test for commercial speech restrictions is stated in *Mattress*

*Outlet*, 153 Wn.2d at 512 as follows:

(1) whether the speech concerns a lawful activity and is not misleading, (2) whether the government's interest is substantial, (3) whether the restriction directly and materially serves the asserted interest, and (4) whether the restriction is no more extensive than necessary.

(citing and paraphrasing the test adopted in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)). The test utilized in *Get Outdoors II* similarly looks to see if a restriction serves a significant governmental interest, is tailored to serve that interest, and leaves open ample alternative channels of communication. *Get Outdoors II*, 506 F.3d at 893. The City concedes that there is nothing unlawful about selling toys or misleading about advertising a toy store called "Inland Octopus" with octopus signs. The first prong of the *Central Hudson* test is therefore not at issue.

(1) A sufficient governmental interests support the wall sign size and height restrictions

Aesthetics and traffic safety are significant interests under the First Amendment which justify sign size and height regulations. *Get Outdoors II*, 506 F.3d at 893-94; *see also Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805-07, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507-08, 510,

101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (plurality opinion); *Id.* 453 U.S. at 552 (Stevens, J., dissenting); *Id.* 453 U.S. at 559-61 (Burger, C.J., dissenting); *Id.* 453 U.S. at 570 (Rehnquist, J., dissenting).

Mr. Catsiff argues that his signs are entitled to greater protection under article 1, section 5 of the Washington State Constitution and that the City does not have a compelling interest for its sign size and height regulations. In *State v. Lotze*, 92 Wn.2d 52, 58-59, 593 P.2d 811 (1979), this Court described traffic safety and aesthetic values to be compelling state interests adequate to distinguish between commercial and noncommercial speech when regulating highway sign placement. This Court departed from *Lotze* in *Collier* to the extent that *Lotze* implied that aesthetics and traffic safety are compelling interests justifying greater restrictions on political speech than commercial speech, *Collier*, 121 Wn.2d at 756, but the Court still concluded that these interests are "sufficient" to justify regulations on the *noncommunicative* aspects of signs such as size. *Collier*, 121 Wn.2d at 761.

Mr. Catsiff attempts to distinguish authorities that hold aesthetics and traffic safety are sufficient interests to regulate sign size and height by characterizing them as billboard cases. However, *Vincent* was not a billboard case. It dealt with a prohibition against posting signs on public property, and the Supreme Court held "[a]s is true of billboards, the esthetic interests that

are implicated by temporary signs are presumptively at work in all parts of the city," and that they provided sufficiently substantial justification to ban temporary signs on public property. *Vincent*, 466 U.S. at 817. *Collier* was not a billboard case. It dealt with posting of political yard signs on private property and this Court did not draw a distinction between that situation and billboard cases when holding that aesthetics and traffic safety are sufficient interests to justify sign size regulations. *Collier*, 121 Wn.2d at 761.

The Walla Walla Sign Code contains a purpose section which states:

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.

CP 58-59, WWMC § 20.204.010. Mr. Catsiff argues that the purpose section is somehow inadequate because it doesn't use the words "aesthetics" or "traffic safety." However, the section utilizes the nomenclature of the time that it was enacted in 1991: "visual clutter," CP 104, which was understood to mean those interests. *See Vincent*, 466 U.S. 806-17. The Sign Code further manifests its interest in traffic safety in WWMC § 20.204.050(A) where it explains that it does not apply to "any on-premises sign which is not visible to motorists or pedestrians on any public right-of-way." CP 63; CP

109. This was also understood at the time to relate the ordinance to traffic safety. *See Metromedia*, 453 U.S. at 508-09. More importantly though, the City has provided a legislative history demonstrating that the wall sign size and height restrictions were adopted as part of a comprehensive plan to address aesthetics and traffic control.

Walla Walla adopted policies in 1981 to improve traffic circulation in the central business district and recognizing that the City was responsible for its visual quality. CP 344-45. The City adhered to those policies and in 1988 additionally recognized that signage needed particular attention. CP 352-60. It adopted a revitalization plan known as the "Main Street Approach" which recommended an integrated streetscape and historic restoration program that would address both. CP 447; CP 521-24. It implemented that plan by contemporaneously adopting a zoning ordinance with a Sign Code and a local improvement district ordinance to fund needed public improvements. CP 99-144. The plan controlled traffic by creating a:

downtown that is people-oriented with a historical theme around street and building enhancements. Streetscaping that controls traffic by added intersection walks, plantings, lighting, benches, trash and bike accessories in concert with historically sensitive building restoration during the coming years will offer the visitor, resident, present and future merchants a downtown that can grow and prosper in the city.

CP 447. Key to the plan was visual restoration of downtown buildings to

their original historic character. CP 357-58; CP 524. The plan advised following a building improvement guide, CP 524, which stressed the importance of a good downtown appearance, CP 565-67, and the impact that signage has on that appearance. CP 578-79.

The plan was successful, and the City undertook a second implementation phase in 2001. It designated its downtown as a sub-area, and adopted policies to participate with interest groups to further beautify the downtown, develop a sign code for that area, and improve traffic circulation. *E.g.* CP 408-11; CP 411-12, (LU-16 & LU-17); CP 414-15 (LU-40 - LU-42); CP 417 (EV-11). It relied on many of those policies in 2002 to define its "downtown" area, CP 260 and CP 272-74, and began working on "possible standards and guidelines related to such things as signage. . . ." CP 270. The City adopted its Downtown Design Standards in 2003 to build on the progress that had been made and for the express purpose of "promoting and preserving the character, qualities, and economic vitality of the Downtown. . . ." CP 283, WVMC § 20.178.010. At the time those standards were considered, the City discussed four elements that it was seeking to address: "the physical element, transportation element, housing element and economic element." CP 289.

The City has repeatedly and recently reaffirmed its continuing

regulatory interest in the visual quality of its downtown. *E.g.* CP 372 (LU-49 - LU-52); CP 391 (LU-16); CP 394 (LU-51 - LU-54); CP 401-02 (EV-11); CP 407-23; CP 428-40; CP 611-18; CP 620-32. It has demonstrated enforcement of both its wall sign size requirements and its Downtown Design Standards. *E.g.* Ex. 17-20. It submits that Mr. Catsiff's use of examples of other painted depictions in town allegedly similar to his signs is nothing more than an effort to divert attention away from the well founded revitalization voyage still underway to "the ones that got away."

The City admits that economic considerations in part underlie its aesthetic interest in downtown. CP 379 (EV-11); CP 417 (EV-11); CP 611-12; CP 623-25. It disagrees with Mr. Catsiff's attempt to portray this as a weakness. The Supreme Court has favorably recognized that esthetic interests "are both psychological and economic." *Vincent*, 466 U.S. at 817; *see also Markham Advertising Co. v. State*, 73 Wn.2d 405, 421-24, 439 P.2d 248 (1968), *appeal dismissed* 393 U.S. 316 (1969), *reh'g denied* 393 U.S. 1112 (1969). The City submits that its concerns about economic vitality and its financial investment in the visual quality of its downtown, CP 137-67, strengthens its showing of a governmental interest. Mr. Catsiff even admits that the success of the revitalization program is what drew his business downtown. Ex. 15, p. 16, lines 5-8.

(2) The wall sign size and height restrictions directly and materially serves the governmental interests

This part of the *Central Hudson* test requires a showing that "the ordinance directly and materially serves the governmental interests." *Mattress Outlet*, 153 Wn.2d at 513. The Sign Code was adopted for the "elimination of visual clutter," CP 104, WWMC § 20.204.010, and the Design Standards were adopted for "promoting and preserving" the character and qualities of Walla Walla's historic downtown. CP 283, WWMC § 20.178.010. *Prime Media*, 398 F.3d at 823-24 explained that it is neither speculation nor conjecture that larger signs create more visual blight.

The Building Improvement Guide relied upon by the City explains that signs create an individual image by calling attention to a business, but they also contribute to the overall image of a downtown. CP 578. It notes that signs must serve both purposes if a Main Street is to work together as a whole. CP 578. It also explains and graphically demonstrates how false front façades like the one where the Inland Octopus toy store relocated is an example of *insensitive change* which detracts from the historic quality of a downtown. CP 570. This is detrimental to the idea of "visual relatedness" which was a crucial goal of the integrated "Main Street" approach. CP 568. The guide demonstrates how false façades destroy continuity, "and the

character of the building group, as a whole, suffers." CP 568. The guide also graphically demonstrates how false front façades negatively dominate an historic building and block when they become a large sign. CP 570-71.

The wall sign size and height requirements immediately serve the City's interests in eliminating visual clutter and promoting and preserving the character of its downtown by reducing the number of instances where "[m]erchants try to out-shout one another with large, flashy signs" that are distracting and detrimental to the image of Main St. as a whole. CP 578. They also serve a longer term goal of the revitalization plan to encourage uncovering of buildings covered by false façades to create an atmosphere that responds to the historic character of Walla Walla. CP 521-22; CP 371 (LU-37 & LU-38). The City submits that the oversized front wall sign at the Inland Octopus toy store validates the observations of the Building Improvement Guide. It "out-shouts" everything else in the area and dominates the appearance of the block to the detriment of the historic quality that the City has tried to restore and preserve. It also provides a disincentive against restoration not only of that façade but also every other remaining false façade upon which a "big" sign might be painted.

The City submits that the legislative record in this case demonstrates that the sign size and height restrictions at issue here serve an integrated

traffic safety purpose by helping to create a "business district that will enhance both pedestrian and auto circulation into the business district and assist with the convenience of the shopper." CP 521. They do so by directly contributing to the street template's "overall design concept [ ] to maintain the open character of the street and the visual access to the building architecture." CP 522. They advance the City's revitalization plan to "generate a new 'Main Street' image and an active, pedestrian-friendly atmosphere in an historic setting." CP 429.

While the City submits that it has factually demonstrated that its wall sign size and height restrictions directly and materially serves its governmental interests, it additionally asks that this Court recognize the correlation between elimination of visual clutter through sign size/height restrictions and aesthetics/traffic safety as a matter of law. *See Metromedia*, 453 U.S. at 508-09; *Ackerley Communications of the Northwest, Inc. v. Krochalis*, 108 F.3d 1095, 1099-1100 (9th Cir. 1997); *Mattress Outlet*, 153 Wn.2d at 521 (Madsen, J., dissenting).

(3) The wall sign size and height restrictions are narrowly tailored, no more extensive than necessary, and leave open ample alternative channels of communication

With respect to this part of the tests regarding the "fit" of a restriction, this Court in *Mattress Outlet* recognized that "the means chosen need not be

the least restrictive means, the fit between the means chosen and the interests asserted must be reasonable." *Mattress Outlet*, 153 Wn.2d at 515. In *Prime Media*, the court upheld a 120 square foot restriction, explaining:

[T]he question is not whether a municipality can "explain" why a 120-square-foot limitation "detract[s] more from the aesthetics of the City than signs with smaller sign face sizes"; it is whether the regulation is "*substantially broader* than necessary to protect the City's interest in eliminating visual clutter" and advancing traffic safety. . . . ("[T]he case law requires a reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends.'" ) The City has satisfied this more modest test.

*Prime Media*, 398 F.3d at 822 (citations omitted).

The legislative history demonstrates that the City carefully considered its sign size and height restrictions. Its Sign Code was a product of its stated policy of "working with downtown businessmen to develop a workable sign code specifically for the downtown area." CP 354, policy D. A Building Improvement Guide was thereby commissioned which made recommendation that a "sign should not dominate; its shape and proportions should fit your building just as a window or door fits." CP 578. It also suggested that "[s]ome types of signs are *not* appropriate, including . . . oversized signs . . . applied over the upper facade." *Id.* The City used those considerations when choosing its sign size and height limitation in 1991, and it continues to rely on them. CP 627. The City's consideration of such issues

when developing its code, and its later action in 2003 to restore the originally adopted restrictions for the downtown area after they were inadvertently changed, CP 286, 298, and 299-300, demonstrate reasonable legislative balancing based on local study and experience which satisfies any calibration duty. *Prime Media*, 398 F.3d at 823-24.

Walla Walla's size restrictions do not ban wall signs at any location. They also do not limit the number of wall signs. CP 57, WWMC § 20.178.110(B); CP 73, WWMC § 20.204.250(A)(4), (5) & (8). They provide only that walls signs cannot be more than 30 feet high and combined sign areas cannot exceed 150 square feet in size or 25% of a wall area. *Id.* They apply per frontage, meaning that a location with two frontages may have two 150 square foot wall signs. *Id.* Mr. Catsiff's store location is an example. It is entitled to display signs in back, as well as in front, and does. As the back sign shows, the size restriction does not unreasonably prevent someone from having an easily visible octopus sign. CP 790, ¶ 1.3; CP 635, ¶ 1.9.

The evidence in this case proves that the City's wall sign size and height restrictions leave open ample alternative channels of communication. Mr. Catsiff is able to post multiple properly sized signs on site. He publishes photographs of his front sign in a local advertising circular. CP 639, ¶ 1.21; CP 714-21; Ex. 15 p. 55, line 10 through p. 57, line 9, and deposition exhibit

18. Mr. Catsiff regularly publishes advertisements in the local newspaper. CP 636-38, ¶¶ 1.15-1.19; CP 678-87; Ex. 15, p. 21, line 18 through p. 22, line 4, and deposition exhibit 4. He publishes advertisements in many other regional papers. Ex. 15, p. 22, lines 14-18. He advertises on radio and television. Ex. 15, p. 23, lines 9-14. He sells postcards depicting his front sign. Ex. 15, p. 42, lines 8-14. He prints and places hotel lobby cards. Ex. 15, p. 23, lines 15-16. He posts pictures of both signs on the Internet. CP 636, ¶ 1.11; CP 661-65; Ex. 15, p. 41, lines 1-18, and deposition exhibit 11. Multiple alternative means are available and have been actually used by Mr. Catsiff to advertise and distribute photos of his signs.

The City sign size restrictions act only to keep someone from installing a wall sign that dominates a building façade or the overall appearance of a downtown block, and they do not foreclose any other alternative channels of communication. The City submits that they "fit" and are reasonable.

Based on the analysis above and the earlier analysis herein of *Collier* and *Ladue*, the City therefore submits that its wall sign size and height restrictions satisfy (1) the criteria outlined in *Collier* to evaluate restrictions on the *noncommunicative* aspects of signs, (2) the commercial speech test restated in *Mattress Outlet*, and (3) the test for time, place and manner

restrictions utilized in *Get Outdoors II*.

**F. The wall sign size and height requirements are not unconstitutionally vague**

A party challenging the constitutionality of an ordinance has the burden of proving that it is unconstitutionally vague beyond a reasonable doubt. When an enactment is challenged on vagueness, the issue is whether there is adequate notice to citizens and adequate standards to prevent arbitrary enforcement. *Huff*, 111 Wn.2d at 928-29. In *Huff*, this Court further explained:

Strict specificity is not required; the exact point where actions cross the line into prohibited conduct need not be predicted. . . . "[I]f [persons] of ordinary intelligence can understand a penal statute, *notwithstanding some possible areas of disagreement*, it is not wanting in certainty." . . . . A statute is not unconstitutional "if the general area of conduct against which it is directed is made plain." . . . The language of a challenged statute will not be looked at in a vacuum, rather, the context of the entire statute is considered.

*Huff*, 111 Wn.2d 929 (citations omitted); *see also Seattle v. Eze*, 111 Wn.2d 22, 26-28, 759 P.2d 366 (1988).

Mr. Catsiff alleges that the City Sign Code's definition of a "sign" makes its sign size and height requirements unconstitutionally vague. However, the restrictions at issue in this case apply to a "wall signs." CP 57, WWMC § 20.178.110(B); CP 73-74, WWMC § 20.204.250(A)(4), (5) & (8). The same rules of statutory construction applicable to statutes apply to

ordinances, and they are construed as a whole to avoid strained or absurd consequences. *Everett v. O'Brien*, 31 Wn.App. 319, 321-22, 641 P.2d 714 (1982). The City therefore submits that term "sign" cannot be isolated in an attempt to manufacture ambiguity. The Sign Code defines a "wall sign" as "any sign attached to or painted directly on the wall, or erected against and parallel to the wall of a building, not extending more than twelve (12) inches from the wall." CP 61; WWMC § 20.204.020(A)(37). The Downtown Design Standards similarly provide that their size and height restrictions apply to "wall signs" painted upon, mounted flat, or erected against and parallel to a building. CP 57; WWMC § 20.178.110(B). Each, in turn, 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." CP 61, WWMC § 20.204.020(A)(27); CP 43, WWMC § 20.06.030. These definitions must be read together. The City submits that there is no danger that a regulator or citizen could mistake t-shirts or hats as surfaces to which the Walla Walla size and height requirements apply, because they are limited to wall surfaces, surfaces attached to walls, and surfaces erected against and parallel to walls.

The Sign Code and Design Standards contain specificity in four

different respects which constrain officials and 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) which is attached to, painted on, or erected against and parallel to a wall; and (3) it must also be something that "identifies, advertises and/or promotes[;]" (4) "an activity, product, service, place, business, political or social point of view, or any other thing." The fourth criteria is further limited by the doctrine of *eiusdem generis* with respect to any vagueness claim. *See State v. Talley*, 122 Wn.2d 192, 213, 858 P.2d 217 (1993). The "maxim of statutory construction, *eiusdem generis*, provides that when general words follow specific words, the general words are construed to embrace a similar subject matter." *Burns v. Seattle*, 161 Wn.2d 129, 149, 164 P.3d 475 (2007). Therefore, the reference to "any other thing" in the fourth criteria is limited to things similar to "an activity, product, service, place, business, political or social point of view."

By contrast, the definition of a "sign" contained in the Scenic Vistas Act is not nearly as specific. It defines a sign as follows:

"Sign" means any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing that is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main-traveled way of the interstate system or other state

highway.

RCW 47.42.020(10); *see also* 23 C.F.R. § 750.102(m) (an almost identical definition used in the national standards for highway beautification). This Court has commented that the term "sign" is broadly defined therein. *Lotze*, 92 Wn.2d at 55. The first criterion of the State definition is broader than Walla Walla's and applies to "any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing." It is missing anything similar to Walla Walla's second criterion requiring attachment or painting on a wall. Its third criterion is broader than Walla Walla's and applies to things that are "designed, *intended*, or used to advertise or inform." It completely lacks the specificity provided by Walla Walla's fourth criterion and is more open ended. Nonetheless, the Scenic Vistas Act has withstood every conceivable constitutional challenge including an argument that it does not provide adequate standards to regulators and a protected speech challenge. *Eg.*, *Markham*, 73 Wn.2d at 429-30; *Lotze*, 92 Wn.2d at 56-60.

"If possible, an enactment must be interpreted in a manner which upholds its constitutionality." *Tacoma v. Luvene*, 118 Wn.2d 826, 841, 827 P.2d 1374 (1992); *see also Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 611 (9th Cir. 1993). The City submits that Mr. Catsiff asks this Court

to do the opposite. He asks the Court to interpret in a way which creates ambiguity and hold Walla Walla to "impossible standards of specificity" that both the State is unable to meet in its statutes and the federal government is unable to meet in its regulations. The Walla Walla wall sign size and height regulations specify four criteria which a person of common intelligence can apply, and the City submits the general area of conduct against which it is directed is made plain.

**G. The wall sign size and height requirements are not unconstitutionally overbroad**

Mr. Catsiff argues that the wall sign size and height restrictions are overbroad, because they reach noncommercial speech as well as commercial speech. This Court has recognized that application of overbreadth doctrine is strong medicine which should be employed sparingly and only as a last resort. *Halstien*, 122 Wn.2d at 122. This Court has also further stated:

The first task in overbreadth analysis is to determine if a statute reaches constitutionally protected speech or expressive conduct. . . . If the answer is yes, then the court must examine whether the statute prohibits a "real and substantial" amount of protected conduct in contrast to the statute's plainly legitimate sweep. . . . Even if a statute is "substantially overbroad", it will not be overturned unless the court is unable to place a sufficiently limiting construction upon the statute.

*Halstein*, 122 Wn.2d at 122-23; *see also Luvane*, 118 Wn.2d at 839-40.

An ordinance is not overbroad if it only affects speech in a

constitutional manner. "For example, restrictions on the *volume* of speech do not necessarily violate the First Amendment. . . ." *Eze*, 111 Wn.2d at 31. Regulations on the physical characteristics of signs are analogous to regulations on the volume of speech. *See Ladue*, 512 U.S. at 48. A valid regulation on the physical characteristics of signs, *i.e.* their *non-communicative* aspects, is therefore not susceptible to an overbreadth charge.

Both this Court and the federal courts have held that cities may regulate the size of noncommercial signs. This Court confirmed in *Collier* that the size of political signs may be regulated. *Collier*, 121 Wn.2d at 761. The Ninth Circuit confirmed in *Get Outdoors II* that sign size and height restrictions may be regulated under even a noncommercial speech standard. *Get Outdoors II*, 506 F.3d at 893-94, n. 5. Consequently, the City submits that Mr. Catsiff has not demonstrated a defect upon which an overbreadth claim can be based and instead points to the plainly legitimate sweep of the City's ordinances.

Finally, even if Mr. Catsiff is correct that only the size and height of commercial signs may be regulated, the City submits that it is inappropriate to strike them through the overbreadth doctrine. The remedy in such instance would be for this Court to cure the City's wall sign size and height restrictions with a construction limiting them to commercial signs, like Mr.

Catsiff's signs. *O'Day*, 109 Wn.2d at 807.

**H. The City's sign permitting requirements do not constitute an unlawful prior restraint**

Mr. Catsiff argues that the requirement that he obtain sign permits is an invidious prior restraint.

As a threshold matter, the City submits that Mr. Catsiff cannot bring a prior restraint claim in this proceeding. RP 46. He was issued a business permit for relocation of his store on March 29, 2010. CP 634, ¶ 1.7. His permit contained a condition that he "[o]btain a Sign permit prior to construction or installation of any exterior signage." CP 647. The Municipal Code provided him with an administrative appeal. CP 50, ¶ WWMC § 20.18.070. That administrative appeal afforded a remedy for Mr. Catsiff to challenge whether the condition violated any constitutional right. CP 53, WWMC § 20.38.060(C)(6). From there, Mr. Catsiff had a right of judicial appeal. CP 54, WWMC § 20.38.070. Mr. Catsiff did not exhaust that administrative remedy. "If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued." *Ackerley Communications v. Seattle*, 92 Wn.2d 905, 909, 602 P.2d 1177 (1979) (quoting *Public Util. Comm'n v. United States*, 355 U.S. 534, 539-40, 78 S. Ct. 446, 2 L. Ed. 2d 470 (1958)), *cert. denied*

449 U.S. 804 (1980).

The Ninth Circuit explained the prior restraint doctrine in the context of sign permitting requirements in *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 903-04 (2007) (citations omitted) as follows:

The prior restraint doctrine requires that a licensing regime "avoid placing unbridled discretion in the hands of government officials." . . . . This requirement seeks to "alleviate the threat of content-based, discriminatory enforcement that arises where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit." . . . . To avoid impermissible discretion, an ordinance must "contain adequate standards to guide the official's decision and render it subject to judicial review."

It further explained in *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082 (9th Cir. 2006), *cert. denied* 549 U.S. 822 (2006) that additional procedural timing safeguards are required for content-based regulations, but that such additional safeguards are not needed for content neutral laws. *See also City of Mesa*, 997 F.2d at 613.

The City submits that its sign permit regulations bridle discretion even more than those found permissible in *G.K. Ltd. Travel*. Walla Walla permit officials are allowed only to look at sign type, WWMC § 20.204.250(A)(1)-(3), number of signs, WWMC § 20.204.250(A)(4), sign dimensions, WWMC § 20.204.250(A)(5), setbacks and projection beyond property lines, WWMC § 20.204.250(A)(6) & (9) and WWMC §

20.204.080(A)(3), minimum and maximum height, WWMC § 20.204.250(A)(7) & (8), lighting and glare, WWMC § 20.204.080(4) & (8), traffic vision safety requirements, WWMC § 20.204.080(A)(6) and construction/installation safety requirements, WWMC § 20.204.080(A)(1), (2) & (5). CP 64-65, WWMC § 20.204.080; CP 73-74, WWMC § 20.204.250. Depending on sign type, some additional delineated requirements may apply. CP 65-69, WWMC §§ 20.204.090-210. All however describe or incorporate specific standards. With respect to dimensional requirements, the Sign Code even instructs how to measure. CP 69-70, WWMC § 20.204.220. None of these requirements allow an official to deny a sign on the basis of content, and all of the requirements are objectively verifiable. In contrast, the provisions at issue in *G.K. Ltd. Travel* also allowed an official to make a "compatibility" determination. *G.K. Ltd. Travel*, 436 F.3d at 1083. Inclusion of even that provision did not turn the ordinance at issue in that case into an unconstitutional prior restraint, because the ordinance required the official to state reasons for any decision, and that decision was appealable to the City Council. *Id.*

Walla Walla officials are not given similar authority to make a "compatibility" determination, but their decisions are nonetheless subject to review. New permit applications are processed through what the City refers

to as Level I review. CP 62, WWMC § 20.204.030(A)(1). If a permit is denied, the specific reasons must be given for the denial with citation to the specific chapters and sections of the Municipal Code upon which the denial is based. CP 49, WWMC § 20.18.060. The decision is appealable to the City Hearing Examiner. CP 50, WWMC § 20.18.070. The City Hearing Examiner then makes an administrative appeal decision which is sent to the appellant. CP 54, WWMC § 20.38.060(E). That decision is then subject to judicial appeal. CP 54, WWMC § 20.38.070.

The record in this case demonstrates the almost non-existent discretion given to permit officials under the Walla Walla Sign Code. Mr. Catsiff did apply for a sign permit at his original location and that permit was issued. CP 634, ¶ 1.5. As shown on the face of that permit, the City official was limited to review of type, illumination, height, setback, and other areas referenced above. CP 643. The City submits that its sign permitting procedures contain adequate standards to guide decisions made by its officials and render such decisions subject to judicial review.

Mr. Catsiff cites *Collier* for the proposition that the Washington test for restrictions on speech is more demanding, and *O'Day*, 109 Wn.2d 796 and *State v. Coe*, 101 Wn.2d 364, 374-75, 679 P.2d 353 (1984) to argue that the City does not meet the more demanding Washington test for prior

restraints. However, neither *O'Day* nor *Coe* dealt with a sign permit system which allowed administrative review only of the *noncommunicative* aspects of signs, *i.e.* their physical characteristics, and the test adopted in *Collier* for evaluating those types of restrictions is identical to the federal standard stated in *Ladue*. *Compare Collier*, 121 Wn.2d at 761 *with Ladue*, 512 U.S. at 48.

The City recognizes that this Court generally stated in *O'Day* that Const., art. I § 5 categorically rules out prior restraints citing *Coe*. *O'Day*, 109 Wn.2d at 804. *Coe* however wrote that while the language of Const., art. I § 5 seems to rule out any prior restraints, this Court had expressly rejected argument that it imposed an absolute bar citing *Seattle v. Bittner*, 81 Wn.2d 747, 505 P.2d 126 (1973). *Coe*, 101 Wn.2d at 374-75. In *Bittner* this Court invalidated an ordinance requiring theater operators to obtain licenses, because regulators were given too much discretion to deny a license based on character assessments; however, the Court was careful to observe that "not all prior restraint of free expression is forbidden." *Bittner*, 81 Wn.2d at 757. This Court has similarly made general statements that not every "regulation rises to the level of a prior restraint. . . ." *Ino Ino*, 132 Wn.2d at 103.

This Court recently reconciled these general principles in *Voters Educ. Comm. v. PDC*, 161 Wn.2d 470, 493-494, 166 P.3d 1174 (2007), *cert. denied* 553 U.S. 1079 (2008). The Court there reiterated the general

principal stated in *O'Day* and explained that it relates to prior restraints which *forbid* or *prohibit* future speech. *Voters Educ. Comm.*, 161 Wn.2d at 493-94. The City submits that permitting requirements like Walla Walla's which confine regulatory approval authority to the *noncommunicative* aspects of signs, *i.e.* their physical characteristics, do not rise to the level of regulations *forbidding* or *prohibiting* future speech.

In addition, Mr. Catsiff improperly asks this Court to look only at the aesthetic and traffic safety interests that he challenges to evaluate the City's interest in its sign permit system. The City's sign permit system is not premised solely on those interests. The Sign Code is not only interested in "elimination of visual clutter," it is also concerned with "proper sign maintenance." CP 59, § 20.204.010. Together with other interests, they are identified as a unified purpose, and "[t]o accomplish this purpose, the posting, displaying, erecting, use, and maintenance of signs shall occur in accordance with. . . ." the Sign Code. *Id.* Ordinances must be reasonably construed as a whole with reference to their purpose. *HJS Dev. Inc. v. Pierce County*, 148 Wn.2d 451, 471-72, 61 P.3d 1141 (2003). The City Sign Code demonstrates that its concern with "proper sign maintenance" relates to ensuring that construction and installation comply with applicable building codes, that "supports, braces, and guys shall be maintained in a safe and

secure manner," that there is clear viewing area left for traffic "vision safety purposes." CP 64, WWMC § 20.204.080. "Government can have few obligations greater than protection of the safety of its citizens; public safety is clearly a compelling interest. . . ." *Robinson v. Seattle*, 102 Wn.App. 795, 823, 10 P.3d 452 (2000). The City submits that the compelling interest behind its permit system is not diluted or diminished by the fact that other interests also support permit requirements.

Finally, even if it is determined that sign permits may not be required, the City submits that those provisions would be severable and wall sign size and height restrictions would continue to apply. CP 99, section 2; *see Collier*, 121 Wn.2d at 761. To avoid repetition, the City refers the Court largely to its earlier discussion on severability. *See also JJR Inc. v. Seattle*, 126 Wn.2d 1, 10, 891 P.2d 720 (1995).

The City additionally refers to *Valley Outdoor, Inc. v. County of Riverside*, 337 F.3d 1111, 1114-15 (9th Cir. 2003), *cert. denied* 540 U.S. 1111 (2004) in which the court held that sign size and height restrictions could be separated from other invalid aspects of a sign ordinance where they were self contained and functioned independently. The wall sign size and height restrictions in the Downtown Design Standards are entirely self contained and can function without any part of the Sign Code. The design

standards fully describe their own size and height restrictions, provide that they supersede Sign Code provisions to the extent that there is any conflict, and rely on a separate definition section. CP 57-58, WWMC § 20.178.110; CP 26-45, WWMC § 20.06.030. Mr. Catsiff's front sign violates both the size and height requirements of the Sign Code and the size and height requirements of the Downtown Design Standards. CP 796-97, ¶ 3.4. The City submits that no matter what problems may be found in the Sign Code, the front octopus sign cannot hide from the size and height requirements in the design standards.

**I. Mr. Catsiff is not entitled to attorney fees**

Mr. Catsiff claims entitlement to attorney fees under 42 U.S.C. § 1988. That statute provides in proceedings brought to vindicate civil rights that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). This Court has held under the statute that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Parmelee v. O'Neel*, 168 Wn.2d 515, 522, 229 P.3d 723 (2010) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S.Ct. 566, 121 L. Ed. 2d 494 (1992)). This Court has additionally

recognized that "even if a plaintiff is a prevailing party, he may not be entitled to attorney fees where the plaintiff gained only limited success." *Parmelee*, 168 Wn.2d at 524.

The City submits that Mr. Catsiff's success in this action must be measured by whether or not the City's wall sign size and height restrictions are upheld or invalidated. Mr. Catsiff was assessed a \$100 fine for failing to get a right of way permit before using a City sidewalk as a staging area to paint his front sign. CP 797, ¶ 4.4. He assigned no error to that finding and has presented no argument why a right-of-way permit requirement would be unconstitutional. That fine should therefore be upheld regardless of how the rest of the case is decided. Mr. Catsiff was assessed a \$100 fine for failing to first obtain a sign permit before painting the back sign and a \$100 fine for failing to first obtain a sign permit before painting the front sign. CP 797, ¶¶ 4.2 & 4.3. He has challenged the City's permit system as being an alleged unlawful prior restraint, but all that is at issue with respect to that claim is a combined \$200 fine. In contrast, Mr. Catsiff was fined \$100 per day for his front sign's continuing violation of the City's wall sign size and height requirements, CP 797-98, ¶ 4.5, and ordered to take corrective action. CP 798, ¶ 4.6. Those restrictions lie at the heart of his complaint herein and constitute the only material part of his claims. Even if he was successful in

convincing this Court to invalidate a part of the City's Sign Code, such success could only be considered limited if Mr. Catsiff still was required to comply with the wall sign size and height restrictions.

The City submits that Mr. Catsiff should not prevail on any part of his claims. It also submits however that Mr. Catsiff should not be considered a prevailing party entitled to attorney fees under 42 U.S.C. § 1988 unless he defeats the wall size and height restrictions in both WWMC § 20.178.110(B) and WWMC § 20.204.250(A)(4), (5) & (8). CP 57; CP 73-74.

**5. Conclusion**

The City asks the Court to affirm the Hearing Examiner Decision and Order. CP 794-99. The City also asks the Court to affirm the Findings & Conclusions and Judgment of the Superior Court. CP 936-44.

DATED September 14, 2011



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