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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

KETCHIKAN GATEWAY BOROUGH,

Plaintiff,

vs.

Robert and Leta Trask, John
Doe and Jane Doe

Defendants.

FILED in the Trial Courts State of Alaska
First Judicial District at Ketchikan

SEP 18 2007

Clerk of the Trial Courts

By _____ Deputy

Case No. 1KE-07- 437 CI

COMPLAINT TO ENJOIN SIGN CODE VIOLATION

COMES NOW Plaintiff, KETCHIKAN GATEWAY BOROUGH, and
alleges against the Defendant as follows:

(1) At all times mentioned herein, Plaintiff,
hereinafter referred to as "Borough", was and now is a second
class borough duly organized and existing under and by virtue of
the laws of the State of Alaska.

(2) At all times mentioned herein, the Defendants
Robert and Leta Trask were the owners of a parcel of improved
real property located in the Ketchikan Gateway Borough in the
First Judicial District in the State of Alaska. Plaintiff is
informed and believes that Defendants Robert and Leta Trask are
residents of the State of Oregon.

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2 (3) Plaintiff is informed and believes that the
3 Defendants Robert and Leta Trask are the owners of record of
4 that certain parcel of real property, hereinafter referred to as
5 "the subject property," located within the Ketchikan Gateway
6 Borough generally identified as 713/715 Hill Road, Ketchikan,
7 Alaska, and more particularly described as follows:
8

9 USS 1587, Lot 60, 713/715 Hill Road
10

11 (4) Plaintiff is informed and believes that
12 Defendants have general control over the subject property.

13 (5) Defendants John and Jane Doe are residents of the
14 subject property.

15 (6) Plaintiff is informed and believes that the
16 Defendants Robert and Leta Trask have installed, and that all
17 defendants maintain, a roof sign in violation of KGB Code
18 60.10.090(A)(8) on the subject property.

19 (7) Plaintiff Borough by law is the designated
20 planning and zoning authority for the Ketchikan Gateway Borough
21 and is authorized and required by law to adopt, administer, and
22 enforce all planning and zoning regulations within the Ketchikan
23 Gateway Borough.

24 (8) On or about August 7, 1967, in the exercise of
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the planning, zoning and other police powers vested in the Borough by the Alaska Constitution and the laws of the State of Alaska, and to preserve and promote the public health, safety and general welfare of the Ketchikan Gateway Borough, Plaintiff Borough duly enacted a comprehensive zoning ordinance now set forth and designated as Title 60 of the Ketchikan Gateway Borough Code of Ordinances, hereinafter referred to as "KGB Code," which ordinance divided the Ketchikan Gateway Borough into designated zoning districts according to the location of the permitted and restricted uses of private property deemed to best regulate and restrict use of such property, including the property owned by Defendants and depicted and described herein.

(9) Said Title 60 of the KGB Code includes limitations on the display and use of signs.

(10) In November 2004 the provisions of KGB Code 60.10.090 were amended to include, *inter alia*, KGB Code 60.10.090(A)(8) which prohibits the display of signs using words or phrases painted directly on the roof surface.

(11) Said ordinance, and KGB Code Title 60, as amended, at all times mentioned herein was and now is in full force and effect.

(12) Subsequent to the effective date of the amendments to KGB Code 60.10.090(A)(8) defendants did not have

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1
2 a roof mounted sign on the premises at 713/715 Hill Road. More
3 recently, in 2007, defendants painted or caused to be painted
4 words and phrases directly on the roof surface at 713/715 Hill
5 Road in violation of KGB Code 60.10.090(A) (8). A photograph of
6 said sign is appended to this complaint as Attachment 1, and is
7 incorporated herein by reference.

8
9 (13) Ketchikan Gateway Borough Code Section 60.10.090
10 leaves available alternate means of communication allowing
11 display of signs expressing views on any issue, regardless of
12 content, up to 16 square feet on residential property without a
13 permit for up to 60 days in each year.

14 (14) The subject property and all improvements thereon
15 were and are now, and at all times mentioned herein, located in
16 the medium density residential district pursuant to KGB Code §
17 60.10.040.

18 (15) That on several occasions, including but not limited
19 to each day from July 10, 2007, to the date of this complaint,
20 Defendants have violated the above-referenced ordinances by
21 maintaining a prohibited roof sign on the subject property
22 despite repeated and written requests by Plaintiff that the sign
23 be removed and the violation abated.

24 (16) Said actions and conduct in relation to the subject
25 property are in violation of KGB Code §§ 60.10.090(A) (8) and
26

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1
2 constitute a public nuisance per se, as declared to be such by
3 KGB Code § 60.10.105(D).

4 (17) The Defendants threaten to and, unless restrained by
5 this court and ordered to abate same, will continue to use,
6 occupy and maintain the violation on the subject property all to
7 the irreparable injury of Plaintiff and the public.

8 (18) Plaintiff is entitled to a preliminary and permanent
9 injunction enjoining the wrongful and illegal acts of said
10 Defendants and the illegal and wrongful use of the subject
11 property herein alleged, as expressly authorized in KGB Code §
12 60.10.105, AS 09.40.230, and as otherwise provided by law.

13 (19) Plaintiff has no adequate remedy at law.
14

15 **WHEREFORE, PLAINTIFF PRAYS FOR JUDGMENT AGAINST DEFENDANT**

16 **AS FOLLOWS:**

17 (1) For injunctive relief prohibiting Defendants and their
18 agents, servants, and employees, and all persons acting for,
19 with their consent, or in concert with them or for them from
20 maintaining or using the subject property in violation of KGB
21 Code § 60.10.090(A)(8), and ordering abatement of any present
22 violations;

23 (2) Imposition of a civil penalty in the amount of \$200.00
24 as a penalty for the violation under KGB Code § 60.10.105(D);
25
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(3) For Plaintiff's costs and attorney's fees herein; and
(4) For such further and additional relief as the court
may allow.

RESPECTFULLY SUBMITTED at Ketchikan, Alaska this 18th
of September, 2007.

KETCHIKAN GATEWAY BOROUGH
Plaintiff

By: 
Scott A. Brandt-Erichsen
Borough Attorney
Attorney for Defendant
Alaska Bar No. 8811175

VERIFICATION

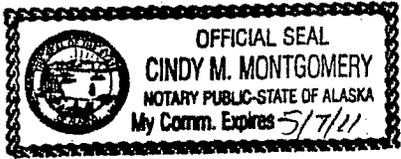
I, Jonathan Lappin after being duly sworn, hereby declare
and say: that I am the duly appointed Acting Code Administrator
for the Ketchikan Gateway Borough, Plaintiff, in the above-
entitled action, and make this verification for and on behalf of
said Plaintiff, that I have read the foregoing Complaint to
Enjoin Zoning Violation, and know the contents thereof, and I
declare under penalty of perjury that the same is true of my own
knowledge except as to those matters which are therein alleged
upon information and belief, and those matters I believe them to
be true and am competent to testify thereto.


Jonathan Lappin
Acting Code Administrator

WITNESS my hand and official seal the day and year in
this certificate first above written.

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Cindy M. Montgomery
NOTARY PUBLIC FOR ALASKA
My Commission Expires: 5/7/11

(Seal)

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COMPLAINT TO ENJOIN ZONING
VIOLATION
1KE-07-_____ CI

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DO UNTO OTHERS AS YOU WOULD BE
BY YOUR DEEDS YOU ARE KNOWN
BY LOVE YOUR NEIGHBOR

YOU'RE
WELCOME

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NEW T

OCT 12 2007

of the Trial Court

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

KETCHIKAN GATEWAY BOROUGH,

Plaintiff,

vs.

ROBERT AND LETA TRASK, JOHN DOE,
AND JANE DOE,

Defendants.

Case No.: 1KE-07-437CI

ANSWER OF DEFENDANT LETA TRASK

COMES NOW Defendant, Leta Trask (hereinafter "Defendant"), and responds as follows:

1.

Defendant lacks sufficient knowledge and/or information to admit or deny paragraph 1.

2.

Defendant admits Leta Trask owns a parcel of improved real property located in the city of Ketchikan in the state of Alaska. Defendant further admits Leta Trask is a resident of the state of Oregon. Defendant lacks sufficient information to admit or deny the remainder of paragraph

2.

3.

Defendant admits Leta Trask is the owner of record of a parcel of improved real property generally identified as 713/715 Hill Rd. in Ketchikan, Alaska (hereinafter "Property").

Defendant lacks sufficient information to admit or deny the remainder of paragraph 3.

4.

Defendant Leta Trask admits she has control over the Property to the extent she is a co-owner of the Property and it is rented to tenants. Defendant denies the remainder of paragraph 4.

5.

Defendant lacks sufficient information to admit or deny paragraph 5.

6.

Defendant denies paragraph 6.

7.

Defendant lacks sufficient information to admit or deny paragraphs 7-11.

8.

Defendant denies paragraph 12.

9.

Defendant lacks sufficient information to admit or deny paragraphs 13-14.

10.

Defendant denies paragraphs 15-19.

DEFENDANT LETA TRASK'S FIRST AFFIRMATIVE DEFENSE

11.

(RES JUDICATA)

The court has already ruled the language on Defendant's roof does not violate the law in Lybrand v. Trask Superior Court No. 1KE-98-169 CI and Supreme Court No. S-9510.

///

///

///

DEFENDANT LETA TRASK'S SECOND AFFIRMATIVE DEFENSE

12.

(COLLATERAL ESTOPPEL)

The court has already ruled the language on Defendant's roof does not violate the law in Lybrand v. Trask Superior Court No. 1KE-98-169 CI and Supreme Court No. S-9510.

DEFENDANT LETA TRASK'S THIRD AFFIRMATIVE DEFENSE

13.

(UNCONSTITUTIONAL)

Ketchikan Gateway Borough Code 60.10.090 and/or Ordinance 132 8A is a violation of the Alaska Constitution.

DEFENDANT LETA TRASK'S FOURTH AFFIRMATIVE DEFENSE

14.

(UNCONSTITUTIONAL)

Ketchikan Gateway Borough Code 60.10.090 and/or Ordinance 132 8A violates the First Amendment of the United States Constitution.

DEFENDANT LETA TRASK'S FIFTH AFFIRMATIVE DEFENSE

15.

(STATUTE OF LIMITATIONS)

Defendant failed to file suit in the time frame required by law.

///

///

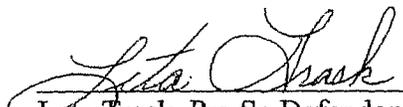
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1 3) Defendant be awarded her costs and disbursements incurred herein; and

2 4) Defendant be awarded such further and additional relief as the court may allow.

3 Dated this 9th day of October, 2007.

4 
5 _____
6 Leta Trask, Pro Se Defendant

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1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT KETCHIKAN

3 KETCHIKAN GATEWAY BOROUGH,)
4)

5 Plaintiff,)
6)

7 vs.)
8)

9 LETA TRASK,)
10)

11 Defendant.)
12)

Case No. IKE-07-437 CI

13 LETA TRASK,)
14)

15 Plaintiff/Counterclaimant,)
16)

17 vs.)
18)

19 KETCHIKAN GATEWAY BOROUGH,)
20)

21 Defendant.)
22)

FILED in the Trial Courts State of Alaska
First Judicial District at Ketchikan
MAR 28 2008
Clerk of the Trial Courts
By _____ Deputy

23 AMENDED ANSWER

24 COMES NOW Defendant Leta Trask, by and through counsel, Amanda
25 Skiles of Schulz & Skiles, and answers Plaintiff's Complaint to the extent that
26 allegations are directed at her. To the extent the allegations are directed at other
27 potential defendants, including, but not limited to, Robert Trask, such allegations
28 are not answered.

29 1. The statements in this paragraph are conclusions of law rather than
allegations of fact, and no response is required. To the extent any response is
required, admitted.

KGB v. Trask, IKE-07-437 CI
Amended Answer and Counterclaim
Page 1 of 13

1 2. Admitted with regard to the statement that Leta Trask is the owner of a
2 parcel of improved real property located in the Ketchikan Gateway Borough in the
3 First Judicial District in the State of Alaska. Admitted with regard to the statement
4 that Leta Trask is a resident of the State of Oregon.
5

6 3. Admitted with regard to the statement that Leta Trask is the owner of record
7 of a parcel of improved property generally identified as 713/715 Hill Road in
8 Ketchikan, Alaska, more particularly described as USS 1587, Lot 60, 713/715 Hill
9 Road.
10

11 4. Admitted with regard to the statement that Leta Trask has general control
12 over the subject property.
13

14 5. Paragraph 5 is not directed at Defendant Leta Trask. Therefore, it is not
15 answered.
16

17 6. The statements in this paragraph are conclusions of law rather than
18 allegations of fact, and no response is required. To the extent any response is
19 required, denied.
20

21 7. The statements in this paragraph are conclusions of law rather than
22 allegations of fact, and no response is required. To the extent a response is
23 required, admitted.
24

25 8. The statements in this paragraph are conclusions of law rather than
26 allegations of fact, and no response is required. To the extent a response is
27 required, admitted.
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9. Admitted.

10. Admitted.

11. The statements in this paragraph are conclusions of law rather than allegations of fact, and no response is required. To the extent any response is required, admitted.

12. The statements in this paragraph are conclusions of law rather than allegations of fact, and no response is required. To the extent any response is required, denied.

13. The statements in this paragraph are conclusions of law rather than allegations of fact, and no response is required. To the extent any response is required, denied.

14. The statements in this paragraph are conclusions of law rather than allegations of fact and no response is required. To the extent any response is required, admitted.

15. The statements in this paragraph are conclusions of law rather than allegations of fact and no response is required. To the extent any response is required, denied.

16. The statements in this paragraph are conclusions of law rather than allegations of fact and no response is required. To the extent any response is required, denied.

1 17. The statements in this paragraph are conclusions of law rather than
2 allegations of fact and no response is required. To the extent any response is
3 required, denied.
4

5 18. The statements in this paragraph are conclusions of law rather than
6 allegations of fact and no response is required. To the extent any response is
7 required, denied.
8

9 19. The statements in this paragraph are conclusions of law rather than
10 allegations of fact and no response is required. To the extent any response is
11 required, denied.
12

13 **AFFIRMATIVE DEFENSES**

14 WHEREFORE having answered Plaintiff's Complaint, Defendant Leta
15 Trask asserts the following affirmative defenses:
16

17 20. Plaintiff has failed to state one or more claims upon which relief may be
18 granted.
19

20 21. §§ 60.10.090(A) & (B) of the Ketchikan Gateway Borough Code of
21 Ordinances (hereinafter referred to as "KGB Code") violate Leta Trask's right to
22 freedom of speech guaranteed by Article I § 5 of the Alaska Constitution
23

24 22. KGB Code §§ 60.10.090(A) & (B) violate Leta Trask's right to freedom of
25 speech guaranteed by the First and Fourteenth Amendments of the United States
26 Constitution.
27

- 1 23. KGB Code §§ 60.10.090(A) & (B) violate Leta Trask's right to freedom of
- 2 religion guaranteed by Article I § 4 of the Alaska Constitution.
- 3
- 4 24. KGB Code §§ 60.10.090(A) & (B) violate Leta Trask's right to freedom of
- 5 religion guaranteed by the First and Fourteenth Amendments of the United States
- 6 Constitution.
- 7
- 8 25. KGB Code §§ 60.10.090(A) & (B) violate Leta Trask's due process rights
- 9 guaranteed by Article I § 7 of the Alaska Constitution.
- 10
- 11 26. KGB Code §§ 60.10.090(A) & (B) violate Leta Trask's due process rights
- 12 guaranteed by the Fifth and Fourteenth Amendments of the United States
- 13 Constitution.
- 14
- 15 27. KGB Code §§ 60.10.090(A) & (B) violate Leta Trask's right to equal
- 16 protection guaranteed by Article I § 1 of the Alaska Constitution.
- 17
- 18 28. KGB Code §§ 60.10.090(A) & (B) violate Leta Trask's right to equal
- 19 protection guaranteed by the Fifth and Fourteenth Amendments to the United States
- 20 Constitution.
- 21
- 22 29. Statute of Limitations: Plaintiff has failed to file suit in the time frame
- 23 required by law.
- 24
- 25 30. Res Judicata.
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- 27 31. Estoppel.
- 28
- 29 32. Waiver.

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33. Defendant Leta Trask reserves the right to assert any additional affirmative defenses which may be revealed during investigation of Plaintiff's claims, during discovery, or otherwise, in this litigation.

COUNTERCLAIM

COMES NOW Leta Trask, and alleges against the Ketchikan Gateway Borough as follows:

34. Counterclaimant Leta Trask was at all times relevant to this action a resident of the State of Oregon.

35. Counterclaimant Leta Trask was at all times relevant to this action an owner of record of a parcel of improved real property located in the Ketchikan Gateway Borough in the First Judicial District in the State of Alaska, more particularly described as USS 1587, Lot 60, 713/715 Hill Road.

36. On information and belief, Defendant Ketchikan Gateway Borough is a general law municipality and borough of the second class organized pursuant to the laws of the State of Alaska.

37. Counterclaimant Leta Trask's claims are in part based upon 42 U.S.C. § 1983, which provides a means to redress the deprivation under the color of state law, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

1 38. Claims under 42 U.S.C. § 1983 may be brought in state or federal court.

2 39. On information and belief, Defendant Ketchikan Gateway Borough, by law,
3 is designated the planning and zoning authority for the Ketchikan Gateway Borough
4 and is authorized by law to adopt, administer, and enforce all planning and zoning
5 regulations within the Ketchikan Gateway Borough.
6

7 40. On information and belief, on or about August 7, 1967, Plaintiff enacted a
8 zoning ordinance, now set forth and designated as Title 60 of the Ketchikan
9 Gateway Borough Code of Ordinances.
10

11 41. Title 60 of the KGB Code includes limitations on the display and use of
12 signs.
13

14 42. On information and belief, in November 2004 the provisions of KGB Code §
15 60.10.090 were amended.
16

17 43. On information and belief, in November 2004, the provisions of KGB Code
18 § 60.10.140 were amended.
19

20 44. In November 2004, the provisions of KBG Code § 60.10.090 were amended
21 to add among other provisions, 60.10.090(A)(8), which prohibits roof-mounted
22 signs, including any signs painted on the roof surface, but excepting those mounted
23 on a marquee or canopy.
24

25 45. KGB Code § 60.10.090(A) sets forth the general requirements for the display
26 of signs.
27

1 46. KGB Code § 60.10.090(B) sets forth which signs are permitted in residential
2 zones.

3
4 47. KGB Code § 60.10.090(A)(9) allows for "political signs" up to sixteen
5 square feet on residential property without a permit, for up to a period of 60 days
6 within one calendar year if the sign is not related to a specific election.

7
8 48. KGB Code § 60.10.090 does not provide a time limit in which the
9 administrative official must deny or grant a permit.

10 49. The speech at issue in this matter is painted directly upon the roof of the
11 aforementioned property owned by Counterclaimant Leta Trask.

12
13 50. The aforementioned property owned by Counterclaimant Leta Trask is
14 located in the medium density residential district pursuant to KGB Code §
15 60.10.040.

16
17 51. At all times relevant to this action, either words or figures have been painted
18 on the roof of the aforementioned property, including, but not limited to, phrases,
19 hearts, and a cross.

20
21 52. Ketchikan Gateway Borough has filed suit against Leta Trask alleging a
22 violation of KGB Code § 60.10.090(A)(8), and seeking injunctive relief and a civil
23 penalty.

24
25 53. The First Amendment to the Constitution of the United States provides:
26 "Congress shall make no law respecting an establishment of religion, or prohibiting
27 the free exercise thereof; or abridging the freedom of speech, or of the press; or the
28

1 right of the people peaceably to assemble, and to petition the Government for a
2 redress of grievances.”

3
4 54. The Fifth Amendment to the Constitution of the United States provides that
5 no person shall be deprived of life, liberty, or property, without due process of law.

6
7 55. The First and Fifth Amendments to the Constitution of the United States are
8 made applicable to the states by and through the Fourteenth Amendment to the
9 Constitution of the United States.

10
11 56. The Fourteenth Amendment to the Constitution of the United States provides
12 that no state shall deprive any person of life, liberty, or property without due
13 process of law or deny any person equal protection of the laws.

14
15 57. Article I § 5 of the Alaska Constitution provides that, “Every person may
16 freely speak, write, and publish on all subjects, being responsible for the abuse of
17 that right.”

18
19 58. Article I § 4 of the Alaska Constitution provides that, “No law shall be made
20 respecting an establishment of religion, or prohibiting the free exercise thereof.”

21
22 59. Article I § 7 of the Alaska Constitution provides in part that, “No person
23 shall be deprived of life, liberty, or property, without due process of law.”

24
25 60. Article 1 § 1 of the Alaska Constitution provides that, “This constitution is
26 dedicated to the principles that all persons have a natural right to life, liberty, the
27 pursuit of happiness, and the enjoyment of the rewards of their own industry; that
28 all persons are equal and entitled to equal rights, opportunities, and protection under

1 the law; and that all persons have corresponding obligations to the people and to the
2 State.”

3
4 61. As a result of the violations to her constitutional rights guaranteed by the
5 Constitution of the United States and the Alaska Constitution, Counterclaimant Leta
6 Trask has suffered damages, including, but not limited to, mental and emotional
7 distress, loss of life's enjoyment, attorneys' fees, and impairment of reputation, in
8 amounts to be proven at trial.
9

10 **CLAIMS FOR RELIEF**

11 **COUNT I: FIRST, FIFTH, & FOURTEENTH AMENDMENTS**
12 **AND 42 USC §1983**

13
14 62. Counterclaimant Leta Trask hereby re-alleges all preceding paragraphs.

15 63. KGB Code § 60.10.090, including, but not limited to, §§ 60.10.090(A) &
16 (B), violates the First and Fourteenth Amendments on its face and as applied
17 because it creates an effective ban on constitutionally protected speech.
18

19 64. KGB Code § 60.10.090, including, but not limited to, §§ 60.10.090(A) &
20 (B), violates the First and Fourteenth Amendments because it is not the least
21 restrictive means of accomplishing any compelling governmental purpose.
22

23 65. KGB Code § 60.10.090, including, but not limited to, §§ 60.10.090(A) &
24 (B), violates the First, Fifth, and Fourteenth Amendments because it is substantially
25 overbroad.
26

1 66. KGB Code § 60.10.090, including, but not limited to, §§ 60.10.090 (A) &
2 (B), violates the First, Fifth, and Fourteenth Amendments because it is void-for-
3 vagueness.
4

5 67. KGB Code § 60.10.090 violates the First and Fourteenth Amendments
6 because it is an unlawful prior restraint on free speech.
7

8 68. KGB Code § 60.10.090, including, but not limited to, §§ 60.10.090(A) & (B)
9 violates Leta Trask's right to equal protection guaranteed by the Fifth and
10 Fourteenth Amendments Leta Trask's right to equal protection as it provides greater
11 protection to commercial speech than it does to non-commercial speech.
12

13 69. Leta Trask's right to equal protection guaranteed by the Fifth and Fourteenth
14 Amendments is violated by Ketchikan Gateway Borough's selective enforcement of
15 KGB Code § 60.10.090(A)(8).
16

17 70. By enforcing KGB Code §§ 60.10.090 (A) & (B), Ketchikan Gateway
18 Borough, acting under the color of state law, deprived and is depriving, Leta Trask
19 of her rights guaranteed and protected by the United States Constitution.
20

21 71. Defendant Ketchikan Gateway Borbough is liable for any such actions which
22 violate Leta Trask's constitutional rights.
23

24 COUNT II: Alaska Constitution Article I §§ 1, 4, 5, & 7

25 72. Counterclaimant re-alleges and incorporates all preceding paragraphs.
26
27
28
29

1 73. By enforcing KGB Code §§ 60.10.090(A) & (B), Ketchikan Gateway
2 Borough deprived, and is depriving, Leta Trask of her rights guaranteed and
3 protected by the Alaska Constitution.
4

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Leta Trask as Defendant and Counterclaimant requests that
7 this Honorable Court:
8

- 9 A. Award declaratory relief asserting that §§ 60.10.090(A) & (B) of the KGB
10 Code are unconstitutional.
11
12 B. Enter a permanent injunction prohibiting the Ketchikan Gateway Borough
13 from enforcing §§ 60.10.090(A) & (B) of the KGB Code
14
15 C. Award compensatory damages for deprivation of Leta Trask's constitutional
16 rights guaranteed by the Constitution of the United States and the Alaska
17 Constitution.
18
19 D. Award Defendant Leta Trask actual attorneys fees and costs in accordance
20 with 42 U.S.C. § 1988, in prosecuting this action.
21
22 E. Find Leta Trask a public interest litigant entitled to an award of actual
23 attorneys' fees and costs.
24
25 F. Deny the relief sought by Ketchikan Gateway Borough in its Complaint.
26
27 G. Award such other and further relief as it deems just and proper.

28 Dated this 28th day of March, 2008.

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SCHULZ & SKILES

By: *Amanda Skiles*
Amanda M. Skiles
Attorney for Leta Trask
AK Bar No. 0206025

This is to certify that a true and correct copy of the foregoing is being delivered via court tray to the Ketchikan Gateway Borough Attorney.

Date: 3/28/08
By: *Amanda Skiles*

SCHULZ AND SKILES, Attorneys at Law
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Ph: (907) 225-9401 Fax: (907) 225-5513

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT KETCHIKAN

3
4 KETCHIKAN GATEWAY BOROUGH,)
5)
6 Plaintiff,)
7)
8 v.)
9)
10 LETA TRASK, JOHN DOE, AND)
11 JANE DOE,)
12 Defendants.)

Filed in the Trial Courts
STATE OF ALASKA, FIRST DISTRICT
at Ketchikan

MAY 23 2008

Clerk of the Trial Courts
By: SMY Deputy

Case No. 1KE-07-437 CI

11 MEMORANDUM AND ORDER

12 The Borough moves to dismiss Ms. Trask's counterclaim. She opposes the
13 motion. The Borough's motion is, for the following reasons, granted in part and denied in part.

14 I. FACTS

15 a. Complaint

16 The Borough's verified Complaint alleges that:

- 17
- 18 1. Defendants own the property located at 713/715 Hill Road in Ketchikan;
 - 19 2. Defendants have installed a roof sign in violation of KGB Code 60.10.090(A)(8);
 - 20 3. The Ordinance is part of Title 60 which was enacted pursuant to KGB's
21 planning, zoning, and other police powers vested in the Borough by the
22 Alaska Constitution and State statutes. Title 60 divided the Ketchikan
23 Gateway Borough into designated zoning districts. Title 60 includes
24 limitations on the display and use of signs;
 - 25 4. KGB Code 60.10.090 was amended in 2004 to include § 60.10.090(A)(8),
which prohibits signs using words or phrases painted directly on the roof
surface;

MEMORANDUM AND ORDER

KGB v. Trask et al., Case No. 1KE-07-427 CI

Page 1 of 7

28
Alaska Court System

- 1 5. In 2007, Defendants caused words and phrases to be painted on the roof of
2 the residence at 713/715 Hill Road. A photograph is attached;
- 3 6. The residence is located in a medium density residential district under
4 KGB Code § 60.10.040;
- 5 7. The sign is a public nuisance per se under KGB Code § 60.10.105(D); and
- 6 8. Defendants have refused to remove the sign despite repeated requests from
7 the Borough that they do so.

8 **b. Amended Answer**

9 Ms. Trask,¹ in her Amended Answer:

- 10 1. Admits that she owns the property and residence;
- 11 2. Denies that the roof of the residence violates KGB § 60.10.090(A)(8);
- 12 3. Admits the allegations concerning the enactment of Title 60 and the 2004
13 amendment;
- 14 4. Denies that there was no sign on the roof of the residence at the time of the
15 2004 amendment and that such a sign was put in place in 2007;
- 16 5. Admits that the property is zoned medium density residential.

17 Ms. Trask's Amended Answer sets forth several affirmative defenses, including
18 claims that KGB Code §§ 60.10.90(A) & (B):

- 19 1. Violate her free speech rights under Article I § 5 of the Alaska
20 Constitution and the 1st and 14th Amendments to the U.S. Constitution;
- 21 2. Violate her rights to freedom of religion under Article I § 4 of the Alaska
22 Constitution and the 1st and 14th Amendments to the U.S. Constitution;
- 23 3. Violate her rights to due process under Article I § 7 of the Alaska
24 Constitution and the 5th and 14th Amendments to the U.S. Constitution;
25 and
4. Violate her right to equal protection under Article I § 1 of the Alaska
Constitution and the 5th and 14th Amendments to the U.S. Constitution.

¹ Mr. Trask is no longer a defendant.

1 Ms. Trask's Amended Answer includes a Counterclaim in which she alleges:

- 2
- 3 1. She owns the property at issue;
 - 4 2. Her claims are based, in part, on 42 U.S.C. § 1983;
 - 5 3. The Borough has enacted the sign ordinances referenced in the Complaint;
 - 6 4. "The speech at issue is painted directly on the roof of the aforementioned
 - 7 property owned by Counterclaimant Leta Trask;"
 - 8 5. "At all times relevant to the is action, either words or figures have been
 - 9 painted on the roof of the aforementioned property, including, but not
 - 10 limited to, phrases, hearts, and a cross;"
 - 11 6. The Borough has filed this action to enforce KGB Code §
 - 12 60.10.090(A)(8); and
 - 13 7. The Borough's actions violate the constitutional provisions referenced in
 - 14 her affirmative defenses.

15 She seeks a judgment which: declares that §§ 60.10.090(A) & (B) are

16 unconstitutional; enjoins the Borough from enforcing the same; awards her compensatory

17 damages for deprivation of her constitutional rights under the Alaska and United States

18 Constitutions; and, awards her actual attorneys fees and costs under 42 U.S.C. § 1988 or

19 otherwise as a public interest litigant.

20 II. DISUCSSION

21 a. Parties' Positions

22 The Borough argues that Ms. Trask's Counterclaim must be dismissed under Civil

23 Rule 12(b)(6) for three reasons. First, it is based on § 1983. Second, the Borough has absolute

24 immunity from a § 1983 claim for its actions in promulgating and enforcing its ordinances.

25 Third, in any event, its actions have not caused the deprivation of her constitutional rights. The

Borough notes that she can still pursue her related affirmative defenses.

1 Ms. Trask acknowledges that her Counterclaim is based on § 1983. She argues
2 that the Borough's conduct in promulgating and enforcing KGB Code § 60.10.090(A)(8) have
3 violated her constitutional rights and KGB does not have immunity for the same.

4 **b. Law**

5 **1. Civil Rule 12(b)(6)**

6 Alaska R. Civ. P. 12(b)(6) provides that a claim that a party has failed "to state a
7 claim upon which relief can be granted" in a counterclaim may be made by motion. In deciding
8 such a motion the court must "presume all factual allegations of the [counterclaim] to be true and
9 make all reasonable inferences in favor of the non-moving party."² A counterclaim need only
10 "allege a set of facts 'consistent with and appropriate to some enforceable cause of action.'"³
11 "Therefore, a [counterclaim] should not be dismissed for failure to state a claim unless it appears
12 beyond doubt that the plaintiff can prove no sets of facts in support of the claims that would
13 entitle the plaintiff to relief."⁴ "Because [counterclaims] must be liberally construed, a motion to
14 dismiss under Rule 12(b)(6) is viewed with disfavor and should rarely be granted."⁵

15 **2. 42 U.S.C. § 1983**

16 42 U.S.C. § 1983 provides that:

17
18 Every person who, under color of any statute, ordinance, regulation, custom, or
19 usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen
20 of the United States . . . to the deprivation of any rights, privileges, or immunities
21 secured by the Constitution and laws, shall be liable to the party injured in an
22 action at law, suit in equity, or other proper proceeding for redress . . .

23 ² *Rathke v. Corrections Corp. of America*, 153 P.3d 303, 308 (Alaska 2007).

24 ³ *Angnabooguk v. State*, 26 P.3d 447, 451 (Alaska 2001) (quoting *Linck v. Barokas & Martin*, 667 P.2d 171, 173
(Alaska 1983)); *see also, Rathke*, 153 P.3d at 308.

25 ⁴ *Angnabooguk*, 26 P.3d at 451.

⁵ *Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250, 253 (Alaska 2000) (citing *Kollodge v. State*, 757 P.2d
1024, 1026 n. 4 (Alaska 1988) and *Odom v. Fairbanks Memorial Hospital*, 999 P.2d 123, 128 (Alaska 2000).

1 Section 1983 does not create any substantive rights. "It merely provides a
2 procedure by which rights already guaranteed by the federal constitution or a federal statute may
3 be vindicated."⁶ Relief under § 1983 is precluded if there is an adequate state post-deprivation
4 remedy.⁷

5 A municipality is a "person" under § 1983.⁸ There are two elements to a § 1983
6 action against a municipality. First, the harm must be caused by a constitutional violation.
7 Second, the municipality must be responsible for the violation.⁹

8 To satisfy the causation requirement, the plaintiff must show that there "is a direct
9 causal link between" the conduct for which a municipality is responsible and the "deprivation of
10 federal rights."¹⁰

11 A municipality is responsible for a violation if the action alleged to have violated
12 a constitutional right "implements or executes a policy statement, ordinance, regulation, or
13 decision officially adopted and promulgated by that body's officers."¹¹ A municipality may also
14 be so responsible if the alleged constitutional violation was caused by a governmental
15 "custom".¹²

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21 ⁶ *Thoma v. Hickel*, 947 P.2d 816, 820 (Alaska 1997) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979));
22 see also, *State, Dept. of Health and Social Services v. Native Village of Curyung*, 151 P.3d 388, 151 P.3d 388, 405
(Alaska 2006).

23 ⁷ *Zinerman v. Burch*, 494 U.S. 113, 126, 128-29 (1990).

24 ⁸ *Hilderbrandt v. City of Fairbanks*, 957 P.2d 974, 976 (Alaska 1998); *Monell v. Department of Social Services*
25 *of New York City*, 436 U.S. 658, 690-91 (1978).

⁹ *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992).

¹⁰ *Board of the County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 404 (1997); see also, *Pitts v.*
County of Kern, 949 P.2d 920, 926 (Cal. 1998); *Estate of Hansen*, 914 P.2d 127, 136-37 (Wash. App. Div. 1 1996).

¹¹ *Monell*, 436 U.S. at 690.

¹² *Id.* at 691; see also, *Pitts*, 949 P.2d at 925.

1 Municipal officials can assert absolute or qualified immunity to a § 1983 action in
2 certain circumstances.¹³ But municipalities cannot.¹⁴

3 **c. Decision**

4 The Borough's motion is granted to the extent that Ms. Trask's counterclaim is
5 based on alleged violations of the Alaska constitution for two reasons. First, she acknowledges
6 that her counterclaim is based on § 1983. Second, § 1983 does not apply to such violations of
7 state law.¹⁵

8
9 The remainder of the Borough's motion is denied for five reasons. First, the
10 Borough does not have absolute or qualified immunity. Second, the Borough is "responsible"
11 for the sign ordinance. Third, there is a direct connection between the sign ordinance and the
12 alleged federal constitutional violations. Fourth, the constitutionality of the ordinance, facially
13 or as applied¹⁶ to Ms. Trask, is not now before the court. The court has not found it
14 constitutional and it appears that the court must presume that it is unconstitutional for purposes
15 of deciding this motion. Fifth, the Borough has not persuaded the court that one or more¹⁷ of her
16 constitutional rights could not have already been violated by the Borough's conduct.¹⁸

17
18
19 ¹³ See, *Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 72
(2nd Cir. 1992); *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Crawford v. Kemp*, 139 P.3d 1249, 1255
(Alaska 2006); *Thoma v. Hickel*, 947 P.2d 816, 818-19 (Alaska 1997).

20 ¹⁴ *Leatherman v. Tarrant County, Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993)
21 ("These decisions [i.e. *Owen v. City of Independence*, 445 U.S. 622 (1980)] make it quite clear that, unlike various
government officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under §
1983.").

22 ¹⁵ Alaska has not recognized a cause of action for damages for a violation of state constitutional rights, though the
23 Alaska Supreme Court has indicated that it may do so "in cases of flagrant constitutional violations where little or no
alternative remedies are available." *Lowell v. Hayes*, 117 P.3d 745, 753 (Alaska 2005). It appears that if Alaska did
recognize such a cause of action, Ms. Trask may not be able to pursue a § 1983 damages claim.

24 ¹⁶ See, *Miniken v. Walter*, 978 F.Supp. 1356, 1359 (E.D. Wash. 1997) ("Statutes . . . may be challenged on two
grounds (1) either facially or (2) as applied"); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 575 (9th Cir. 1993).

25 ¹⁷ The Borough's motion does not address the merits of her claims.

¹⁸ The cases cited by the Borough do not squarely address this issue. *City of Los Angeles v. Heller*, 475 U.S. 796,
799 (1986) holds that if there is no constitutional violation there can be no § 1983 damages. *Heller* does not address

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III. CONCLUSION

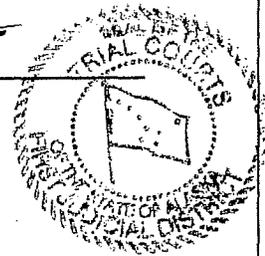
The Borough's motion is granted to the extent that Ms. Trask's counterclaim seeks damages under §1983 for violations of her state constitutional rights. The motion is otherwise denied.

IT IS SO ORDERED.

Dated at Ketchikan, Alaska this 23rd day of May 2008.



Trevor N. Stephens
Superior Court Judge



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Date 5-27-08
S. David T. Cochran, ITAB
A. J. Kiles
SMB

when a constitutional violation occurs. Neither do the other cases cited by the Borough or Ms. Trask. Note, "even without proof of actual injury, [a plaintiff] is entitled to nominal damages for prevailing in an action under [§ 1983] for the deprivation of First Amendment rights." *Yniquez v. Arizonans for Official English*, 42 F.3d 1217, 1243 (9th Cir. 1994) (citing *Carey v. Phipus*, 435 U.S. 247, 266-67 (1978)).

1
2
3 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
4 FIRST JUDICIAL DISTRICT AT KETCHIKAN

FILED IN ALASKA
First Judicial District at Ketchikan
State of Alaska

JUN 09 2007
Clerk of the Trial Court

5 KETCHIKAN GATEWAY BOROUGH,

6 Plaintiff,

7 vs.

8 LETA TRASK,
9 Defendant.

Case No. 1KE-07-437 CI

PLAINTIFF KETCHIKAN
GATEWAY BOROUGH'S ANSWER
TO DEFENDANT LETA TRASK'S
COUNTERCLAIM

10
11
12 By way of response to paragraphs 34 through 73 of Defendant
13 Leta Trask's Answer and Amended Answer and Counterclaim
14 Plaintiff Ketchikan Gateway Borough responds as follows:

- 15
16
17 1. With respect to the allegations contained in paragraph 34,
18 of the counterclaim Plaintiff Ketchikan Gateway Borough
19 lacks sufficient knowledge or information to form a belief
20 as to the truth or falsity of the allegations contained in
21 said paragraph and therefore denies the same.
- 22 2. With respect to the allegations set forth in paragraphs 35,
23 36, 39, 40, 41, 42, 43, 44, 50 and 52, of the counterclaim
24 Plaintiff Ketchikan Gateway Borough admits the allegations

25
26 Answer to Defendant Leta Trask Counterclaim-
1KE-07-437 CI
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contained in the counterclaim.

3. With respect to the allegations set forth in paragraphs 51, 61, 68, 69, 70, 71, and 73 of the counterclaim Plaintiff Ketchikan Gateway Borough denies the allegations set forth in the counterclaim.

4. With respect to the allegations set forth in paragraphs 37, 38, 45, 46, 47, 48, 53, 54, 55, 56, 57, 58, 59, 60, 63, 64, 65, 66 and 67 of the counterclaim Plaintiff Ketchikan Gateway Borough responds that such allegations assert conclusions of law and do not require a response from the Borough.

5. With respect to the allegations in paragraph 49 of the counterclaim, Plaintiff Borough admits that there is a sign on the roof at 713/715 Hill Road, but denies the remaining allegations in paragraph 49 of the counterclaim.

6. With respect to the allegations contained in paragraphs 62 and 71 of the counterclaim Plaintiff Ketchikan Gateway Borough responds by incorporating by reference its responses to the remaining portions of Defendant Trask's counterclaim.

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Answer to Defendant Leta Trask Counterclaim-
1KE-07-437 CI
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By way of further answer and by way of affirmative defenses Plaintiff Ketchikan Gateway Borough asserts the following affirmative defenses to the counterclaim:

- A. Defendant Trask has failed to state a claim upon which relief may be granted.
- B. Defendant Trask has failed to join indispensable parties.
- C. Defendant Trask's claims are barred by *res judicata*.
- D. Defendants Trask's claims are barred by *collateral estoppel* or waiver.
- E. Defendants Trask's claims are barred by accord and satisfaction.
- F. Defendant Trask's claims are barred by absolute immunity.
- G. Defendant Trask's claims for damages are barred by legislative immunity.
- H. Defendant Trask's claims for damages are barred by

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H. Defendant Trask's claims for damages are barred by prosecutorial immunity.

I. Defendant Trask's damages, if any, were caused by Defendant Trask's own conduct.

J. Defendant Trask's damages, if any, were caused by the conduct of third parties not named defendants in this action.

K. Defendant Trask's claims are barred by the applicable Statute of Limitations.

L. Plaintiff Ketchikan Gateway Borough reserves the right to assert any additional affirmative defenses which may be revealed during the investigation of Defendant Trask's counterclaim during discovery or otherwise in the course of this litigation.

Wherefore, Plaintiff Ketchikan Gateway Borough requests that the Court:

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attorneys fees incurred in defending against defendant Trask's counterclaim; and

3. Award such other and further relief as it deems just and proper under the circumstances.

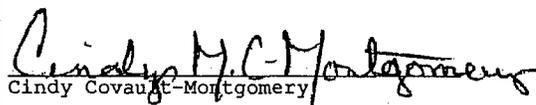
DATED at Ketchikan, Alaska, this 6th day of June, 2008.

KETCHIKAN GATEWAY BOROUGH

By: 
Scott A. Brandt-Erichsen
Borough Attorney
Attorney for Plaintiff
Alaska Bar No. 8811175

I certify that a true and correct copy of the foregoing was delivered this 6th day of June, 2008, via Court Tray to:

Amanda Skiles
Schulz & Skiles
307 Bawden Street
Ketchikan, Alaska 99901


Cindy Covault-Montgomery

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PLAINTIFF KGB'S PRELIMINARY
WITNESS LIST -
1KE-07-437 CI

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FIRST JUDICIAL DISTRICT AT KETCHIKAN

3
4 KETCHIKAN GATEWAY BOROUGH,)

5 Plaintiff,)

6 v.)

7 LETA TRASK,)

8 Defendant.)

9 Case No. 1KE-07-437 CI

Filed in the Trial Courts
State of Alaska
First Judicial District
at Ketchikan

MAR 01 2009

Clerk of the Trial Courts

By _____ Deputy

10 ORDER

11 Ms. Trask has moved for summary judgment. Her motion raises several
12 constitutional issues. KGB opposes the motion. Oral arguments occurred on October 24, 2008.
13 The court took the matter under advisement. The court has since spent considerable time
14 working on the motion.

15 It appears that the analyses the court must employ require it to make findings with
16 respect to the scope of the prohibition in KGB Code 60.10.090(A)(8). The parties discuss but
17 have not fully addressed this issue. The court could presume that it covers what is painted on
18 Ms. Trask's roof and decide the motion accordingly but the court would have to thereafter re-
19 consider and possibly re-decide certain issues if the court later determines that it does not. The
20 court could issue two sets of findings – one based on the writings on the roof coming within the
21 scope of the prohibition and one based on its not. The court is not willing to decide a
22 hypothetical. The court could also decide the issue now but is reluctant to do so now for two
23 reasons. First, the parties have not fully briefed the issue. Second, the court's decision could
24
25

1 substantially affect the outcome of the Borough's enforcement action. There may be additional
2 evidence that a party wants to present.

3 Given the above, the parties shall file additional briefing on the above-discussed
4 issue, not to exceed 10 pages exclusive of exhibits, by March 23, 2009. If either party wants
5 additional oral argument or an evidentiary hearing they must request the same therein.

6 **IT IS SO ORDERED.**

7 Dated at Ketchikan, Alaska this 1st day of March 2009.

8
9 
10 Trevor N. Stephens
11 Superior Court Judge



12
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16
17
18 **CERTIFICATION**

Copies Distributed

Date 3/3/09

To S. Brandt-Eriksen
A. Scholz

By CK

1
2
3 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
4 FIRST JUDICIAL DISTRICT AT KETCHIKAN

5 KETCHIKAN GATEWAY BOROUGH,

6 Plaintiff,

7 vs.

8 LETA TRASK,
9 Defendant.

FILED IN THE TRIAL COURT STATE OF ALASKA
First Judicial District at Ketchikan

MAR 27 2009

Clerk of the Trial Court

By Deputy
Case No. 1KE-07-437 CI

PLAINTIFF'S SUPPLEMENTAL
BRIEFING

10
11 The Court's order dated March 1st, 2009, directed that the
12 parties submit supplemental briefing on the issue of whether the
13 display on the Defendant's roof falls within the scope of the
14 prohibition in KGB Code Section 60.10.090(A)(8).¹ The Court
15 expressed concern about making findings regarding whether the
16 actual display on Ms. Trask's roof is a prohibited roof sign in
17 the absence of briefing on that issue.

18
19 There are two relevant provisions, 1) whether the display
20 is a sign as defined in the Borough Code, and 2) whether the
21 "sign" is a roof mounted sign.

22
23 ¹
24 This section provides "roof mounted signs, including any
25 signs painted on the roof surface, but excluding those
mounted on a marquee or canopy, are prohibited."

26 KGB v. LETA TRASK
PLAINTIFF'S SUPPLEMENTAL BRIEFING
1KE-07-437 CI

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The Borough Code during the relevant time period defined "sign" in KGB Code Section 60.10.140, as:

"sign: any words, lights, letters, parts of letters, figures, numerals, phrases, sentences, emblems, devices, trade names or trademarks by which anything is made known, such as are used to designate a position, a business or a commodity or product which are visible from any public area and used to attract attention."

In briefing and at oral argument the Borough made several arguments relating to the issues upon which the Court requested supplemental briefing. These arguments call for the Court to find that the display is a roof sign under the Borough Code.

A. Without a roof sign, Trask lacks standing to challenge application of the roof sign prohibition to her display.

In order for Trask to challenge the constitutionality of the prohibition on roof signs, Trask implicitly admits that her display is a roof sign within the meaning of KGB Code Section 60.10.140 and 60.10.090(A)(8). This argument was addressed in the earlier briefing. See Brief of Ketchikan Gateway Borough in Opposition to Motion for Summary Judgment. (Borough Opposition Brief) at 2, Footnote 1.

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1
2 Trask argued that she challenges the Borough ordinance as
3 it applies to roof signs, and as it applies to non-commercial
4 speech in residential zones.² Trask also challenges the
5 availability of an appeal process.³ To the extent that Trask's
6 challenges relate to provisions other than the total ban on
7 signs painted directly on the surface of a roof, the Borough
8 pointed out that under Broderick v. Oklahoma, 413 U.S. 601
9 (1973), the Court must look at whether a limited construction
10 has been, or could be, placed on the challenged ordinance and
11 evaluate whether the specific requirements asserted to be void
12 are severable from the provisions for which Trask has interest
13 standing.
14

15 Thus, the constitutionality of the Borough's time
16 limitation on political yard signs or other subsections of the
17 ordinance⁴ is only relevant if Trasks' sign is a political yard
18

19 _____
20 ² Reply Brief of Defendant Leta Trask (Trask Reply Brief) at 2.

21 ³Trask Reply Brief at 10-11.

22 ⁴
23 See Trasks Memorandum in Support of Summary Judgment at 10-11
24 challenging the constitutionality of KGB Code
25 60.10.090(A)(1), 60.10.090(A)(2), 60.10.090(A)(9),
60.10.090(B)(1), 60.10.090(B)(2), 60.10.090(B)(3) and
60.10.090(B)(4).

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sign or a sign which falls into the category of a subsection which the Court finds invalid. Similarly, the challenge to the appeal process will only be relevant where that process has been involved. Where the provision at issue in Trasks's specific case is a total prohibition on signs painted directly on a roof⁵, other alleged constitutional defects which are severable from the roof sign ban challenged by Trask will not dictate the result.

B. Factual inferences on Summary Judgment call for a finding that Trasks display is a roof sign.

Trask's challenge to the constitutionality of the ordinance is before the Court on a Motion for Summary Judgment. The relevant standard requires that all inferences of fact are to be drawn in the favor of the party opposing summary judgment and against the moving party.⁶ Thus, to the extent that there is a factual question as to whether Ms. Trasks' display is a roof sign prohibited by KGB Code Section 60.10.090 (A) (8), the Court is called upon to make those inferences of fact in favor of the Borough's position that it is in fact a roof sign under the

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⁵KGB Code § 60.10.090 (A) (8).

⁶Alaska Rent-a-Car Inc. v Ford Motor Company, 526 P.2d 1136, 1139 (Alaska 1974).

KGB v. LETA TRASK
PLAINTIFF'S SUPPLEMENTAL BRIEFING
1KE-07-437 CI

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definition.

C. Trask's display is, in fact, a prohibited roof sign.

The display is a roof sign as defined in the Borough Code. As discussed by the borough at Oral Argument, the definition of sign in KGB Code Section 60.10.140 has three elements; 1) is there a message; 2) is the message visible from a public area; and 3) is the message used to attract attention. The first element, the message, is described by 10 components followed by a disjunctive conjunction and an eleventh option. Accordingly, a message may be:

- 1. Words;
- 2. Lights;
- 3. Letters;
- 4. Figures;"
- 5. Numerals;
- 6. Phrases;
- 7. Sentences;
- 8. Emblems;
- 9. Devices;
- 10. Trade Names; or
- 11. Trade Marks by Which anything is made known, such as

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are used to designate an individual, a firm, an association, a corporation, a profession, a business or a commodity or a product.

Here the display on Ms. Trasks roof clearly is made up of words. See Affidavit of Jerry Cegelske.

Second, are there words visible from a public area? Clearly the answer is yes. See Affidavit of Jerry Cegelski. Third are these words used to attract attention. Here, not only are these words used to attract attention, they have in fact have attracted the attention of numerous parties who have expressed objections. See Affidavit of Jerry Cegelske. Accordingly, Trask's display is a sign. Because it is painted directly on the roof, it falls within the scope of the prohibition in KGB Code Section 60.10.090(A)(8).

If the Court finds that, as a matter of law, this display does not fall within the scope of the definition of sign, and the prohibition in KGB Code Section 60.10.090(A)(8), then the Court is necessarily finding that no violation of the Borough Code has occurred, and accordingly the Borough's complaint should be dismissed.

KGB v. LETA TRASK
PLAINTIFF'S SUPPLEMENTAL BRIEFING
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Further, if Trask's display is not a roof sign in violation of the Borough Code, Trask lacks the interest injury standing required to maintain her claim for damages under 42 USC § 1983 asserting that the Borough's prohibition on roof signs is an infringement of her constitutional rights. Thus, Trask's counter claim would need to be dismissed as well.

DATED at Ketchikan, Alaska, this 17th day of March, 2009.

KETCHIKAN GATEWAY BOROUGH

By: 
Scott A. Brandt-Erichsen
Borough Attorney
Attorney for Plaintiff
Alaska Bar No. 8811175

I certify that a true and correct copy of the foregoing was delivered this 21st day of March, 2009, via Court Tray to:

Amanda Skiles
Schulz & Skiles
307 Bawden Street
Ketchikan, Alaska 99901


Cindy Covault-Montgomery

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Borough Attorney
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

KETCHIKAN GATEWAY BOROUGH,

Plaintiff,

vs.

LETA TRASK,

Defendant.

FILED in the Trial Courts State of Alaska
First Judicial District at Ketchikan

MAR 27 2009

Clerk of the Trial Courts

By _____ Deputy

CASE No. 1KE-07-437 CI

AFFIDAVIT OF JERRY CEGELSKE

STATE OF ALASKA)
) ss.
FIRST JUDICIAL DISTRICT)

Jerry Cegelske, being first duly sworn, states as follows:

1. I am the Code Enforcement Officer for the Plaintiff in the above-entitled action.

2. The paragraphs marked as Exhibit A to this Affidavit is a true and correct copy of the picture I personally took of the Trask Roof located at 713/715 Hill Road, Ketchikan Alaska, on October, 7, 2008.

3. The photograph attached as Exhibit A was taken by me from a public way.

4. The letter attached as Exhibit B is a true and correct copy of the complaint petition delivered to the Borough

AFFIDAVIT OF JERRY CEGELSKE-
KGB v. Trask
1KE-07-437 CI
Page 1 of 2

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regarding the Trask Roof sign.

5. The foregoing statements are within my personal knowledge and if sworn as a witness I can testify competently thereto.

6. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED at Ketchikan, Alaska, this 17th day of March 2009.

KETCHIKAN GATEWAY BOROUGH

By: Jerry Cegelske
Jerry Cegelske
Code Enforcement Officer

SUBSCRIBED AND SWORN to before me this 17th day of March, 2009.

(Seal)



Cindy M. Montgomery
Notary Public for Alaska
My commission expires: 5/7/11

Office of the
Borough Attorney
344 Front Street
Ketchikan, Alaska
99901
(907)228-6635
Fax(907)228-6683

Scott

TO: Ketchikan Gateway Borough

RE: PAINTED SIGN ON THE ROOF OF 713/715 HILL ROAD.

Attachment (1) - sketch showing property locations in relation to the property at 713/715 Hill Road.

Attachment (2) - two pages regarding the Borough sign ordinance.

Attachment (3) - Photo showing sign which can be viewed from Hill and Denali.

The Lybrand's have been in court twice regarding the messages painted on the roof of 713/715 Hill Road. ~~But the~~ the court ordered the signs to be painted so the messages would be unreadable. However, a partial message and flowers and stick figures remained.

Finally, in August 2005 the sign was completely obliterated and the court dismissed the case in June 2007. It must be noted that the owners of 713/715 Hill Road do not live in Ketchikan but return to the house for a period of time during the summer. On June 28, 2007, the owners returned and a new sign was painted on the roof during the time the owners were in residence.

Because of the decrease in value of their property at 731 Hill Road due to the view of the unsightly signage, in 2005 the Lybrand's property assessment was lowered 10%.

We, the undersigned, request the Ketchikan Gateway Borough take any and all action required to have the sign removed.

<i>Elizabeth F. Lybrand</i>	731 Hill Road	247-6513
<i>Thomas E. Lybrand</i>	730 Hill Road	225-5049
<i>Kathy M. Joseph</i>	730 Hill Rd	225-5049
<i>James Wingren</i>	808 Hill Rd	225-4783
<i>Cornie Wingren</i>	808 Hill Rd	225-4783
<i>Kerry S. Rappinger</i>	3752 Denali St.	247-5289
<i>Kent Jensen</i>	3813 Denali	617-6100
<i>[Signature]</i>	710-712 Hill Road	225-4131

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT KETCHIKAN

3 KETCHIKAN GATEWAY BOROUGH,))

4 Plaintiff,))

5 vs.))

6 LETA TRASK,))

7 Defendant.))

Filed in the Trial Courts
State of Alaska
First Judicial District
at Ketchikan

MAR 27 2009

Clerk of the Trial Courts
By _____ Deputy

Case No. 1KE-07-437 CI

9
10 MEMORANDUM RE: "SIGN"

11 The Court has requested that the parties provide additional briefing as to whether
12 the painting on Leta Trask's roof meets the definition of "sign" as set forth in KGB Code
13 of Ordinances §60.10.140. Leta Trask, by and through counsel, hereby responds with the
14 following.

15
16 A determination that the painting on Leta Trask's roof meets the definition of
17 "sign" requires both legal and factual findings. The factual findings necessary are
18 whether the painting is visible from a "public area"¹ and whether the painting is "used to
19 attract attention". Leta Trask has not conceded these facts, but does concede that for
20 purposes of a summary judgment motion, these facts are to be construed in favor of the
21 non-moving party. Other factual findings necessary are whether the painting is of words,
22 lights, letters, parts of letters, figures, numerals, phrases, sentences, emblems, devices,
23 trade names or trademarks by which anything is made known. Leta Trask does not
24 dispute that her painting contains words or phrases. However, she does dispute whether
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28 ¹ As opposed to a private deck or yard.

1 the words or phrases are such as are used to designate an individual, a firm, an
2 association, a corporation, a profession, a business or commodity or product. The issue
3 for the Court is whether the phrase, "such as are used to designate an individual, a firm,
4 an association, a corporation, a profession, a business or commodity or product," applies
5 to the entire preceding list or only trade names or trademarks by which anything is made
6 known.
7

8
9 In 1967, Ordinance 20 was passed.² That ordinance provided the following
10 definition of sign:

11
12 Any words, lights, letters, parts of letters, figures, numerals,
13 phrases, sentences, emblems, devices, trade names or
14 trademarks by which anything is made known, such as are
15 used to designate an individual, a firm, an association, a
16 corporation, a profession, a business or a commodity or
17 product, which are visible from any public street or highway
18 and used to attract attention.

19 On March 17, 1969, Ordinance 20 was codified. Sign was defined in KGB Code
20 §49.15.260. The definition remained unchanged.³ In 2004, Ordinance 1328A was
21 passed.⁴ That ordinance amended the definition of sign to read as follows:

22 Any words, lights, letters, parts of letters, figures, numerals,
23 phrases, sentences, emblems, devices, trade names or
24 trademarks by which anything is made known, such as are

25 ² The relevant portion of Ordinance 20 is attached is Exhibit J and was retrieved from
26 www.borough.ketchikan.ak.us/clerks/clerks.htm, by clicking weblink, then Clerk, then Ordinances, then Ordinance
27 Nos. 0001-0500, then 0020. It can also be found at <http://216.67.0.20/weblink7/DocView.aspx?id=1346>.

28 ³ The relevant portion of KGB Code §49.15.260 is attached as Exhibit K and was retrieved from
29 www.borough.ketchikan.ak.us/clerks/clerks.htm, by clicking weblink, then Clerk, then Superseded Codes, then
KGB Code of Ordinances Adopted 03/17/196, then Title 49, Planning and Zoning. It can also be found at
<http://216.67.0.20/weblink7/DocView.aspx?id=60787>.

⁴ Ordinance 1328A was previously attached to the Memorandum in Support Motion of Leta Trask's Motion for
Summary Judgment as Exhibit A.

1 used to designate an individual, a firm, an association, a
2 corporation, a profession, a business or a commodity or
3 product, which are visible from any public area and used to
4 attract attention.

5 The only modification to the definition of sign was that "public street or highway"
6 became "public area". This was in part to clarify that water was to be included as a
7 public space.⁵

8 Prior to this one amendment to the definition of sign, it appears the position of
9 KGB was that the painting on Leta Trask's roof did not meet the definition of sign, or at
10 least that the purpose of the code was to regulate only commercial speech.⁶ Even shortly
11 after the amendment, when Leta Trask wrote KGB to see whether she needed a permit,
12 she was advised that based upon the information she provided, her painting did not meet
13 the definition of sign; therefore, no permit was required.⁷ However, upon circulation of a
14 petition that provided incorrect statements about Court orders, KGB's position has
15 apparently changed.⁸ While KGB's prior position might not provide the legal answer as
16 to whether Leta Trask's painting meets the definition of sign, it provides relevant insight.

17 In determining whether the definition of sign applies to Leta Trask's painting, the
18 starting point is the plain meaning of the language. Leta Trask does not dispute that the

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25 ⁵ See, Exhibit L, which is a page from the Assembly Meeting Packet provided on September 27, 2004. The full
26 packet can be located at <http://216.67.0.20/weblink7/DocView.aspx?id=11659>, or by going to
27 www.borough.ketchikan.ak.us/clerks/clerks/htm, then clicking weblink, then Assembly Meeting Information, then
28 Assembly Meeting Packets, then 2004, then 9/27/04, then Item 4c.

29 ⁶ See, Exhibit M. This is a 1998 Memorandum from the KGB attorney to the Planning Director which was provided
by Leta Trask. A copy of the Memorandum was disclosed to KGB on June 5, 2008.

⁷ See, Exhibits G & H, which were previously attached and are reattached for reference. These exhibits were
provided by Leta Trask, as well as KGB as part of initial disclosures.

⁸ See, Exhibit N, which is a copy of the petition received by KGB in response to Interrogatory No. 7.

1 painting on her roof contains words or phrases. However, she contends that the definition
2 requires that such words or phrases be those "such as are used to designate an individual,
3 a firm, an association, a corporation, a profession, a business or a commodity or
4 product...". KGB apparently contends that any words, lights, letters, parts of letters,
5 figures, numerals, phrases, sentences, emblems, or devices, which are visible from any
6 public area and used to attract attention, are signs, even when they are not "used to
7 designate an individual, a firm, an association, a corporation, a profession, a business or a
8 commodity or product..." KGB's reading is contrary to the general rules of sentence
9 construction which indicate that this phrase relates back to the entire preceding list, not
10 just the item immediately preceding the phrase. The meaning might be different if
11 semicolons were used to separate the list rather than commas. However, commas are in
12 fact used. As such, to qualify as a sign, the words or phrases painted on Leta Trask's
13 roof must not only be visible from a public area and used to attract attention, but they
14 must be words or phrases, "such as are used to designate an individual, a firm, an
15 association, a corporation, a profession, a business or a commodity or product". The
16 words or phrases painted upon Leta Trask's roof do not meet this requirement. As such,
17 her painting is not subject to the regulation of KGB Code §60.10.090, which regulates
18 signs.

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25 In addition to the foregoing, the purpose of KGB Code §60.10.090 is to regulate
26 commercial speech presented in the form of signs. When working on Ordinance 1328A,
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1 the advertisement sent out to encourage participation was sent only to business owners.⁹

2 The advertisement refers to the ordinance as the "Downtown Signage Ordinance." That

3 the application was meant for commercial speech is furthered by the fact that KGB Code

4 §60.10.090(A)(2) limits permitted signs to advertising only the business or activity

5 engaged in on the immediate premises.¹⁰ It is further supported by the fact that KGB

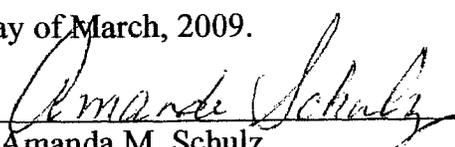
6 Code § 60.10.090(B) limits signs permitted in residential zones to those that advertise.

7 Such a strict restriction can only be constitutional if its application is limited to

8 commercial speech.

9
10 Based upon the foregoing, the painting at issue in this matter does not meet the
11 definition of sign in KGB Code § 60.10.140 and KGB has sought to regulate Leta Trask's
12 private speech without authority.

13 Dated at Ketchikan, Alaska, this 27th day of March, 2009.

14
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17 
18 Amanda M. Schulz
19 Attorney for Leta Trask
20 AK Bar No. 0206025

21 Certified: A true and correct copy of the above and its attachments is being served via court tray to Scott-
22 Brandt-Erichsen, Borough Attorney, on 3-27-09, by Sandra McElane.

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26 ⁹ See, Exhibit O, which is a page from the Assembly Meeting Packet provided on September 27, 2004. The full
27 packet can be located at <http://216.67.0.20/weblink7/DocView.aspx?id=11659>, or by going to
28 www.borough.ketchikan.ak.us/clerks/clerks/htm, then clicking weblink, then Assembly Meeting Information, then
29 Assembly Meeting Packets, then 2004, then 9/27/04, then Item 4c.

¹⁰ See also, Exhibit M.

but by the facts presented and the testimony given. If it is determined that the public necessity, convenience or general welfare requires the change or amendment, the Borough Assembly shall by ordinance effect the proposed zone change.

4. All changes of zone boundaries shall be filed with the administrative official and shall be noted on the Zoning Map as specified in Section 1.

Section 25. Severability.

- A. In the event any portion, section, subsection, sentence, clause or phase of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction such decision shall not affect the validity of the remaining portions of this ordinance.

Section 26. Definitions.

A. General Interpretation.

1. Words used in the present tense include the future tense.
2. The singular number includes the plural.
3. The word "person" includes a corporation as well as an individual.
4. The word "lot" includes the word "plot" or "parcel".
5. The term "shall" is always mandatory.
6. The word "used" or "occupied" as applied to any land or building shall be construed to include the words "intended, arranged or designed to be used or occupied."

B. Specific Definitions.

Accessory Building. A detached building, the use of which is appropriate, subordinate and customarily incidental to that of the main building or to the main use of the land and which is located on the same lot as the main building or use. An accessory building shall be considered to be a part of the main building when joined to the main building by a common wall or when any accessory building and the main building are connected by a breezeway.

Accessory Use. A use customarily incidental and subordinate to the principal use of the land, building or structure and located on the same lot or parcel of land.

Administrative Official. The person charged with the administration and enforcement of this ordinance.

Alley. A public way designed and intended to provide only a secondary means of access to any property abutting thereon.

Alteration. Any change, addition or modification in the construction, location or use classification.

Apartment House. See Dwelling, Multiple.

Area, Building. The total of areas taken on a horizontal plane at the main grade level of the principal building and all accessory buildings, exclusive of steps.

Automobile Wrecking. The dismantling of used motor vehicles or trailers or the storage or sale of parts from dismantled or partially dismantled, obsolete or wrecked vehicles.

Boarding House. A building other than a hotel where lodging, with or without meals, is provided for compensation for three or more persons, on other than a day-to-day basis and which is not open to transient guests.

Building. Any structure built for the support, shelter or enclosure of persons, animals or property of any kind.

Building Code. The building code and/or other building regulations applicable in the City and/or Borough.

Building Existing. A building erected prior to the adoption of this ordinance or one for which a legal building permit has been issued.

Building Height. The vertical distance from the highest ground level grade of the building to the highest point of the roof.

Building, Principal or Main. A building in which is conducted the principal or main use of the lot on which said building is situated. Attached garages, porches and carports shall be considered to be part of the principal building.

Coverage. That percentage of the total lot area covered by principal and accessory buildings.

Dwelling. A building or any portion thereof designed or used exclusively for residential occupancy including one-family, two-family and multiple-family dwellings, but not including any other building wherein human beings may be housed.

Dwelling Unit. One or more rooms in a building designed as a unit for occupancy by one family for living or sleeping purposes and having a kitchen or kitchenette.

Dwelling, One-family. Any detached building containing only one dwelling unit.

Dwelling, Two-family. Any building containing only two dwelling units.

Dwelling, Multiple-family. Any building containing three or more dwelling units.

Essential Service. The erection, construction, alteration, or maintenance by public utilities or municipal departments or commissions, of underground or overhead gas, electrical, steam or water transmission or distribution systems, collection, communication, supply or disposal systems, including poles, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, traffic signals, hydrants and other similar equipment and accessories in connection therewith, but not including buildings reasonably necessary for the furnishing of adequate service of such public utilities or Borough departments or commissions or for the public health or safety or general welfare.

Family. Any number of individuals living together as a single house-keeping unit in a dwelling unit.

Fence, Height. The vertical distance between the ground directly under the fence and the highest point of the fence.

Floor Area. The total of each floor of a building within the surrounding outer walls but excluding vent shafts, courts, stairways and elevators.

Frontage. The lot width measured along the property line adjacent to the street ROW.

Garage, Private. An accessory building or any portion of a main building used in connection with residential purposes for the storage of passenger motor vehicles.

Grade (Average Ground Level). The average level of the finished ground at the center of all walls to a building. In case walls are parallel to and within five feet of a public sidewalk, the ground level shall be measured at the sidewalk.

Gross Floor Area. The total of each floor of a building within the surrounding outer walls but excluding vent shafts and courts, stairways and elevators.

Guest Room. Any room in a hotel, dormitory, boarding or lodging house used and maintained to provide sleeping accommodations for not more than two persons.

Home Occupation. An accessory use of a service character customarily conducted within a dwelling, by the residents, which does not involve the conduct of trade on the premises.

Hotel. Any building or group of buildings in which there are guest rooms used, designed or intended to be used for the purpose of offering to the general public lodging on a day-to-day basis.

Junked Vehicle. Any abandoned, wrecked or inoperable vehicle.

Junk Yard. Any space used for the storage or abandonment of junk or waste material including scrap metals or other scrap materials, or for the dismantling, demolition or abandonment of

automobiles, other vehicles, machinery or any parts thereof.

Loading Space. An off-street space or berth on the same lot with a building or structure to be used for the temporary parking of commercial vehicles while loading or unloading merchandise or materials.

Lot. A parcel of land occupied or to be occupied by a principal use and having frontage on, or access to, a public street.

Lot, Corner. A lot situated at the junction of, and bordering on, two intersecting streets. A corner lot shall be considered to have two front yards.

Lot Line, Front - Corner Lot. The lines separating the lot from the street.

Lot Line, Front - Interior Lot. A line separating the lot from the street.

Lot Line, Rear. The line that is opposite and most distant from the front lot line, and in the case of irregular, triangular or gore shaped lot, a line not less than 10 feet in length, within a lot, parallel to and at the maximum distance from the front lot line.

Lot Line, Side. Any lot boundary line not a front lot line or a rear lot line.

Lot Depth. The average horizontal distance between the front and rear lot lines measured in the mean direction of the side lot lines.

Lot Width. The average horizontal distance separating the side lot lines of a lot and at right angles to its depth.

Motel. A group of one or more detached or semi-detached buildings containing two or more individual dwelling units and/or guest rooms designed for or used temporarily by automobile tourists or transients, with a garage attached or parking space conveniently located to each unit, including groups designated as auto courts, motor lodges, or tourists courts.

Non-conforming Building. Any building or structure or any portion thereof, lawfully existing at the time this ordinance became effective, which was designed, erected, or structurally altered for a use that does not conform to the use regulations of the zone in which it is located or a building or structure that does not conform to all the height and area regulations of the zone in which it is located.

Nursery, Children's. Any home or institution used and maintained to provide day care for children not more than 7 years of age.

Parking Space. Any automobile parking space not less than 180 square feet in area.

Person. A natural person, his heirs, executors, administrators, or assigns, and also including firm, partnership, or corporation, its or their successors or assigns, trust or other legal entity including the federal government, or the agent of any of the aforesaid.

Principal Use. The major or predominant use of a lot or parcel of land.

Service Station. Any building, structure, premises or other space used primarily for the retail sale and dispensing of motor fuels, tires, batteries, and other accessories; the installation and servicing of such lubricants, tires, batteries and other accessories, and such other services which do not customarily or usually require the services of a qualified automotive mechanic.

Sign. Any words, lights, letters, parts of letters, figures, numerals, phrases, sentences, emblems, devices, trade names or trade marks by which anything is made known, such as are used to designate an individual, a firm, an association, a corporation, a profession, a business or a commodity or product, which are visible from any public street or highway and used to attract attention.

State Highway. A right-of-way classified by the State of Alaska as a Primary, Secondary A or Secondary B highway.

Street. A public right-of-way used as a thoroughfare and which is designed and intended to provide the primary means of access to property abutting thereon.

Street Line. The line of demarcation between a street and the lot or land abutting thereon.

Structure. That which is built or constructed, a building of any kind, composed of parts jointed together in some definite manner.

(a) Mobile Home. Means any coach, mobile home, trailer or other

vehicle or structure designed or used for human dwelling or sleeping purposes, and propelled either by its own power or by any other power-driven vehicle to which it may be attached, whether such mobile home is designed or used for permanent occupancy.

- (b) Person means an individual, partnership, firm, company, corporation, whether tenant, owner, lessee, licensee, or their agent, heir or assign.
- (c) Mobile Home Space means a plot of ground containing not less than 1800 square feet set up and designated for the use of a single mobile home within a mobile home park.
- (d) Mobile Home Park means any park, court, parcel or tract of land designed or used for the purpose of supplying a location or accommodations for more than one mobile home, and shall include all buildings used or intended for use as a part of the equipment thereof whether or not a charge is made for the use of the mobile home park and its facilities. A mobile home park shall not include automobile or mobile home sales lots.
- (e) Mobile Home Sales Lot means a parcel of ground containing not less than 5000 square feet in area upon which unoccupied trailers may be displayed for inspection and sale
- (f) Unit means a mobile home unit.

Commission means the Gateway Borough Planning and Zoning Commission.

Assembly means the Gateway Borough Assembly.

Chairman means the Chairman of the Gateway Borough.

Use. The purpose for which land or a building is arranged, designed, or intended, or for which either land or a building is or may be occupied or maintained.

Yard. An open unoccupied space, other than a court, unobstructed from thirty inches above the ground level to the sky, except where specifically provided by this Ordinance, on the same lot on which a building is situated.

Yard, Front. A yard extending across the full width of a lot measured between the front lot line of the lot and the front building line. A corner lot shall be considered to have two front yards.

Yard, Rear. A yard extending across the full width of the lot between the most rear main building and the rear lot line.

Yard, Side. A yard on each side of a main building and extending from the front lot line to the rear lot line. The width of the required side yard shall be measured horizontally from the nearest point of a side lot line to the nearest part of the main building.

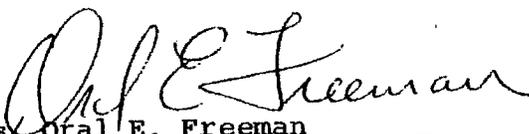
Zoning Change. The alteration or moving of a use district boundary; the re-classification of a lot, or parcel of land from one zone to another, the change of any of the regulations contained in this Ordinance.

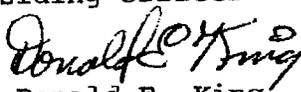
Zoning Ordinance or Ordinance. The Gateway Borough Zoning Ordinance.

Section 27. Effective Date.

This ordinance shall become effective thirty days after its passage and approval. Passed and approved this 7th day of August, 1967.

ATTEST:


/s/ Orval E. Freeman
Presiding Officer


/s/ Donald E. King
Borough Chairman


/s/ Judith A. Slajer
Borough Clerk

Sec. 49.15.260. Definitions.

(a) General Interpretation.

- (1) Words used in the present tense include the future tense.
- (2) The singular number includes the plural.
- (3) The word *person* includes a corporation as well as an individual.
- (4) The word *lot* includes the word *plot* or *parcel*.
- (5) The term *shall* is always mandatory.
- (6) The word *used* or *occupied* as applied to any land or building shall be construed to include the words *intended*, *arranged*, or *designed to be used or occupied*.

(b) Specific Definitions.

Accessory Building. A detached building, the use of which is appropriate, subordinate and customarily incidental to that of the main building or to the main use of the land and which is located on the same lot as the main building or use. An accessory building shall be considered to be a part of the main building when joined to the main building by a common wall or when any accessory building and the main building are connected by a breezeway.

Accessory Use. A use customarily incidental and subordinate to the principal use of the land, building or structure and located on the same lot or parcel of land.

Administrative Official. The person charged with the administration and enforcement of this chapter.

Alley. A public way designed and intended to provide only a secondary means of access to any property abutting thereon.

Alteration. Any change, addition or modification in the construction, location, or use classification.

Apartment House. See Dwelling, Multiple.

Area, Building. The total of areas taken on a horizontal plane at the main grade level of the principal building and all accessory buildings, exclusive of steps.

Automobile Wrecking. The dismantling of used motor vehicles or trailers or the storage or sale of parts from dismantled or partially dismantled, obsolete or wrecked vehicles.

Boarding House. A building other than a hotel where lodging, with or without meals, is provided for compensation for three or more persons, on other than a day-to-day basis and which is not open to transient guests.

Building. Any structure built for the support, shelter or enclosure of persons, animals, or property of any kind.

Building Code. The building code and/or other building regulations applicable in the City and/or Borough.

Building Existing. A building erected prior to the adoption of Ordinance No. 20 or one for which a legal building permit has been issued.

Building Height. The vertical distance from the highest ground level grade of the building to the highest point of the roof.

Building, Principal or Main. A building in which is conducted the principal or main use of the lot on which said building is situated. Attached garages, porches and carports shall be considered to be part of the principal building.

Coverage. That percentage of the total lot area covered by principal and accessory buildings.

Dwelling. A building or any portion thereof designed or used exclusively for residential occupancy including one-family, two-family and multiple-family dwellings, but not including any other building wherein human beings may be housed.

Dwelling Unit. One or more rooms in a building designed as a unit for occupancy by one family for living or sleeping purposes and having a kitchen or kitchenette.

Dwelling, One-family. Any detached building containing only one dwelling unit.

Dwelling, Two-family. Any building containing only two dwelling units.

Dwelling, Multiple-family. Any building containing three or more dwelling units.

Essential Service. The erection, construction, alteration, or maintenance by public utilities or municipal departments or commissions, of underground or overhead gas, electrical, steam or water transmission or distribution systems, collection, communication, supply or disposal systems, including poles, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, traffic signals, hydrants and other similar equipment and accessories in connection therewith, but not including buildings reasonably necessary for the furnishing of adequate service of such public utilities or Borough departments or commissions or for the public health or safety or general welfare.

Family. Any number of individuals living together as a single house-keeping unit in a dwelling unit.

Fence, Height. The vertical distance between the ground directly under the fence and the highest point of the fence.

Floor Area. The total of each floor of a building within the surrounding outer walls but excluding vent shafts, courts, stairways and elevators.

Frontage. The lot width measured along the property line adjacent to the street ROW.

Garage, Private. An accessory building or any portion of a main building used in connection with residential purposes for the storage of passenger motor vehicles.

Grade (Average Ground Level). The average level of the finished ground at the center of all walls to a building. In case walls are parallel to and within five feet of a public sidewalk, the ground level shall be measured at the sidewalk.

Gross Floor Area. The total of each floor of a building within the surrounding outer walls but excluding vent shafts and courts, stairways and elevators.

Guest Room. Any room in a hotel, dormitory, boarding or lodging house used and maintained to provide sleeping accommodations for not more than two persons.

Home Occupation. An accessory use of a service character customarily conducted within a dwelling, by the residents, which does not involve the conduct of trade on the premises.

Hotel. Any building or group of buildings in which there are guest rooms used, designed or intended to be used for the purpose of offering to the general public lodging on a day-to-day basis.

Junked Vehicle. Any abandoned, wrecked or inoperable vehicle.

Junk Yard. Any space used for the storage or abandonment of junk or waste material including scrap metals or other scrap materials, or for the dismantling, demolition or abandonment of automobiles, other vehicles, machinery or any parts thereof.

Loading Space. An off-street space or berth on the same lot with a building or structure to be used for the temporary parking of commercial vehicles while loading or unloading merchandise or materials.

Lot. A parcel of land occupied or to be occupied by a principal use and having frontage on, or access to, a public street.

Lot, Corner. A lot situated at the junction of, and bordering on, two intersecting streets. A corner lot shall be considered to have two front yards.

Lot Line, Front - Corner Lot. The lines separating the lot from the street.

Lot Line, Front - Interior Lot. A line separating the lot from the street.

Lot Line, Rear. The line that is opposite and most distant from the front lot line, and in the case of irregular, triangular or gore shaped lot, a line not less than 10 feet in length, within a lot, parallel to and at the maximum distance from the front lot line.

Lot Line, Side. Any lot boundary line not a front lot line or a rear lot line.

Lot Depth. The average horizontal distance between the front and rear lot lines measured in the mean direction of the side lot lines.

Lot Width. The average horizontal distance separating the side lot lines of a lot and at right angles to its depth.

Motel. A group of one or more detached or semi-detached buildings containing two or more individual dwelling units and/or guest rooms designed for or used temporarily by automobile tourists or transients, with a garage attached or parking space conveniently located to each unit, including groups designated as auto courts, motor lodges, or tourists courts.

Non-conforming Building. Any building or structure or any portion thereof, lawfully existing at the time Ordinance No. 20 became effective, which was designed, erected, or structurally altered for a use that does not conform to the use regulations of the zone in which it is located or a building or structure that does not conform to all the height and area regulations of the zone in which it is located.

Nursery, Children's. Any home or institution used and maintained to provide day care for children not more than 7 years of age.

Parking Space. Any automobile parking space not less than 180 square feet in area.

Person. A natural person, his heirs, executors, administrators, or assigns, and also including firm, partnership, or corporation, its or their successors or assigns, trust or other legal entity including the federal government, or the agent of any of the aforesaid.

Principal Use. The major or predominant use of a lot or parcel of land.

Service Station. Any building, structure, premises or other space used primarily for the retail sale and dispensing of motor fuels, tires, batteries, and other accessories; the installation and servicing of such lubricants, tires, batteries and other accessories, and such other services which do not customarily or usually require the services of a qualified automotive mechanic.

Sign. Any words, lights, letters, parts of letters, figures, numerals, phrases, sentences, emblems, devices, trade names or trade marks by which anything is made known, such as are used to designate an individual, a firm, an association, a corporation, a profession, a business or a commodity or product, which are visible from any public street or highway and used to attract attention.

State Highway. A right-of-way classified by the State of Alaska as a Primary, Secondary A or Secondary B highway.

Street. A public right-of-way used as a thoroughfare and which is designed and intended to provide the primary means of access to property abutting thereon.

Street Line. The line of demarcation between a street and the lot or land abutting thereon.

Structure. That which is built or constructed, a building of any kind, composed of parts jointed together in some definite manner.

- a. Mobile Home. Means any coach, mobile home, trailer or other vehicle or structure designed or used for human dwelling or sleeping purposes, and propelled either by its own power or by any other power-driven vehicle to which it may be attached, whether such mobile home is designed or used for permanent occupancy.
- b. Person. Means an individual, partnership, firm, company, corporation, whether tenant, owner, lessee, licensee, or their agent, heir or assign.
- c. Mobile Home Space. Means a plot of ground containing not less than 1800 square feet set up and designated for the use of a single mobile home within a mobile home park.
- d. Mobile Home Park. Means any park, court, parcel or tract of land designed or used for the purpose of supplying a location or accommodations for more than one mobile home, and shall include all buildings used or intended for use as a part of the equipment thereof whether or not a charge is made for the use of the mobile home park and its facilities. A mobile home park shall not include automobile or mobile home sales lots.

e. Mobile Home Sales Lot. Means a parcel of ground containing not less than 5000 square feet in area upon which unoccupied trailers may be displayed for inspection and sale.

f. Unit. Means a mobile home unit.

Commission. Means the Ketchikan Gateway Borough Planning and Zoning Commission.

Assembly. Means the Ketchikan Gateway Borough Assembly.

Chairman. Means the Chairman of the Ketchikan Gateway Borough.

Use. The purpose for which land or a building is arranged, designed, or intended, or for which either land or a building is or may be occupied or maintained.

Yard. An open unoccupied space, other than a court, unobstructed from thirty inches above the ground level to the sky, except where specifically provided by this chapter, on the same lot on which a building is situated.

Yard, Front. A yard extending across the full width of a lot measured between the front lot line of the lot and the front building line. A corner lot shall be considered to have two front yards.

Yard, Rear. A yard extending across the full width of the lot between the most rear main building and the rear lot line.

Yard, Side. A yard on each side of a main building and extending from the front lot line to the rear lot line. The width of the required side yard shall be measured horizontally from the nearest point of a side lot line to the nearest part of the main building.

Zoning Change. The alteration or moving of a use district boundary; the re-classification of a lot, or parcel of land from one zone to another, the change of any of the regulations contained in this chapter.

Zoning Ordinance or Ordinance. The Ketchikan Gateway Borough Zoning Ordinance. (Ord. 20) Code of Ordinances 49.15.

B. Comments on Specific Changes

Attached is a draft ordinance with all the proposed items for discussion incorporated. It should be noted that if approved, legal non-conforming signs could remain in place for three years after the ordinance is passed. Additional comments and discussion about specific proposed code changes are as follows:

60.10.140, Definitions:

Sign: "Area" was added to include all areas visible from any public space, including from the water. While it can be argued that the water is a right-of-way with regard to water access to lots off the road system, it is not very clear. This amendment rectifies that.

Hanging and projecting signs: These were not previously defined by the Code.

Temporary Signs: Restrictions on these sign types require a clear definition. It also includes "mobile" signs – something not seen often in Ketchikan, but popular in bigger cities as a way to circumvent the sign ordinance.

60.10.090

(A)1: Previously, real estate, construction, and political signs were not exempt from permitting requirements. Also, clarifying what drawings are required with applications makes review easier.

(A)2: This addresses a need for clarification on the definition of "immediate premises", and deals with signs on multiple tenant buildings being placed on areas not adjacent to their actual business. It also provides for directory signage to be placed on multiple tenant buildings, ensuring that all businesses get some exposure.

(A)5: We have had numerous complaints about flashing LED type signage and other signage that is annoying and inappropriate in a historic district. These type of attractors are becoming more and more popular as technologies improve and cost goes down. The last sentence makes intermittent signs such as the Welcome Arch and the neon Salmon Landing Building Market signs exempt, as well as clocks and barber shop poles.

(A)7: Most sign codes address the removal of abandoned signs. Ours didn't. This rectifies that by requiring abandoned signs to be removed within six months.

(A)8: Roof signs are banned by many communities, and they have been an item of great contention in Ketchikan. The Central Commercial Zone should have signage reflecting a pedestrian scale. Roof signs violate that scale. They can also be dangerous in high winds.

(A)9: This provides parameters for political signage and allows them to be placed without a sign permit with certain restrictions.

(A)10: This allows "grand opening" signs and banners without a permit for a set short term period in all zones, including the Central Commercial Zone.

(A)11) and (B)4: This replaces the previous code section regarding construction signs with a simpler version, and it now applies to all zones not just residential zones.

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Exhibit L

75

KETCHIKAN GATEWAY BOROUGH

Office of the Borough Attorney • 344 Front Street • Ketchikan, Alaska 99901

Scott A. Brandt-Erichsen
Borough Attorney

(907) 228-6695
Fax: (907) 247-6625

MEMORANDUM

RECEIVED
APR 14 1998

TO: Susan Dickinson
Planning Director

FROM: Scott A. Brandt-Erichsen *SBE*
Borough Attorney

RE: Application of Sign Ordinance to
Painting on a Residential Rooftop

DATE: April 14, 1998

GATEWAY BOROUGH PLANNING DEPT.
BY: *[Signature]*

Received by me May/June

QUESTION:

You requested that I advise as to whether a message painted on the top of a residential roof would be subject to the Borough's sign code.

FACTS:

You have advised that an individual has painted a message including biblical quotations and symbols on their residential rooftop. The message is approximately 25 feet long and 20 feet high. It consists of white paint on black rooftop. It also implies inappropriate conduct on the part of a George L., apparently referring to the uphill neighbor George Lybrand.

I am familiar with this communication as it is directly below my house, and I can see it every day. I personally find it to be offensive and inappropriate, and interpret it as impugning the character and reputation of George Lybrand, the adjacent property owner. However, my personal reaction does not affect my reading of the law regarding this matter.

BRIEF ANSWER:

The message described above clearly does not qualify as a sign or advertising device permitted under KGB Code § 60.10.090. However, it is unclear whether such a communication method is prohibited by the Borough sign ordinance.

DISCUSSION:

The Borough sign ordinance is set out in KGB Code § 60.10.090. Signs are defined in KGB Code § 60.10.140. The definition of sign provides that a sign is:

Any words, lights, letters, parts or letters, figures, numerals, phrases, sentences, emblems, devices,

*Page 1 of 2
4-14-98*

*Exhibit M
Page 1 of 2*

trade names or trademarks by which anything is made known, such as are used to designate an individual, a firm, an association, a corporation, a profession, a business or a commodity or product, which are visible from any public street or highway and used to attract attention."

The communication described would satisfy this definition as words or phrases. The communication may be visible from a public street or highway, but is not clearly noticeable in the traditional sense that a commercial sign directed to the street would be visible to a street or highway. It is unclear whether the communication is used to attract attention in general or merely attention from neighbors. It appears to be directed primarily to the uphill neighbor and is not designed to attract the attention of persons passing on the adjacent roadway.

Under these circumstances, it is unclear whether this communication would fall into the category of "sign."

In the event that the communication qualifies as a sign, it is not of the type generally regulated by KGB Code § 60.10.090. This code section, in context, apparently addresses commercial communication or other communication related to the business or activity engaged in on the immediate premises. The communication at issue here does not fall into that category.

As a result of the ambiguity as to both the definition of sign and the purpose of the code as it relates to this type of communication, it is doubtful that the Borough could successfully pursue prosecution of a violation of the Borough Code relating to this communication. However, it is quite possible that this communication may expose the owner or occupant of the residence to potential civil liability for a libel or defamation claim. Such a claim would be a civil matter between the person making the communication and the target of the communication.

If you have any other questions, please contact me at your convenience.

ss/m/painz.pd

cc: Georgianna Zimmerle
Borough Manager

*Page 2 of 2
4-14-98*

Ketchikan Gateway Borough
344 Front St.
Ketchikan, Alaska 99901

Aug. 10, 2005

LETA TRASK
c/o Attorney K. Trask
1652 Wilcox Rd #25
Salmon, Or 97306

RE: Roof mural & "sign" permit necessity

Attn: Planning Dept. (Erin)
(over for approx. drawing)

Dear Sir:

It is my intent to replace the biblical passages on my tar roof. When I requested a "sign permit" because of a demand by Attorney Henley (on behalf of G. Liebrand), one was not needed because nothing "commercial" in the decorations (selling or advertising a product). However, Mr. Liebrand brought a civil action (with his wife Liz) stating that such biblical mural were causing her to get mental health care.

Both the Superior court & later the Alaska Supreme Court agreed there was no support for Mr. Liebrand's position.

Seems with the new "sign permit" changes in Dec. '04 I am receiving notice from Attorney Currell that my present mural is in violation & of course if I re-establish the old biblical mural it will be in violation.

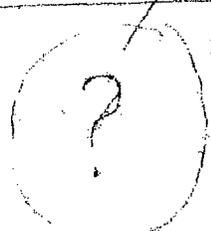
Erin, in the Borough office, was of the understanding that no permit is needed. I also request that my tenants might put holiday ^(or lights) decorations on or around the house. I believe it is my constitutional right of expression. I will proceed on that assumption but request written verification from you. LETA TRASK (Contact address) ^{above}

Exhibit C
Page 1 of 2

78

Mural of ...?
 Balloons? K. has?
 flowers?
 Biblical?
 Smile Faces?
 play bring words to
 end of roof or
 do other pictures: (possibly "hippo in a pink tutu")
 as requested by Judge T.

other side
 has a few
 birds in flight



DO UNTO OTHERS AS ---
 LOVE YOUR NEIGHBOR
 BY YOUR DEEDS THEY WILL

not enough room
 to show full
 passage

may take up
 more or less room

Already has a cross
 and former
 "You're Welcome"

KETCHIKAN GATEWAY BOROUGH

Planning Department • 344 Front Street • Ketchikan, Alaska 99901

Ph: 228-6610 Fax 247-8439

October 5, 2005

Leta Trask
498 N. 72nd St.
Springfield, OR. 97478

RE: Sign Permit Request for 713/715 Hill Road, City of Ketchikan.

In your letter dated August 10, 2005 you have advised that you intend to paint symbols on your roof at 713/715 Hill Road. You have verbally assured that the symbols, murals, and sayings will not be directed at any public area or roadway. The symbols shall not advertise any commodity or product, designate an individual, a firm, an association, a corporation, a profession, or a business. Further you have advised that your designs are not intended to attract attention. If this is the case, than you are not required to obtain a Borough Sign Permit for such an application. Your proposal does not require a Sign Permit because it does not meet the definition of a sign under Borough Code.

If you have any questions or need any additional information, call the Planning Department at 228-6610.

Erin Reeve, Assistant Planner
Department of Planning and Community Development

Cc: David Taylor, Principle Planner
Scott Brandt-Erichsen, Borough Attorney

TO: Ketchikan Gateway Borough

JUL 10 2007

RE: PAINTED SIGN ON THE ROOF OF 713/715 HILL ROAD.

CLERK'S OFFICE

Attachment (1) - sketch showing property locations in relation to the property at 713/715 Hill Road.

Attachment (2) - two pages regarding the Borough sign ordinance.

Attachment (3) - Photo showing sign which can be viewed from Hill and Denali.

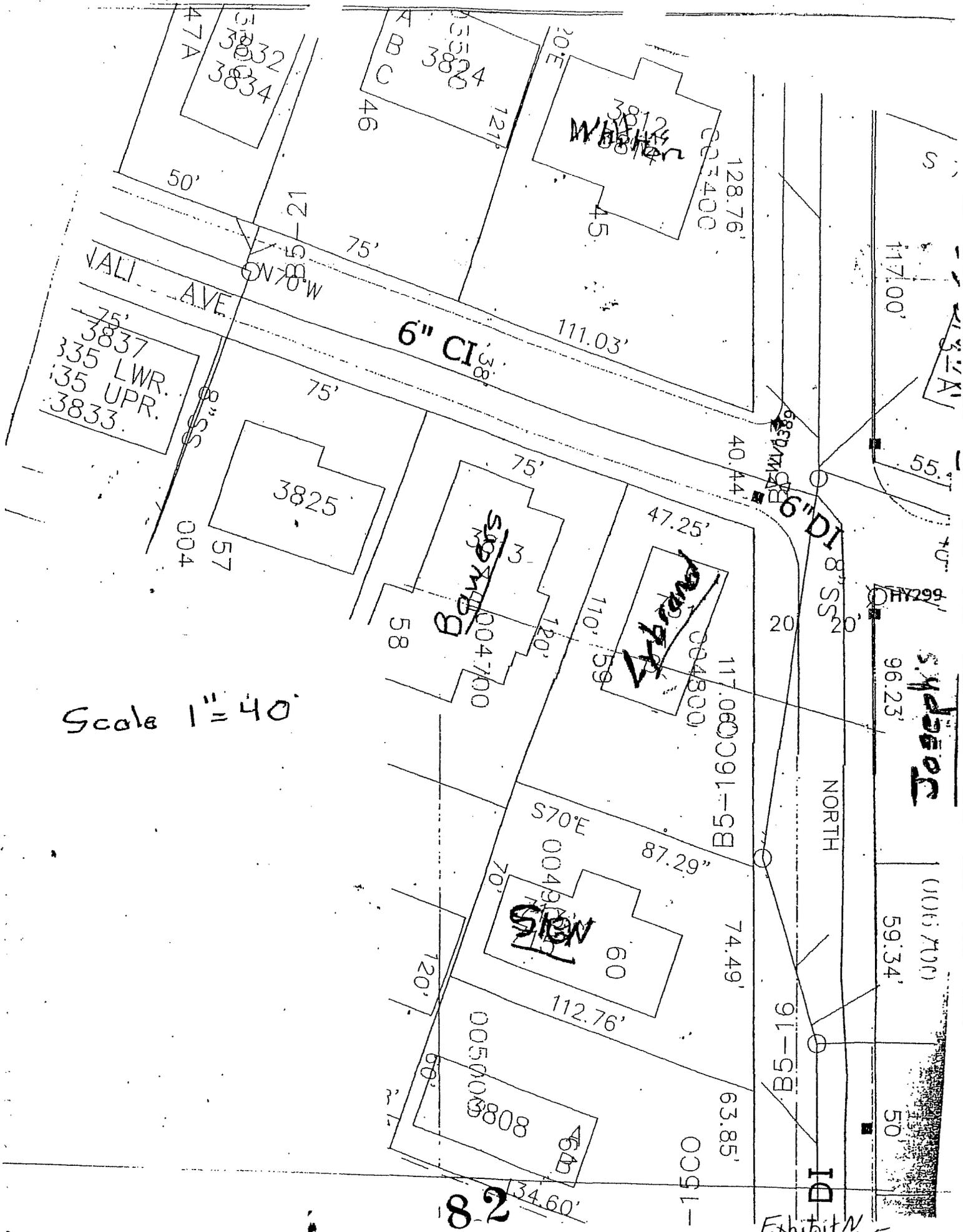
The Lybrand's have been in court twice regarding the messages painted on the roof of 713/715 Hill Road. ~~First time~~ the court ordered the signs to be painted so the messages would be unreadable. However, a partial message and flowers and stick figures remained.

Finally, in August 2005 the sign was completely obliterated and the court dismissed the case in June 2007. It must be noted that the owners of 713/715 Hill Road do not live in Ketchikan but return to the house for a period of time during the summer. On June 28, 2007, the owners returned and a new sign was painted on the roof during the time the owners were in residence..

Because of the decrease in value of their property at 731 Hill Road due to the view of the unsightly signage, in 2005 the Lybrand's property assessment was lowered 10%.

We, the undersigned, request the Ketchikan Gateway Borough take any and all action required to have the sign removed.

<i>Elizabeth F. Lybrand</i>	731 Hill Road	247-6513
<i>Thomas E. Lybrand</i>	730 Hill Road	225-5049
<i>Kathy M. Joseph</i>	730 Hill Rd	225-5049
<i>James Wingren</i>	808 Hill Rd	225-4783
<i>Cornie Wingren</i>	808 Hill Rd	225-4783
<i>Kerry S. Replinger</i>	3752 Denali St.	247-5289
<i>Kent Jensen</i>	3813 Denali	617-6100
<i>[Signature]</i>	710-712 Hill Road	225-4131



Scale 1" = 40'

8.2

Exhibit N

Joseph

(006700)

59.34'

50'

117.00'

55'

70'

66299

96.23'

91-5B

74.49'

63.85'

0091-

NORTH

10

66299

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128.76'

111.03'

40.44'

47.25'

117.080091-5B

87.29'

112.76'

74.49'

63.85'

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60.10.090. Signs and advertising devices.

(A) *General requirements:*

- (1) A permit shall be obtained from the administrative official for this chapter [title] prior to the installation of any exterior sign, nameplate, advertising sign or advertising structure excepting those less than two (2) square feet in area and temporary construction, real estate, and political signs that meet the provisions of this ordinance. Sign permit applications shall include plans for all signs to be placed. The plans shall illustrate sign elevations, cross sections, dimensions, placement on the site, materials, colors, and lighting, designed to withstand high winds. Construction and erection of signs shall be in accordance with this chapter [title].
- (2) Signs permitted under this section shall advertise only the business or activity engaged in on the immediate premises. In the case of building complexes with multiple tenants, immediate premises shall be considered the actual store frontage or parts of the building adjacent to leased space. Subject to the other requirements of this ordinance, one (1) directory sign that lists all commercial tenants in a building complex is allowed per building façade, either mounted flush or as a free-standing or monument sign.
- (3) No sign shall be erected at any location where, by reason of the position, shape or color of such sign, it may interfere with, obstruct the view of, or be confused with any authorized traffic sign, signal or device.
- (4) No sign shall be placed within forty (40) feet of any intersection measured at the center line of the intersecting streets.
- (5) ~~Flashing signs and intermittent illumination are permitted only in commercial and industrial zones, with the exception of the Central Commercial Zone, where flashing, blinking, or intermittently illuminated signs visible from the exterior of a building are prohibited with the exception of intermittently illuminated neon non-textual symbols, revolving barber shop poles, and clocks.~~
- (6) In all residential zones, lighting shall be indirect and shielded from adjacent property.
- (7) ~~Abandoned signs shall be removed by the property owner within six (6) months of the cessation of the advertised business or activity.~~
- (8) Roof-mounted signs, including any signs painted on the roof surface, but excepting those mounted on a marquee or canopy, are prohibited.
- (9) Political signs up to sixteen (16) square feet each on residential property and up to thirty-two (32) square feet on commercial or industrial property may be displayed on private property without a sign permit. Signs may be installed no sooner than one hundred twenty (120) days prior to the election date and shall be removed within five (5) working days after the election date. Political signs not relating to a specific election shall be limited to a display period not to exceed sixty (60) days within one (1) calendar year. Unlighted political signs of up to four (4) square feet may be displayed on private property up to one

computer generated according to the specifications of the digital mapping program, which specifications are on file in the department of planning and community development and available for public inspection and copying.

Open storage: The unenclosed storage of property including but not limited to: appliances, equipment, gear machinery, material supplies, provisions, tools, goods and portions thereof for a period exceeding sixty (60) days. This definition does not include the display of merchandise associated with a bonafide retail business. Unenclosed, for the purposes of this definition, shall mean located outside a fully enclosed building.

Person: A natural person, his heirs, executors, administrators or assigns, and also including firm, partnership or corporation, its or their successors or assigns, trust or other legal entity, including the federal government, or the agent of any of the aforesaid.

Place: A street with usual average daily traffic of 0 to 100 trips per day usually a dead-end street.

Principal use: The major or predominant use of a lot or parcel of land.

Residential kennel: Any lot or premises on which not more than six (6) household pets are kept for compensation.

Service station: Any building, structure, premises or other space used primarily for the retail sale and dispensing of motor fuels, tires, batteries and other accessories; the installation and servicing of such lubricants, tires, batteries and other accessories; and such other services which do not customarily or usually require the services of a qualified automotive mechanic.

Sight obscuring enclosure: A method of visually shielding or obscuring one abutting or nearby structure or use from another by a board or chain-link fence with slats, wall or berm, or by densely planted vegetation that is at least eight (8) feet in height.

Sign: Any words, light letters, signs, letters, figures, commercial phrases, sentences, emblems, devices, trade names or trademarks, or any thing in the nature of such as are used to designate an individual, a firm, an association, a corporation, a profession, a business or a commodity or product, which are visible from any public area and used to attract attention.

Sign, Abandoned: Any sign or sign structure identifying a use or activity that has ceased to occupy the site for a period greater than six (6) months.

Sign Area: The area of a sign face (which is also the sign area of a wall sign or other sign with only one face) shall be computed by means of the smallest square, circle, rectangle, triangle, or combination thereof that will encompass the extreme limits of the writing, representation, emblem, or other display, together with any material or color forming an integral part of the background of the display or used to differentiate the sign from the backdrop or structure against which it is placed, but not including any supporting framework, bracing, or decorative fence or wall when such fence or wall otherwise meets zoning regulation and is clearly incidental to the display itself.

Sign, Construction: A sign placed at a construction site identifying the project or the name of the architect, engineer, contractors, financier or other involved parties.



Meeting to Downtown Business Owners
prior to the meeting of August 24, 2004

You are invited to a
Public Work Session
with the Planning Department and the
Ketchikan Gateway Borough Planning Commission
Tuesday, August 24, 7 pm
at the City Council Chambers to discuss possible
amendments to the
Downtown Signage Ordinance (60.10.090)



Your input is important, and we would welcome your attendance at the Planning Commission work session. Copies of the draft ordinance that the Planning Commission will be discussing and revising are available at the Planning Department, 344 Front Street.
If you have any questions, please call me at 228-6610.

David Taylor
Principal Planner
Ketchikan Gateway Borough
Department of Planning and Community Development

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Exhibit 0

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT KETCHIKAN
3

4 KETCHIKAN GATEWAY BOROUGH,)
5)
6 Plaintiff,)
7)
8 v.)
9)
10 LETA TRASK,)
11)
12 Defendant.)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

Filed in the Trial Courts
State of Alaska
First Judicial District
at Ketchikan
APR 13 2009
Clerk of the Trial Courts
By _____ Deputy

Case No. 1KE-07-437 CI

26 MEMORANDUM AND ORDER

27 Ms. Trask moves for summary judgment. The Ketchikan Gateway Borough
28 (KGB) opposes her motion. Oral argument occurred on October 24, 2008. The court took the
29 matter under advisement. The court requested additional briefing. The briefing was completed
30 on March 27, 2009. Ms. Trask's motion is, for the following reasons, granted in part and denied
31 in part.

32 I. ISSUES

33 The potential issues are:

- 34 a. Whether Ms. Trask's writings constitute a "sign" under KGB Code §
35 60.10.140(B);
- 36 b. Whether Ms. Trask has standing to assert that KGB Code §§
37 60.10.090(A), (B) are unconstitutional;
- 38 c. Whether KGB Code § 60.10.090(A)(8) contains unconstitutional content
39 based restrictions on speech.
- 40 d. Whether KGB Code § 60.10.090(A)(8) is impermissibly overbroad.
- 41 e. Whether KGB Code § 60.10.090(A)(8) is void for vagueness.

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MEMORANDUM AND ORDER

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- 1 f. Whether other provisions in KGB Code §§ 60.10.090(A), (B) are
2 unconstitutional.

3 II. FACTS

4 a. KGB Ordinances

5 KGB Code § 1.10.020, in part, provides:

6 In the construction of the KGB Code, and of all ordinances and resolutions, the
7 following rules shall be observed, unless such construction would be inconsistent
8 with the manifest intent of the assembly or repugnant to the context of the
9 provisions hereof, or to the law.

10 (l) *Interpretation.* In the interpretation and application of any provision of the
11 KGB Code, it shall be held to be the minimum requirements adopted for
12 the promotion of the public health, safety, comfort, convenience and
13 general welfare. Where any provisions of the KGB Code impose greater
14 restrictions upon the subject matter than the general provisions imposed by
15 the KGB Code, the provision imposing the greater restriction or regulation
16 shall be deemed to be controlling.

17 (s) *Nontechnical and technical words.* Words and phrases shall be construed
18 according to the common and approved usage of the language, but
19 technical words and phrases and such others as may have acquired a
20 peculiar and appropriate meaning in law shall be construed and understood
21 according to such meaning.

22 (w) *Or, and.* "Or" may be read "and," and "and" may be read "or" if the
23 context requires it.

24 KGB Code § 1.10.045 provides:

25 **Severability.** Any ordinance heretofore or hereafter adopted by the assembly
which lacks a severability clause shall be construed as though it contained the
clause in the following language: "If any provision of this ordinance, or the
application thereof to any person or circumstances is held invalid, the remainder
of this ordinance and the application to other persons or circumstances shall not
be affected thereby."

1 KGB Code § 60.10.090¹, in part, provides:

2 (A) *General Requirements:*

3 (1) A permit shall be obtained from the administrative official for this
4 chapter [title] prior to the installation of any exterior sign,
5 nameplate, advertising sign or advertising structure except those
6 less than THREE (3) square feet in area and temporary
7 construction, real estate, GOVERNMENTAL NOTICES,
8 GOVERNMENTAL PUBLIC SAFETY SIGNAGE, and political
9 signs PROVIDED that SUCH SIGNS OR NOTICES meet the
10 provisions of this ordinance. Sign permit applications shall include
11 plans for all signs to be placed. The plans shall illustrate sign
12 elevations, cross sections, dimensions, placement on the site,
13 materials, colors, and lighting, designed to withstand high winds.
14 Construction and erection of signs shall be in accordance with this
15 chapter [title].

16 (2) Signs permitted under this section shall advertise only the business
17 or activity engaged in on the immediate premises. In the case of
18 building complexes with multiple tenants, immediate premises
19 shall be considered the actual store frontage or parts of the building
20 adjacent to lease space. Subject to the other requirements of this
21 ordinance, one directory sign that lists all commercial tenants in a
22 building complex is allowed per building facade, either mounted
23 flush or as a free-standing or monument sign.

24 (3) No sign shall be erected at any location where, by reason of the
25 position, shape or color of such sign, it may interfere with, obstruct
the view of, or be confused with any authorized traffic sign, signal
or device.

19
20 ¹ The KGB revised its sign ordinances on November 15 2004 and January 21, 2008. The
21 provisions added in 2004 are underlined. The revisions made in 2008 are in capitals. The
22 Recitals portion of the 2004 Ordinance (No. 1328A) provide, in part, that:

23 A. These amendments are presented at the request of the Ketchikan Gateway Borough
24 Planning Commission and the Borough Assembly, as established as part of the approved Zoning
25 Reform priorities, Phase 1.

26 B. The intent of this ordinance to amend Title 60 of the Code of Ordinances is to
27 improve the sign ordinance in order to better reflect and support the desired character and
28 development patterns of the community, and to further promote and enhance Ketchikan's
29 development as a regional center for business and tourism.

- 1 (4) No sign shall be placed within forty (40) feet of any intersection
2 measured at the center line of the intersecting streets.
- 3 (5) Flashing signs and intermittent illumination are permitted only in
4 commercial and industrial zones, with the exception of the Central
5 Commercial Zone, where flashing, blinking, or intermittently
6 illuminated signs visible from the exterior of a building are
7 prohibited with the exception of intermittently illuminated neon
8 non-textual symbols, revolving barber shop poles, and clocks.
- 9 (6) In all residential zones, lighting shall be indirect and shielded from
10 adjacent property.
- 11 (7) Abandoned signs shall be removed by the property owner within
12 six months of the cessation of the advertised business or activity.
- 13 (8) Roof-mounted signs, including any signs painted on the roof
14 surface, but excepting those mounted on a marquee or canopy, are
15 prohibited.
- 16 (9) Political signs up to 16 square feet each on residential property and
17 up to 32 feet on commercial or industrial property may be
18 displayed on private property without a sign permit. Signs may be
19 installed no sooner than 120 days prior to the election date and
20 shall be removed within five working days after the election date.
21 Political signs not relating to a specific election shall be limited to
22 a display period not to exceed 60 days within one calendar year.
23 Unlighted political signs of up to four square feet may be displayed
24 on private property up to 180 days prior to the election and shall be
25 removed within five working days after the election date.
- (10) During a 'grand opening' not to exceed 14 days, temporary grand
opening signs of up to twenty four (24) square feet may be
displayed on the premises in all zones without a sign permit and
regulations with respect to sign area, placement, and sign type,
with the exception that not more than one grand opening event
may be advertised at any business location within any 12 month
period; provided that each separate business location within a
multiple-business complex shall be entitled to a grand opening
event separate from a grand opening event for the complex as a
whole.
- (11) Temporary construction signs may be displayed without a sign
permit in all zones, limited to a total sign area of 32 square feet per
construction site, displayed no longer than one year, and removed
no later than 10 days after completion or occupancy of the project.

MEMORANDUM AND ORDER

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1
2 (12) SIGNS ERECTED BY GOVERNMENT AGENCIES FOR
3 PUBLIC SAFETY OR PUBLIC NOTIFICATION MAYBE
4 ERECTED IN ANY ZONE WITHOUT A PERMIT.

5 (B) *Signs permitted in residential zones:*

6 (1) *Real estate signs:* One (1) sign not exceeding two (2) square feet
7 advertising only the sale, rental or lease of the building or on
8 premises on which it is maintained is allowed without a permit.

9 (2) *Subdivision signs:* Signs advertising the sale or lease of lots or
10 buildings within new subdivisions of at least two and one-half (2-
11 1/2) acres are permitted providing they are non-illuminated or
12 indirectly illuminated and do not exceed fifty (50) square feet in
13 area. Not more than one (1) such sign shall be located in each
14 major approach to the subdivision and the front, side and rear yard
15 requirements applying to principal structures shall apply to the
16 location of such signs. The display of such signs shall be limited
17 to a period of two (2) years. Prior to the expiration thereof, the
18 applicant may request an extension from the board of adjustment.
19 The sign shall be removed prior to the expiration of the two (2)
20 year period or extension thereof. If the sign has not been removed,
21 the city or borough may enter upon the premises upon which the
22 sign is located and remove such sign at no liability to the city or
23 borough and at the expense of the owner.

24 (3) *Bulletin boards:* Bulletin boards used to display announcements of
25 meetings to be held on the premises on which such boards are
located shall be permitted for churches, schools, community
centers and public, charitable or institutional uses.² Unless

26 ² KGB Code § 60.10.025(e) provides that the RM Zone (Medium Density Residential Zone) "is
27 established to provide for areas where a predominantly medium density residential development
28 is desirable. Nonresidential uses are permitted or prohibited on the basis of their compatibility
29 with the residential character of the environment."

30 KGB Code § 60.10.035 and § 60.10.040 provide that: the "principal uses" in the RM Zone are:
31 "(a) One (1) and two (2) family residences. (b) Twinhouse dwellings . . . (c) Temporary uses and
32 buildings subject to the requirements listed in section § 60.10.107."; and, the "accessory uses"
33 are: "(a) private garages and required off-street parking; (b) Greenhouses and toolsheds; (c)
34 Home occupations under the conditions listed in section § 60.10.095; (d) Other uses and
35 structures customarily accessory and clearly subordinate to permitted principal uses; (e) Non-
commercial telecommunications antennas which are attached to a permitted structure and which
will not create a nuisance or hazard as set forth in § 60.10.117." And KGB Code §

1 otherwise permitted in the zone, such signs shall contain no more
2 than twenty (20) square feet in area; may be used as all signs; may
3 be used as ground signs when located a minimum of ten (10) feet
4 from the street lot line; may be indirectly illuminated; and one (1)
5 such sign shall be permitted for each street frontage.

6
7 (4) *Signs identifying home occupations and cottage industries.*³ One
8 (1) sign per use not exceeding two (2) square feet in area. Such

9
10 60.10.040(B)(3)(b) provides that the planning commission can permit: “. . . Public utility and
11 community facilities, churches, convents, marinas, libraries, museum and art galleries, day
12 nurseries, children’s homes, orphanages, community and recreational clubs, hospitals,
13 sanitariums, nursing homes, homes for the aged, convalescent homes, schools (public and
14 private), professional-medical and dental clinics (occupied by ten (10) or less persons), funeral
15 and mortuary establishments, and cemeteries and related uses.”

16 KGB Code § 60.10.032(A)(3) provides that the planning commission can permit conditional uses
17 in a Rural Residential Zone which include: “(a) Public utility, police and fire protection facilities,
18 parks, libraries, elementary and secondary schools, and marinas.”

19 KGB Code § 60.10.033(A)(3) provides that the planning commission can permit conditional uses
20 in a Suburban Residential Zone which include: “(b) . . . Public Utility and community facilities,
21 churches, marinas, day nurseries, community and recreational clubs and public schools.”

22 KGB Code § 60.10.035(A)(3) provides that the planning commission can permit uses in a Low
23 Density Residential Zone which include: “(g) Public utility facilities, community facilities,
24 churches, marinas, day nurseries, community and recreational clubs and public and private
25 schools.”

KGB Code § 60.10.037(A)(3) provides that the planning commission can permit uses in a
Neighborhood Residential Zone which include: “(e) Public utility facilities, community facilities,
churches, marinas, day nurseries, children’s homes, orphanages, nursing homes, homes for the
aged, convalescent homes, community and recreational clubs and public and private schools.”

The planning commission may permit “tax-exempt uses” in a Low Density Residential Zone
(KGB Code § 60.10.035(A)(3)(a)), a Neighborhood Residential Zone (KGB Code §
60.10.037(B)(3)(a)), a Medium Density Residential Zone (KGB Code § 60.10.040(B)(3)(a)),
and a High Density Residential Zone (KGB Code § 60.10.045(A)(4)(a)).

³ Home occupations are permitted “accessory uses” in a Rural Residential Zone (KGB Code §
60.10.032(A)(2)(c)), a Suburban Residential Zone (KGB Code § 60.10.033(A)(2)(c)), a Low
Density Residential Zone (KGB Code § 60.10.035(A)(2)(c)), a Neighborhood Residential Zone
(KGB Code § 60.10.037(B)(2)(c)), a Medium Residential Zone (KGB Code § 60.10.040(B)(2)),
a High Density Residential Zone (KGB Code § 60.10.045(A)(2)). Cottage industries can be
permitted conditional uses in a Rural Residential Zone (KGB Code § 60.10.032(A)(3)(c)), a

MEMORANDUM AND ORDER

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1 sign shall be no closer than ten (10) feet to any property line or
2 shall be flat against the building. No lighting is permitted.⁴

3 (5) *Signs for nonconforming uses:* A legal nonconforming use in a
4 residential zone may have one (1) sign per property, unlighted, and
5 no larger than twenty (20) square feet in area. Such signs shall be
6 flat against the building or shall be located no closer than ten (10)
7 feet to any property line.

8 (C) Signs in commercial and industrial zones, with the exception of the
9 Central Commercial zone:

10 (1) Signs located flat against a building or a marquee.

11 (2) Two (2) ground poles or projecting signs per business not to
12 exceed fifty (50) square feet in area, provided that signs projecting
13 beyond the lot line may be no closer than six (6) inches from the
14 curblin and must be at least eight (8) feet above the finished
15 sidewalk grade. Free-standing signs can be no taller than thirty
16 (30) feet maximum.

17 (3) Each multiple-business complex is allowed one monument or
18 ground pole per street frontage for a directory sign. The sign area
19 of each such directory sign shall not exceed sixteen (16) square
20 feet plus six (6) square feet per separate business advertised, but
21 not larger than sixty-four (64) square feet.

22 (4) One hanging sign is allowed per tenant per street frontage entry,
23 provided that each sign cannot exceed ten (10) square feet total,
24 and must be mounted such that it is no closer than twelve (12)
25 inches from the curb line and there is at least eight (8) feet of
clearance above the finished sidewalk grade, with the exception
that signs hanging under an existing canopy that is less than eight
(8) feet six (6) inches above the finished sidewalk grade must have
at least seven (7) feet of clearance above the finished sidewalk
grade.

23 Suburban Residential Zone (KGB Code § 60.10.033(A)(3)(d)), a Low Density Residential Zone
24 (KGB Code § 60.10.035(A)(3)(h)), a Neighborhood Residential Zone (KGB Code §
25 60.10.037(B)(3)(f)), and a Medium Density Residential Zone (KGB Code § 60.10.040(B)(3)(a)).

⁴ Prior to the 2004 revisions, KGB Code 60.10.090(B)(4) contained a provision which addressed
construction signs. This and other portions of the ordinance deleted in 2004 are not being set
forth herein.

MEMORANDUM AND ORDER

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1 (5) Temporary signs, as defined in 60.10.140, not exceeding fifty (50)
2 square feet in area and advertising specific events are allowed with
3 a sign permit. The purpose of the following limitations on banner
4 or pennant signs is to ensure that banner or pennant signs are not
5 used as permanent signs.

6 (a) Noncommercial banners or pennants may be erected no
7 sooner than ten days prior to the event advertised . . .

8 (b) Commercial banners or pennants . . .

9 (D) Signs in the Central Commercial Zone:

10 (1) Permanent wall signs, located flat against a building, parapet, or a
11 marquee, are permitted provided that the total sign area of all wall
12 signs does not exceed . . .

13 (2) One projecting permanent sign, not to exceed 50 square feet is
14 allowed per street frontage or business facade. . .

15 (3) One hanging sign allowed per tenant per street frontage entry,
16 provided that each sign cannot exceed ten (10) square feet total . . .

17 (4) Window signs of any content are allowed to be placed without a
18 permit, provided that no more than 40% of the total window
19 surface per business is obscured. . .

20 (5) Permanent signs are not allowed to be placed upon a structure in
21 any manner so as to disfigure or conceal any window opening . . .

22 (6) Each multiple-business complex is allowed one monument or
23 ground pole sign per street frontage for a directory sign. The sign
24 area for each such directory shall not exceed . . .

25 (7) Temporary signs, banners, streamers, pennants, blimps, balloons,
and non-rigid vinyl or other synthetic material signs are not
permitted. Exceptions: Political signs per 60.10.090(A)(9), state or
national flags, restaurant menu displays, temporary 'grand
opening' signs on display for fourteen (14) days or less per
60.10.090(A)(10), portable sandwich board signs no larger than
twelve (12) square feet per face placed on private property or in
association with a permitted concessionaire's stand and displayed
less than twelve (12) hours per day, and temporary non-
commercial banners over a public right-of-way for advertisement
of civil or special community events of civic or special community
events for no longer than thirty (30) days per event,

1 (8) All signs, with the exception of window signs, that advertise a
2 specific offer or a product's price, are prohibited.

3 (9) Signs that contain luminescent . . . are prohibited . . .

4 (E) Signs in Public Lands and Institution Zones:

5 (1) Indirectly illuminated flush, pedestal mounted, or bulletin board . .
6 . signs are permitted, not to exceed thirty (30) square feet per street
7 frontage.

8 (F) Signs in the Future Development zone:

9 (1) For signs identifying home occupations and cottage industries, one
10 (1) sign per use not exceeding two (2) square feet . . .

11 (2) For signs identifying lodges or hotels, one (1) sign not exceeding
12 twenty (20) square feet . . .

13 (G) Elimination of nonconforming signs:

14 (1) Signs which do not conform to the requirements of this chapter
15 [title] shall be brought into compliance or eliminated within three
16 (3) years from the passage of this ordinance, with the exception of
17 nonconforming temporary signs, banner signs, or flashing or
18 blinking signs, which must be removed within 90 days . . .

19 (2) A nonconforming sign shall lose its legal, nonconforming status if
20 the sign is altered in any way in structure, color, or copy, or is
21 substantially damaged, relocated, or replaced.

22 (3) The code administrator shall order the removal of any sign erected,
23 installed, or allowed to remain in violation of this chapter. He or
24 she shall give at least 30 days notice in writing to the owner of
25 such sign, or of the building, structure, or premises on which such
sign is located, to remove the sign or bring it into compliance with
this chapter. The director may order removal of the sign at the
expense of the premises if compliance with the written order is not
obtained. In the case of temporary signs, banners signs, portable
signs or pennants, only seven days' notice need be given.

KGB Code § 60.10.140(B)⁵ includes the following definitions:

⁵ This Code section was also revised by Ordinance 1328A, and the additions are underlined.

1 Sign: Any words, lights, letters, parts of letters, figures, numerals, phrases,
2 sentences, emblems, devices, trade names or trademarks by which anything is
3 made known, such as are used to designate an individual, a firm, an association, a
4 corporation, a profession, a business or a commodity or product, which are visible
5 from any public area and used to attract attention.⁶

6 Sign, abandoned: Any sign or sign structure identifying a use or activity that has
7 ceased to occupy the site for a period greater than six (6) months.

8 Sign Area: The area of sign face (which is also the sign area of a wall sign or
9 other sign with only one face) shall be computed by . . .

10 Sign, Construction: A sign placed at a construction site identifying the . . .

11 Sign, Hanging: Any sign hanging under a canopy or marquee mounted
12 perpendicular to a store frontage . . .

13 Sign, Permanent: Any sign built out of permanent, rigid materials, advertising the
14 name of a business, category, location, type of product, or service provided. . .

15 Sign, Projecting: Any sign that protrudes from or is mounted perpendicular to
16 any flat surface on a building . . .

17 Sign, Roof: A sign projecting over the coping of a flat roof, or over the ridge of a
18 gable, hip or gambrel roof, and supported by or attached to said roof, or any sign
19 that uses the roof for support.

20 Sign, Temporary: Any banner, pennant, valance, or advertising display
21 constructed of cloth, canvas, light fabric, cardboard, wallboard, vinyl, plastic, or
22 other non-permanent material . . . to be displayed for a short period of time
23 advertising any sale, price, offer, event, or product. . . This term shall not include
24 signs advertising real property for sale or rent.

25 Sign, Wall: A sign applied to or mounted flush to the wall of a building or
structure . . .

Sign, Window: Any sign painted on , placed in . . . any window exclusive of
merchandise on display which is intended to be seen from the exterior.

b. Ms. Trask's Evidence

Ms. Trask has presented evidence that:

⁶ The definition of "sign" was codified in 1969 and remained unchanged until the change to

1. She is the owner of a residence at 713/715 Hill Road in Ketchikan..
2. The residence is located in a Medium Density Residential Zone.
3. She had biblical passages painted on the roof of the residence as early as April 1988.
4. The KGB Attorney, in an April 14, 1998 letter to the KGB Planning Director and copied to the KGB Manager, advised that 25 foot by 20 foot "biblical quotations and symbols" painted in white on Ms Trask's roof at the Hill Road house appeared to be directed at her neighbor, Mr. Lybrand, and were not designed to attract the attention of persons passing by on the adjacent roadway so it is unclear whether it qualifies as a "sign" and, if it does,

"it is not the type generally regulated by KGB Code § 60.10.090. This code section, in context, apparently addresses commercial communication or other communication related to the business or activity engaged in on the immediate premises. The communication at issue here does not fall into that category. As a result of the ambiguity as to both the definition of sign and the purpose of the code as it relates to this type of communication, it is doubtful that the Borough could successfully pursue prosecution of a violation of the Borough Code relating to this communication. However, it is quite possible this communication may expose the owner . . . to potential civil liability for a libel or defamation claim. Such a claim would be a civil matter between the person making the communication and the target of the communication."

5. Most of these words and symbols were removed prior to August 10, 2005. The only writing remaining on her roof as of that date was a cross next to "YOUR'E WELCOME".
6. She sent a letter dated August 10, 2005 to the KGB Planning Department (attn: Erin) in which she stated her intent to "replace the biblical passages on my tar roof". She noted that the old passages had been the subject of a civil suit filed by her neighbor on which she had prevailed.⁷ She has

public "area" was made in 2004.

⁷ *See, Lybrand v. Trask*, 31 P.3d 801, 804-05 (Alaska 2001) (upholding trial court's ruling that these roof writings were not sufficiently "outrageous" to support a cause of action for intentional infliction of emotional distress and declining to decide whether or not the writings violated the KGB's sign ordinance).

1 received notice from an attorney that her current mural violates the 2004
2 Code revisions as would her contemplated replacement biblical passages.
3 She also noted that Erin of the Planning Department thought that she did
4 not need a sign permit, she is proceeding with that understanding, but she
5 is requesting written confirmation. She provided a diagram of what she
6 intended to write on her roof.⁸

7 7. Erin Reeve of the KGB Planning Department responded to her August 10,
8 2005 letter in a letter dated October 5, 2005. He noted the she had
9 verbally advised him that: the "symbols, murals, and sayings will not
10 directed at any public area or roadway": they will not 'advertise any
11 commodity or product, designate an individual, a firm, an association, a
12 corporation, a profession, or a business", and, "her designs are not
13 intended to attract attention." He told her that if this is the case, then she
14 is "not required to obtain a Borough Sign Permit for such an application.
15 Your proposal does not require a Sign Permit because it does not meet the
16 definition of a sign under Borough Code."

17 8. Since some point on or before July 10, 2007, the following has been
18 painted on the roof of her residence in large white capital letters:

19 DO UNTO OTHERS . . .
20 BY YOUR DEEDS ARE YOU KNOWN
21 LOVE YOUR NEIGHBOR

22 YOU'RE
23 WELCOME⁹

24 9. The KGB received a written complaint from nine persons about the
25 writing on Ms. Trask's roof on or about July 10, 2007.

26 10. Painted American flags are on the roofs of a residence and a downtown
27 business. The KGB's position is that the flags are not signs.

28 _____
29 ⁸ She wrote:

30 DO UNTO OTHERS AS . . .
31 LOVE YOUR NEIGHBOR
32 BY YOUR DEEDS THEY WILL . . .

33 She also noted that there were birds painted on the other face of the roof.

34 ⁹ A white cross has been painted next to this.

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1 11. The KGB recognizes that some holiday decorations and grave markers at
2 the local cemetery could be interpreted to be signs for which permits are
3 required but it has exercised its discretion not to prosecute the same.

4 12. The KGB has received a few sign complaints. It has investigated. In one
5 instance the sign owner obtained a one-year variance. In another instance,
6 the owner removed the sign.

7 **c. KGB's Evidence**

8 The KGB has presented the following evidence:

- 9 1. The writings on Ms. Trask's roof are visible from a public area.
- 10 2. The complaint signed by nine neighbors about the writings on Ms. Trask's
11 roof. The complainants state that: the writings had been the subject of
12 prior court actions between Ms. Trask and the Lybrands; her roof writings
13 had been removed in August 2005; the writings returned on June 28, 2007;
14 Ms. Trask does not live in Ketchikan;¹⁰ the writings have resulted in a
15 10% decrease in the Lybrand's property tax assessment in 2005; and, the
16 undersigned want the KGB to have the "sign" removed.

17 **d. Pleadings**

18 The KGB filed a Complaint to Enjoin Sign Code Violation. The KGB contends
19 that the words and phrases painted on Ms. Trask's roof violate KGB Code § 60.10.090(A)(8) and
20 constitute a nuisance under Borough Code § 60.10.105(D). The KGB requests the court fine Ms.
21 Trask \$200 per § 60.10.105(D) and order her to remove the words and phrases.

22 Ms. Trask has filed an Amended Answer in which she denies that the KGB is
23 entitled to the relief it seeks. She pled affirmative defenses which include assertions that KGB
24 Code § 60.10.090(A) and (B) violate her rights to free speech, freedom of religion, due process,
25 and equal protection under the Alaska and United States Constitutions. She included a
Counterclaim in which, in part, she alleges that the KGB has deprived her of her state and federal

¹⁰ Ms. Trask "admits" in her Answer and Amended Answer that she is a resident of the state of Oregon.

1 constitutional rights and she is entitled to relief under 42 U.S.C. § 1983; and, she asks the court
2 to declare that KGB Code § 60.10.090(A) & (B) are unconstitutional and to enjoin the KGB
3 from enforcing the same.

4 III. DISCUSSION

5 a. Summary Judgment Standards

6 Alaska R. Civ. P. 56(c) provides that summary judgment:

7 shall be rendered forthwith if the pleadings, depositions, answers to
8 interrogatories, and admissions on file, together with the affidavits, show that
9 there is no genuine issue as to any material fact and that any party is entitled to
10 judgment as a matter of law.

11 The moving party “bears the initial burden of proving, through admissible
12 evidence, the absence of genuine factual disputes and [their] entitlement to judgment as a matter
13 of law.”¹¹ If this burden is met, the non-moving party “is required, in order to avoid summary
14 judgment, to set forth specific facts showing that [the non-moving party] could produce evidence
15 reasonably tending to dispute or contradict the movant’s evidence and thus demonstrate that a
16 genuine issue of material fact exists.”¹²

17 The evidentiary “threshold for opposing summary judgment is very low.”¹³ The
18 court must draw all reasonable inferences of fact in favor of the non-moving party.¹⁴ However,
19 the non-moving party cannot demonstrate a genuine issue of material facts by relying on
20 unsupported conclusory allegations or broad generalizations.¹⁵ Moreover, the non-moving party
21 “must present more than a ‘scintilla’ of evidence to avoid summary judgment; the [non-moving
22

23 ¹¹ *Shade v. Co. & Anglo Alaska Service Corp.*, 901 P.2d 434, 437 (Alaska 1995).

24 ¹² *Petranovich v. Matanuska Electric Association*, 22 P.3d 451, 454 (Alaska 2001).

25 ¹³ *John’s Heating Service v. Lamb*, 46 P.3d 1024, 1040 (Alaska 2002); *see also, Meyer v. State, Department of Revenue*, 994 P.2d 365, 367-68 (Alaska 1999).

¹⁴ *Parker v. Tomera*, 89 P.3d 761, 765 (Alaska 2004).

1 party] must present enough evidence to 'reasonably tend[] to dispute or contradict' the evidence
2 present by the" moving party.¹⁶

3 **b. Issues**

4 **1. Sign**

5 **A. Parties' Positions**

6 Ms. Trask contends that the writings and symbols on her roof are not a "sign"
7 under KGB Code § 60.10.090(A)(8) and KGB Code § 60.10.140(B) because KGB Code §
8 60.10.140(B) addresses commercial advertising.

9 The KGB contends that KGB Code § 60.10.140(B) is not limited to commercial
10 speech and includes the writings and symbols on Ms. Trask's roof.

11 **B. Law**

12 There are several recognized rules of statutory construction which are intended to
13 assist a court in interpreting a statute, and which include:

- 14
- 15 1. "The goal of statutory construction is to give effect to the legislature's
16 intent, with due regard for the meaning the statutory language conveys to
17 others."¹⁷ The same goal and related rules apply to municipal
18 ordinances.¹⁸
 - 19 2. The court interprets a statute (ordinance) "according to reason,
20 practicality, and common sense, considering the meaning of its language,
21 its legislative history and its purpose."¹⁹ The court uses a sliding scale
22 approach under which the plainer the language of the statute (ordinance)

23 ¹⁵ *Fomby v. Whisenhunt*, 680 P.2d 787, 792-93 (Alaska 1984); Alaska R. Civ. P. 56(e).

24 ¹⁶ *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 449 (Alaska 2002) (quoting *Yurioff*
25 *v. American Honda Motor Co.*, 803 P.2d 386, 389 (Alaska 1990), quoting *State, Department of*
Highways v. Green, 586 P.2d 595, 606 n. 32 (Alaska 1978)).

¹⁷ *Wilson v. State, Department of Corrections*, 127 P.3d 826, 829 (Alaska 2006) (quoting
National Bank of Alaska v. Ketzler, 71 P.3d 333, 334 (Alaska 2003)).

¹⁸ *See, Marlow v. Municipality of Anchorage*, 889 P.2d 599, 602 (Alaska 1995).

¹⁹ *Wilson*, 127 P.3d at 829; *see also Western Star Trucks, Inc. v. Big Iron Equipment, Service,*
Inc., 101 P.3d 1047, 1050 (Alaska 2004).

1 "the more convincing the evidence of a contrary legislative intent or
2 purpose must be."²⁰ But the court will ignore the plain meaning of a
3 statute (ordinance) "where that meaning leads to absurd results or defeats
4 the usefulness of the enactment."²¹

- 5 3. When words of a statute (ordinance) have not acquired a peculiar meaning
6 by virtue of a statutory definition or judicial construction, the words are to
7 be construed in accordance with their common usage, "absent an
8 indication [the legislature] intended them to bear some different import."²²
9 "Dictionaries provide a useful starting point for determining what
10 statutory terms mean, as they provide the common and ordinary meaning
11 of words."²³
- 12 4. The court gives "a reasonable and practical interpretation in accordance
13 with common sense."²⁴
- 14 5. Under the doctrine of *eiusdem generis*, if particular words are followed by
15 general terms the general words will be considered to be referring to a like
16 class of things as those particularly listed,²⁵ and this doctrine "is equally
17 applicable when . . . specific words comprehending a class of activity
18 follow a more general description."²⁶
- 19 6. Under the doctrine of *expressio unius est exclusio alterius*, there is an
20 inference that if certain things are mentioned in a statute (ordinance) then
21 "all omissions should be understood as exclusions."²⁷ This doctrine is

22 ²⁰ *Ayres v. United Services Automobile Association*, 160 P.3d 128, 129 (Alaska 2007). A
23 "heavy burden" is placed on a party who urges the adoption of an interpretation that appears to
24 be contrary the legislation's plain language. *Ranney v. Whitewater Engineering*, 122 P.3d 214,
25 217 (Alaska 2005) (citation omitted).

²¹ *Martinez v. Cape Fox Corporation*, 113 P.3d 1226, 1230 (Alaska 2005) (quoting *Davenport*
v. McGinnis, 522 P.2d 1140, 1144 n. 15 (Alaska 1974)).

²² *Jimerson v. Tetlin Native Corporation*, 144 P.3d 470, 472 n. 9 (Alaska 2006) (quoting
Williams v. Taylor, 529 U.S. 420, 431 (2000)).

²³ *Alaskans for Efficient Government v. Knowles*, 91 P.3d 273 276 n. 4 (Alaska 2004) (quoting
2A Norman J. Singer, Sutherland Statutory Construction, section 47.28 (6th ed. 2000)).

²⁴ *Whalen v. Hanley*, 63 P.3d 254, 257 (Alaska 2003).

²⁵ *State v. First National Bank of Anchorage*, 660 P.2d 406, 413 (Alaska 1982) (citation
omitted). The court recognizes that this is merely one rule of construction and is not necessarily
dispositive.

²⁶ *Id.* (quoting 2A C. Sands, Sutherland Statutory Construction § 47.17, at 103 (4th ed. 1973)).

²⁷ *Ranney*, 122 P.3d at 218 (quoting *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066
(Alaska 1991) (citing *Puller v. Municipality of Anchorage*, 574 P.2d 1285, 1287 (Alaska
1978)).

1 particularly applicable where the scheme at issue is purely statutory and is
2 not based on the common law.²⁸

- 3 7. The court “must, whenever possible, interpret each part or section of a
4 statute [ordinance] with every part or section, so as to create a harmonious
5 whole.”²⁹ The court “must presume ‘that the legislature intended every
6 word, sentence, or provision of a statute [ordinance] to have some
7 purpose, force, and effect, and that no words or provisions are
8 superfluous.’³⁰
- 9 8. “[I]f the literal import of the text of an act is inconsistent with the
10 legislative meaning or intent [such as where two related statutory
11 provisions are irreconcilably in conflict]³¹ courts will ordinarily modify
12 the statute to comport with [that] legislative intent.”³²
- 13 9. “In interpreting a zoning ordinance, the trial court may consider the
14 contemporaneous construction of that ordinance by the public officials
15 charged with its administration.”³³
- 16 10. “It is also an axiom of statutory construction that an ambiguous statute
17 should be construed in the most beneficial way the language will permit to
18 avoid hardship, forfeiture or injustice.”³⁴
- 19 11. “[W]hen constitutional issues are raised, the court has a duty to construe a
20 statute [ordinance], where reasonable, to avoid dangers of
21 unconstitutionality. Rather than strike a statute [ordinance] down [the
22 court] will employ a narrowing construction, if one is reasonably
23 possible.”³⁵

24 ²⁸ *Id.* at 219 (citation omitted).

25 ²⁹ *Progressive Casualty*, 165 P.3d at 629 (quoting *Kodiak Island Borough v. Exxon Corp.*, 991
P.2d 757,761 (Alaska 1999)).

³⁰ *Id.* (quoting *Kodiak Island Borough*, 991 P.2d at 761).

³¹ The words within these brackets were added by this court.

³² *Phillips v. State*, 183 P.3d 493 (Alaska App. 2008) (quoting *State of Alaska v. Alaska Civil
Liberties Union*, 978 P.2d 597, 613 n. 101 (Alaska 1999) (quoting Norman J. Singer,
Sutherland [on] Statutory Construction § 46.07 (5th ed. 1992)).

³³ *Lazy Mountain Land Club v. Matanuska-Susitna Borough Board of Adjustment and Appeals*,
904 P.2d 373, 384 n. 65 (Alaska 1995) (quoting *Corper v City and County of Denver*, 536 P.2d
874, 879 (Colo. App. 1975), *aff'd* 552 P.2d 13 (Colo. 1976)).

³⁴ *City of Anchorage v Thomas*, 624 P.3d 271, 273 (Alaska 1981) (citations omitted).

³⁵ *State v. American Civil Liberties Union of Alaska*, Opinion No. 6357 at p. 17 (Alaska April
3, 2009).

1 **C. Decision**

2 KGB Code § 60.10.140(B) is not a model of clarity for three reasons. First, the
3 definition of “roof mounted sign” in KGB Code § 60.10.090(A)(8) implicitly incorporates the
4 definition of “sign” in KGB Code § 60.10.140(B). Second, the punctuation used in KGB Code
5 § 60.10.140(B) is problematic. Specifically, the use of all commas and no semi-colons. This
6 section could be read in a limited manner, as including in the definition of “sign” any “words”
7 and “figures” “by which anything is made known, such as are used to designate an individual, a
8 firm, an association, a corporation, a profession, a business or a commodity or product,” and
9 “which are visible from any public area and used to attract attention.” It could also be read in a
10 broader manner, as applying to any “words” and “figures” “which are visible from any public
11 area and used to attract attention.”³⁶ Third, the former construction would be consistent with
12 much of the rest of the KGB sign ordinances, which focus on commercial activities.³⁷ But the
13 KGB sign ordinances also regulate “signs” that do not involve commercial activities.³⁸

14
15 The court finds that the above limited construction of “sign” in KGB Code §
16 60.10.140(B) is the correct interpretation for eight reasons.

- 17 1. It is consistent with the words and the punctuation used by the KGB
18 Assembly. There is a comma after “made known” and “such as are used.”
19 It appears that “such as are used” applies to all of the foregoing.

20 ³⁶ In effect limiting the “by which anything is made known, such as are used to designate an
21 individual a firm, an association, a corporation, a profession, a business or commodity or
22 product” to “trade names and trademarks.”

23 ³⁷ For example, KGB Code § 60.10.090(A)(2) (“Signs permitted under this section shall
24 advertise only the business or activity engaged in on the immediate premises”); KGB Code §
25 60.10.140 – *Sign, Permanent* (Any sign . . . advertising the name of a business, category,
location, type of product, or service provided); and KGB Code § 60.10.140 – *Sign, Temporary*
(Any banner . . . to be displayed for a short period of time advertising any sale, price, offer,
event, or product).

³⁸ For example, government signs and notices (KGB Code §§ 60.10.090(A)(1), (12)), political
signs (KGB Code § 60.10.090(A)(9)), and bulletin boards (KGB Code § 60.10.090(B)(3)).

- 1 2. This construction is consistent with common sense – the primary concern
2 in commercial zoned areas is to regulate business signs and the primary
3 concern in residential zones is to limit and regulate business signs as some
4 limited commercial activities are permitted in such zones. Other types of
5 “signs” would be rare and not of primary concern. This is perhaps best
6 evidenced by the fact that Ms. Trask’s writings and symbols appear to be
7 the only non-commercial “sign” to have ever been an issue for the KGB.
- 8 3. This construction is supported by the doctrine of *ejusdem generis*.
- 9 4. This construction is supported by the doctrine of *expressio unius est*
10 *exclusio alterius*.
- 11 5. This construction is supported by the “axiom of statutory construction”
12 that ordinances are to be construed to “avoid hardship” and “forfeiture.”
13 This construction limits the scope of the prohibition in KGB Code §
14 60.10.090(A)(8).
- 15 6. This is the construction independently arrived at some seven years apart
16 by both the KGB Attorney and the KGB Planning Department with
17 respect to the same roof and, for all intents and purposes, the same words
18 and symbols. Also, it appears to be consistent with the interpretation the
19 KGB has taken with respect to other potential “signs.” A reasonable
20 argument could be made that a flag is an “emblem.” There are two roof
21 flags in Ketchikan that have not been the subject of any enforcement
22 action. Both are visible from public areas. The one on top of the Tongass
23 store is quite prominent. And the court notes the points raised by Ms.
24 Trask with respect to the cemetery.
- 25 7. The KGB sign ordinances can be read harmoniously if the few non-
commercial terms noted above are read as modifying the definition of
“sign” to include the specifically described type of item. This approach
would not apply to KGB Code § 60.10.090(A)(8) as it does not refer to a
specific type of “sign”, such as “government sign”, “political” sign, or a
“bulletin board”. It instead refers to the location of a “sign.”
8. This construction is reasonable and substantially limits, if not eliminates,
 dangers of unconstitutionality.

The above in effect dismisses the KGB’s claim that the writings and symbols on
Ms. Trask’s roof violate KGB Code § 60.10.090(A)(8). There are no genuine issues of material

1 fact and Ms. Trask is entitled to judgment on this issue.³⁹ It appears to do likewise with respect
2 to the KGB's nuisance cause of action as it is premised on a violation of § 60.10.090(A)(8).

3 **2. Standing**

4 **A. Parties' Positions**

5 Ms. Trask contends that she has standing to claim that both KGB Code §
6 60.10.090(A)(8) and other portions of KGB Code §§ 60.10.090(A), and (B) violate constitutional
7 free speech protections.

8 The KGB contends that Ms. Trask has standing to dispute the constitutionality of
9 KGB Code 60.10.090(A)(8) only if the writings on her roof are "signs" under KGB Code §
10 60.10.140(B), and that she has no standing to raise constitutional claims with respect to other
11 portions of KGB Code § 60.10.090(A) or (B) as they do not apply to her situation.

12 **B. Law**

13 The "standing" requirement is based "on the principle that courts should not
14 resolve abstract questions or issue advisory opinions."⁴⁰ The general rule is that a person has
15
16
17

18
19 ³⁹ The court gave the parties the additional opportunity to present supplemental briefing and
20 evidence, and to have an evidentiary hearing. The parties submitted additional evidence and
21 briefing. Neither requested an evidentiary hearing. So it appears that the record is complete as
22 to the issue the court decided – that the above-discussed limited construction is applicable and it
23 is not necessary for the court to decide the same under the summary judgment standards. In this
24 regard the court also notes that this determination is ultimately one to be made by the court and
25 not a jury (and again, the factual record appears to be complete). To the extent that the summary
judgment standards apply to this issue, summary judgment is appropriate as there are no genuine
issues of material fact with respect to the same and Ms. Trask is entitled to judgment as a matter
of law. The court notes that there are genuine issues of fact with respect to whether the words
and symbols on the roof are used to attract attention from a public area (the court reads those two
requirements as being intertwined). But those issues are not material given the court's
conclusion that the symbols and writing on the roof are not a "sign" for a different reason.

⁴⁰ *Ruckle v. Anchorage School District*, 85 P.3d 1030, 1034 (Alaska 2004).

1 standing to bring an action if they have “a sufficient personal stake in the outcome of the
2 controversy.”⁴¹ “This inquiry must turn on the facts of each case.”⁴²

3 There is an exception to this general rule under which a person may argue that a
4 regulation would be unconstitutional if applied to others if the regulation “broadly prohibit[s]
5 speech protected by the First Amendment.”⁴³

6 Alaska’s declaratory judgment statute, in part, provides:

7
8 In a case of actual controversy in the state, the superior court . . . may declare the
9 rights and legal relations of an interested party seeking the declaration, whether or
not further relief is or could be sought.⁴⁴

10 The “actual controversy” requirement “encompasses a number of more specific reasons for not
11 deciding cases, including lack of standing, mootness, and lack of ripeness.”⁴⁵ A court can provide
12 declaratory relief only where the party has standing and the claim is ripe and not moot.⁴⁶

13 There is no standard test for determining if a claim is ripe.⁴⁷ The Alaska Supreme
14 Court⁴⁸ recently stated:

15 The concept of ripeness can be explained in both abstract and practical
16 formulations. The abstract formulation depends on ‘whether . . . there is a
17 substantial controversy, between the parties having adverse legal interests, of
sufficient immediacy and reality to warrant the issuance of declaratory
18 judgment.’⁴⁹ On a more practical level, our ripeness analysis fundamentally

19 ⁴¹ *Hoblit v. Commissioner of Natural Resources*, 678 P.2d 1337, 1341 (Alaska 1984).

20 ⁴² *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 101 (1968)).

21 ⁴³ *Municipality of Anchorage v Leigh*, 823 P.2d 1241, 1245-46 n. 11 (Alaska 1992) (quoting
County Court of Ulster v. Allen, 442 U.S. 140, 154-55 (1979)); *see also, Gottschalk v. State*,
22 575 P.2d 289, 290 n. 2 (Alaska 1978), and *Marks v. City of Anchorage*, 500 P.2d 644, 656 n. 7
(Alaska 1972).

23 ⁴⁴ AS 22.10.020(g).

24 ⁴⁵ *Brause v. State, Department of Health & Social Services*, 21 P.3d 357, 358 (Alaska 2001).

25 ⁴⁶ *Id.*; *See also, ACLU of Alaska* at 7.

⁴⁷ *Id.* at 359.

⁴⁸ *ACLU of Alaska* at 8-9.

⁴⁹ *Id.* at 8 (quoting *Brause*, 21 P.3d at 359 (quoting 13 A. Wright, ET AL., FEDERAL
PRACTICE AND PROCEDURE § 3532, at 112 (2d ed. 1984)).

1 'balances the need for decision against the risks of decision.'⁵⁰ We examine 'the
2 fitness of the issues for judicial decision' and the 'hardship to the parties of
3 withholding court consideration.'⁵¹

4 Under this formulation, varying degrees of concreteness might be deemed
5 acceptable depending on the need for a judicial decision. Thus, in the context of
6 free speech, a 'court may adopt [a] somewhat relaxed approach to justiciability'
7 because of the special consideration traditionally afforded free speech.⁵²

8 In *Alaska Right to Life* the Court noted that:

9 In First Amendment contexts, the Supreme Court has recognized that the harm
10 suffered by a party who restricts allegedly protected speech in order to avoid civil
11 sanction or criminal penalty may warrant preenforcement review in some cases.
12 *See, e.g. Virginia v. American Bookseller's Association*, 484 U.S. 383, 393 . . .
13 (1988) (concluding that a preenforcement challenge was justiciable when
14 plaintiffs restricted their speech based on 'actual and well-founded fear that the
15 law will be enforced against them). A court may adopt this somewhat relaxed
16 approach to justiciability, however, only upon a showing that the plaintiff 'is
17 immediately in danger of sustaining [] a direct injury as a result of [an executive
18 or legislative] action.' *Laird v. Tatum*, 408 U.S. 1, 12-13 . . . (1972).⁵³

19 C. Decision

20 Ms. Trask does not have standing to claim KGB Code § 60.10.090(A)(8) and
21 other portions of KGB Code §§ 60.10.090(A), and (B) violate constitutional free speech rights
22 for two reasons. First, § 60.10.090(A)(8) does not apply to the writings and symbols on her roof.
23 Second, to the extent that *Municipality of Anchorage v. Leigh* remains good law after *American*
24 *Civil Liberties Union of Alaska*, she has not shown that the KGB sign ordinances, as construed
25 by the court herein, "broadly" prohibit speech protected by the First Amendment.

26 ⁵⁰ *Id.* at 8-9 (quoting *Brause*, 21 P.3d at 359 (quoting Wright, *supra* note 48, § 3532 at 114-15))

27 ⁵¹ *Id.* at 9 (quoting *Brause*, 21 P.3d at 359 (quoting Wright, *supra* note 48, § 3532 at 112)
28 (internal quotation marks omitted)).

29 ⁵² *Id.* (quoting *Alaska Right to Life Political Action Committee v. Feldman*, 504 F.3d 840, 851
30 (9th Cir. 2007)).

31 ⁵³ *Alaska Right to Life*, 504 F.3d at 851.

1 Ms. Trask's declaratory judgment claims are not ripe for three reasons. First,
2 there is no longer an actual concrete sign-related controversy between her and the KGB.⁵⁴
3 Second, the limited circumstances under which this requirement is relaxed in free speech cases
4 does not apply as she has not shown that she is in danger of sustaining any direct injury as the
5 result of a civil or criminal enforcement action based on the KGB's sign ordinances. The only
6 sign-related speech she has engaged in, attempted to engage in, or contemplated engaging in is
7 the writings and symbols on her roof. The same do not violate the KGB's sign ordinances as
8 discussed above. Third, the balance between a need for a decision and the risk of a decision
9 favors no decision. The court would be forced to decide the case on the basis of hypothetical
10 facts.⁵⁵ This litigation would "dissipate judicial energies better conserved for litigants who have
11 a real need for official assistance."⁵⁶ The KGB "should not be forced to bear the burdens of
12 litigation without substantial justification."⁵⁷ The decisions would involve "lawmaking" as
13 finding in Ms. Trask's favor requires that the court declare at least portions of the KGB sign
14 ordinances unconstitutional and "[d]ue respect for the legislative branch of government [the
15 KGB] requires that [the court] exercise [its] duty to declare a[n] [ordinance] unconstitutional
16 only when squarely faced with the need to do so."⁵⁸ Ms. Trask would suffer little, if any,
17 hardship if the court did not address the merits of her declaratory relief cause of action. Again,
18
19
20
21

22 ⁵⁴ Ms. Trask has brought a § 1983 action. The court discussed the same in its May 23, 2008
23 Memorandum and Order. She claims that the KGB has violated her constitutional rights by
24 attempting to penalize her under KGB § Code 60.10.090(A)(8) for the writings and symbols on
25 her roof. The KGB is no longer able to do so under the court's ruling herein.

⁵⁵ *See, Brause*, 21 P.3d at 359; *American Civil Liberties Union of Alaska* at 14-18.

⁵⁶ *American Civil Liberties Union of Alaska* at p. 14 (quoting *Brause*, 21 P.3d at 359).

⁵⁷ *Id.* (quoting *Brause* 21 P.3d at 359).

⁵⁸ *Id.* at 19.

1 the only speech she has engaged in, attempted to engage in, or contemplated engaging in does
2 not violate the KGB sign ordinances.

3 Given the foregoing, it is not necessary for the court to address the other potential
4 issues referenced at pp 1-2 hereinabove.

5 **IV. CONCLUSION**

6 KGB § Code 60.10.090(A)(8) does not cover the writings and symbols on Ms.
7 Trask's roof because they do not constitute a "sign" under KGB Code § 60.10.140(B). So the
8 KGB's related enforcement action is dismissed. This ruling also appears to result in the
9 dismissal of the KGB's nuisance cause of action. Ms. Trask does not have standing to litigate
10 the constitutionality of the KGB's sign ordinances and declaratory relief is otherwise
11 inappropriate under the facts and circumstances of this case. The court is not addressing whether
12 or to what extent Ms. Trask's § 1983 cause of action remains viable⁵⁹ as the parties have not
13 addressed this issue.

14 A hearing for the purpose of scheduling a trial on the remaining issues will occur
15 on May 1, 2009 at 4:00 p.m.

16 **IT IS SO ORDERED.**

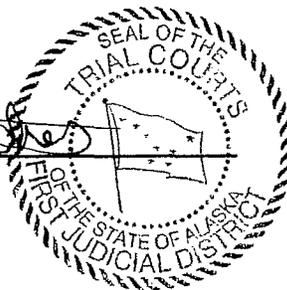
17 Dated at Ketchikan, Alaska this 13th day of April 2009.

18 **CERTIFICATION**

19 Copies Distributed

20 Date 4/13/09
21 To S. Brandt-Erichsen
A. Scholz

22 Trevor N. Stephens
Trevor N. Stephens
Superior Court Judge



23 By ⁵⁹ It appears that, as a preliminary matter, the court at some point would have to address whether
24 the writing on Mr. Trask's roof is constitutionally protected speech. The *Lybrand v. Trask*, 31
25 P.3d 801, 804-05 (Alaska 2001), decision and evidence in the record in this case could support
the inference that the writings and symbols on Ms. Trask's roof are directed at the Lybrands and
done with the intent to deride them, and that the speech is permanent – Ms. Trask has no intent
of removing it and the Lybrands (and other neighbors) have no realistic choice but to look at it
day after day after day.



1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT KETCHIKAN
3

4 KETCHIKAN GATEWAY BOROUGH,)
5)
6 Plaintiff,)
7)
8 v.)
9 LETA TRASK,)
10)
11 Defendant.)

Case No. 1KE-07-437 CI

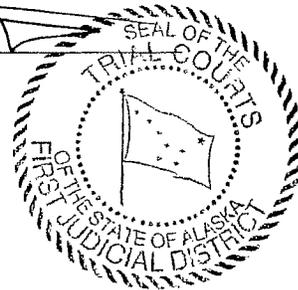
12 ERRATA

13 The court has noted three typographical errors in the April 13, 2009
14 Memorandum and Order. On page 12 line 7 the word "be" was omitted, and should follow "will
15 not." On page 18 line 18 the word "after" should read "between." On page 20 at line 20 there
16 should be a hyphen between "applicable" and "and." The Memorandum and Order shall be
17 deemed to include these changes.

18 **IT IS SO ORDERED.**

19 Date at Ketchikan, Alaska this 19th day of April 2009.

20 
21 Trevor N. Stephens
22 Superior Court Judge



23 **CERTIFICATION**
24 Copies Distributed

25 Date 4/20/09

To S. Brandt-Erichsen
A. Schulz

By CK

ERRATA

KGB v. Trask et al., Case No. 1KE-07-427 CI

Page 1 of 1

111
Alaska Court System

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

Filed in the Trial Courts
State of Alaska
First Judicial District
at Ketchikan

KETCHIKAN GATEWAY BOROUGH,
Plaintiff,

JUN 01 2009

vs.

Clerk of the Trial Courts
By _____ Deputy

LETA TRASK,
Defendant.

Case No. 1KE-07-437 CI

MEMORANDUM RE: 42 U.S.C.A. § 1983

42 U.S.C.A. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. ...

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

I. PROTECTED SPEECH

The United States Supreme Court has determined that limitations exist with regard to freedom of speech. There are certain created categories of expression that have been determined "not within the area of constitutionally protected speech."¹ For example, the

¹ R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992), quoting Roth v. United States, 354 U.S. 476, 483 (1957).
Memorandum Re: 42 U.S.C.A. § 1983
Ketchikan Gateway Borough v. Trask
Case No. 1KE-07-437 CI
Page 1 of 5

SCHULZ AND SKILES, Attorneys at Law
307 Bawden
Ketchikan, AK 99901
Ph: (907) 225-9401 Fax: (907) 225-5513

1 First Amendment protections are generally not found to extend to defamation, obscenity,
2 and fighting words.²

3
4 The phrases written upon Leta Trask's roof are, "Do Unto Others", "By Your
5 Deeds You're Known", "Love Your Neighbor", and "You're Welcome." Also included
6 is a cross and hearts. These writings do not defame the character or reputation of any
7 individual. The writings are not so indecent and improper that they are an affront to
8 accepted standards of decency. Nor are these writings fighting words, "those personally
9 abusive epithets, which, when addressed to the ordinary citizen, are, as a matter of
10 common knowledge, inherently likely to provoke a violent reaction."³ To fall outside the
11 realm of protection, the speech must "produce a clear and present danger of a serious
12 substantive evil that rises far above public inconvenience, annoyance, or unrest."⁴

13
14
15
16 As the paintings upon Leta Trask's roof do not fall within any of the categories
17 recognized by the United States Supreme Court, her writings are entitled to the
18 protections guaranteed by the First Amendment.

19 20 **II. VIABLE CAUSE OF ACTION UNDER 42 U.S.C.A. § 1983**

21 As in Faustin v City, County of Denver, Colorado,⁵ Ketchikan Gateway Borough
22 has infringed upon Leta Trask's constitutional right to freedom of speech. In Faustin,
23 Wendy Faustin filed a claim under 42 U.S.C.A. § 1983 alleging that her First
24

25
26 ² Id., citing Roth, 354 U.S. 476 (1975) (obscenity), Beauharnais v. Illinois, 343 U.S. 250 (1952) (defamation), and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

27 ³ Cohen v. California, 403 U.S. 15, 20 (1971)

28 ⁴ City of Houston v. Hill, 482 U.S. 451, 462 (1987), quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

29 ⁵ 104 F.Supp.2d 1280 (D. Colo. 2000), affirmed in part, reversed in part, and remanded by, 268 F.3d 942 (10th Cir. 2001).

1 Amendment rights were violated. On several different occasions, Faustin displayed a
2 banner at an overpass, reading, "Abortion kills children."⁶ On December 5, 1997, while
3 displaying the banner, a police officer approached Faustin and asked her to stop
4 displaying the banner. The officers advised they were unaware of any law that she was
5 violating. On February 6, 1998, Faustin was again displaying the banner. Another
6 officer approached her and told her she could not display the banner. Faustin advised she
7 was finished for the day and no action was taken.⁷ On March 6, 1998, Faustin was again
8 displaying the banner at the overpass. Yet another officer approached her and told her
9 she was violating the Posting Ordinance. The officer consulted with another officer that
10 indicated that the banner also violated the Outdoor Advertising Act.⁸ After this
11 encounter, Fastin's attorney sent a letter to the Police Chief requesting assurance that
12 Faustin would not be arrested for displaying the banner. No response was received.⁹ On
13 August 7, 1998, Faustin was again displaying the banner and was approached by another
14 officer. Within fifteen minutes, four other police cars arrived. Faustin was cited for
15 violating section 3-1. The charge was dismissed on October 9, 1998, as the city
16 prosecutor determined that the posting ordinance did not apply.¹⁰ On November 18,
17 1998, the Assistance City Attorney wrote a letter to the police chief advising him that
18 Austin's conduct was protected speech. On November 23, 1998, Faustin filed her
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⁶ 268 F.3d at 945.

⁷ *Id.*

⁸ *Id.* at 945-46.

⁹ *Id.* at 946.

¹⁰ *Id.*

1 complaint alleging among other claims that the application of section 3-1 to the display of
2 her banner, was unconstitutional.¹¹

3
4 The lower court found that based upon the defendant's ordering Faustin to stop
5 displaying her banner and charging her pursuant to the ordinance, the statute was applied
6 in an overbroad and unconstitutional manner in violation of 42 U.S.C.A. § 1983.¹²

7
8 According to the district court, the fact that Faustin removed her banner after one of the
9 police contacts, the fact that she was charged at all under the statute, and the fact that her
10 speech was chilled indicated that the defendant's constitutional violation was not "such a
11 quickly disposed of inconvenience."¹³ The district court granted summary judgment in
12 favor of Faustin holding that section 3-1 was unconstitutional as applied to Faustin.¹⁴

13
14 The defendants appealed claiming the case was moot and that Faustin lacked standing
15 because the charge against her had been dismissed and was unlikely to recur.¹⁵ The
16 Court of Appeals found that Faustin had standing to sue for damages based upon her
17 prosecution and affirmed the district court holding on that issue.¹⁶

18
19 Similarly, it turns out that the sign ordinance does not apply to the paintings on
20 Leta Trask's roof. However, KGB used that ordinance to demand, in multiple letters, the
21 removal of Leta Trask's paintings.¹⁷ Like Faustin, Leta Trask stood up for her
22 constitutional rights and continued to display her speech. When she did, KGB used the
23
24

25
26 ¹¹ Id.

¹² 104 F. Supp.2d at 1288.

¹³ Id.

¹⁴ 268 F.3d at 947.

¹⁵ Id.

¹⁶ Id. at 948 & 950.

¹⁷ See, Exhibit A, B & C.

29 Memorandum Re: 42 U.S.C.A. § 1983

Ketchikan Gateway Borough v. Trask

Case No. IKE-07-437 CI

Page 4 of 5

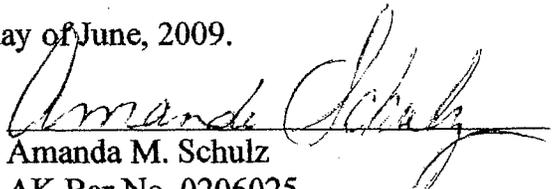
SCHULZ AND SKILES, Attorneys at Law
307 Bowden
Ketchikan, AK 99901
Ph: (907) 225-9401 Fax: (907) 225-5513

1 inapplicable ordinance to file a lawsuit against her. The fact that Leta Trask was willing
2 to challenge the ordinance and not remove her paintings does not mean that the actions of
3 KGB did not inflict injury. The fact that the Court has found the ordinance inapplicable
4 to her paintings such that she cannot continue to be sued does not mean that she did not
5 suffer injury. Rather, the actions of KGB in using the ordinance to demand removal of
6 the painting and then file suit again Leta Trask was an overbroad and unconstitutional
7 application of the ordinance that had the effect of curtailing her speech. While Leta
8 Trask did not remove the sign, fear of further prosecution kept her from making any
9 modifications or performing any upkeep. An evidentiary hearing may be necessary in
10 order to further establish exactly how the action of KGB curtailed her freedom of speech.
11 However, based upon the foregoing, she does have standing to assert her claim under 42
12 U.S.C.A. § 1983 based upon her prosecution.

17 III. CONCLUSION

18 Leta Trask has standing to assert her claim under 42 U.S.C.A. § 1983 despite the fact
19 that the ordinance has been found not to apply. Even if the sign ordinance is
20 constitutional as written, KGB's overbroad application of the ordinance to Leta Trask is a
21 violation of her constitutional right to free speech.

24 Dated at Ketchikan, Alaska, this 15th day of June, 2009.


Amanda M. Schulz
AK Bar No. 0206025

27 Certified: A true and correct copy of the above and its attachments is being served via court tray to Scott-
28 Brandt-Erichsen, Borough Attorney, on 6-1-09, by Jane Melane.

29 Memorandum Re: 42 U.S.C.A. § 1983
Ketchikan Gateway Borough v. Trask
Case No. 1KE-07-437 CI
Page 5 of 5

KETCHIKAN GATEWAY BOROUGH

OFFICE OF THE BOROUGH ATTORNEY • 344 FRONT STREET • KETCHIKAN, ALASKA 99901

SCOTT A. BRANDT-ERICHSEN
BOROUGH ATTORNEY
(907) 228-6635
FAX: (907) 228-6683
E-MAIL: BORGATTY@BOROUGH.KETCHIKAN.AK.US

July 13, 2007

Robert and Leta Trask
498 N. 72nd Street
Springfield, OR 97478

Re: Prohibited Roof-Mounted Sign

Dear Mr. And Mrs. Trask,

My Office has received a complaint concerning a sign recently painted on the roof of 713/715 Hill Road. According to the Borough's property tax records, you are the owner of this property.

As you may or may not be aware, the Ketchikan Gateway Borough Assembly amended the Borough's sign code in November 2004, adopting Ordinance No. 1328A. A copy of this ordinance is attached. This ordinance, among other things, incorporated provisions which specifically prohibited roof-mounted signs, including any signs painted on the roof's surface, but excepting those mounted on a marquee or canopy. See KGB Code Section 60.10.090(A)(8).

Ordinance 1328A also amended the definitions regarding signs providing that a sign includes any words, letters, etc., which are visible from any public area and used to attract attention. Previously the code defined sign in a manner which targeted signs directed at a highway or road only. My office has been advised that the sign which was recently painted on the roof of 713/715 Hill Road is visible from a public area.

The 2004 code amendment also made provisions for the code administrator to order the removal of any sign erected, installed, or allowed to remain in violation of the sign ordinance. By copy of this letter I am requesting that the code administrator issue such an order of removal. I am writing separately, however, in order to 1) respond to the complaint received

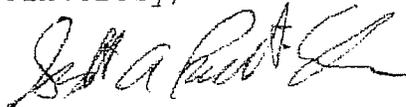
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EXHIBIT A
Page 1 of 2 Page(s)

by my office; and 2) to bring this matter to your attention so that it may be more expediently resolved without an enforcement order from the code administrator.

Thank you for your attention to this matter.

Sincerely,



Scott A. Brandt-Erichsen
Borough Attorney

Enclosure

cc: Jonathan Lappin, Acting Code Administrator

KETCHIKAN GATEWAY BOROUGH

OFFICE OF THE BOROUGH ATTORNEY • 344 FRONT STREET • KETCHIKAN, ALASKA 99901

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(907) 228-6635
FAX: (907) 228-6683

E-MAIL: BORDATTY@BOROUGH.KETCHIKAN.AK.US

August 15, 2007

Robert and Leta Trask
498 N. 72nd Street
Springfield, OR 97478

Re: Prohibited Roof-Mounted Sign

Dear Mr. And Mrs. Trask,

I have received and reviewed letter of July 31, 2007. I have also reviewed your August 10th, 2005, letter to the Planning Department, and the October 5th, 2005, letter from Erin Reeve, Assistant Planner, responding to your letter.

Your July 31st, 2007, letter mis-characterizes both of these prior communications. In particular your August 10th, 2005, letter indicates your intent to replace the biblical passage on your tar roof. Your letter does not indicate what you intended on putting in its place. The October 5th, 2005, letter from Erin Reeve, clearly stated the Borough's understanding as to what you intended to do, painting symbols on your roof. It also notes that you verbally assured him that the symbols would not be directed at a public area or roadway.

As indicated in my letter of July 13th, 2007, the Borough has received written complaints from multiple parties, in this instance 9 separate persons, indicating that your roof mounted sign is visible from a public area or roadway. Thus, the current sign is not as you had represented in 2005, nor does it conform to the parameters which Mr. Reeves' October 5, 2005, letter indicated would allow a roof painting without a sign permit. Your current sign falls within the definition of a roof mounted sign within the Code. Further, any roof mounted sign is only permitted if it is mounted on a marquee or canopy.

Further, with respect to an American or State flag, it is not "words, lights, letters, parts of letters, figures, numerals phrases or sentences." Nor is it an emblem, device, trade name or trademark by which something is made known. These are the operative terms in the definition. If you wish to paint pictures or flags which do not contain letters or numbers and which are not associated with particular products or enterprises, such illustrations would not be "signs", and just as Mr.

Reeve indicated, pictures would not require a permit.

In checking with the Planning department I have not been advised of any record of a conversation with you in the summer of 2006, regarding permits for other roof mounted sign locations. If you have specific complaints about signs which are viewed as a violation of the Code, I would invite you to communicate those complaints including the address where you believe the violations is occurring. Where, as here, the Borough has received a complaint from 9 separate persons regarding a roof sign which clearly violates the provisions of the Code it is appropriate for the Borough to respond. In this instance the owner of the property is responsible for the violation, as are the tenants. If the sign is not removed as indicated, citations for violation of the Borough's sign Code may be issued to the current residents of the location and/or yourself.

Your attention to this matter is appreciated.

Sincerely,



Scott A. Brandt-Erichsen
Borough Attorney

Enclosure

cc: Jonathan Lappin, Acting Code Administrator

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120

EXHIBIT B
Page 2 of 2 Page(s)

KETCHIKAN GATEWAY BOROUGH

OFFICE OF THE BOROUGH ATTORNEY • 344 FRONT STREET • KETCHIKAN, ALASKA 99901

SCOTT A. BRANDT-ERICHSEN
BOROUGH ATTORNEY
(907) 228-6635

FAX: (907) 228-6683

E-MAIL: BORDATTY@BOROUGH.KETCHIKAN.AK.US

September 4, 2007

Residents of
713/715 Hill Road
Ketchikan AK 99901

Subject: Prohibited Roof Sign

To the Residents of 713/715 Hill Road,

My office has received a complaint concerning a sign painted on the roof of the structure at 713/715 Hill Road. According to Borough property tax records this property is owned by a Robert and Leta Trask of Springfield, Oregon.

As you may or may not be aware, the Ketchikan Gateway Borough Code, as amended in November 2004, prohibits signs painted directly on a roof surface. See Code excerpt, attached. For purposes of the Borough Code a sign includes communication with words or identified symbols. Pictures or murals do not fall within the scope of this definition if they do not incorporate trade mark or other similar recognized symbols.

The roof of your residence currently is adorned with a prohibited roof sign. See attached photos.

The provisions of the 2004 Code amendment allow the Borough Code Administrator to order the removal of any sign installed in violation of the sign ordinance. This letter is intended to bring this matter to your attention so that it may be resolved expediently without an enforcement order from the Code Administrator or issuance of a citation. Citations for the violation may be issued to the owner of the property, the owners agent or contractor, or any person who maintains a structure where the violation exists. KGB Code 60.10.105(D). As the occupant of the premises you would be a party responsible, particularly where all other agents of the owner are outside of the Borough.

It is requested that you make arrangements to have the portion of the sign which consists of words or phrases painted over or removed. Your prompt attention to this matter would be appreciated. If you have any questions please feel free to contact me at 228-6635.

Sincerely,

Scott A. Brandt-Erichsen
Borough Attorney

CC: Jonathan Lappin
Roy Eckert
Robert and Leta Trask

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1
2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

3 FIRST JUDICIAL DISTRICT AT KETCHIKAN
4 Filed in the Trial Courts
State of Alaska
First Judicial District
at Ketchikan

5 JUN 09 2009

6 KETCHIKAN GATEWAY BOROUGH,

7 Plaintiff,

8 vs.

9 LETA TRASK, JOHN DOE, AND JANE
10 DOE,

11 Defendants.

Clerk of the Trial Courts
By _____ Deputy

Case No. 1KE-07-437 CI

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS
COUNTERCLAIM

12 In response to the Court's direction, Defendant, Leta
13 Trask, has filed a memorandum regarding the possible liability
14 of the Borough through a \$1983 action for damages. In her
15 memorandum, Trask relies entirely on a case from the Tenth
16 Circuit Court of Appeals, Faustin v. City, County of Denver,
17 Colorado, 104 F.Supp.2d 1280, affirmed in part, reversed in
18 part, and remanded by, 268 F.3d 942 (10th Cir. 2001) (Faustin I)¹.
19 In addition to the fact that a case from a different federal
20 circuit is merely persuasive authority at best, the proceedings
21 in Faustin I and Faustin II do not support a finding of a viable
22 claim here.

23
24 1
25 There was an additional appeal in Faustin v. City and County
of Denver, 423 F.3d 1192 (10th cir. 2005) (Faustin II).

26 PLAINTIFF KGB'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM-
1KE-07-437 CI

1
2 Ms. Trask has not alleged any individual's wrong doing
3 in the counterclaim. Ms. Trask does allege that the Borough, as
4 an entity, is responsible for a deprivation of constitutional
5 rights. Ms. Trask appears to be asserting that the actions
6 taken to enforce the Borough sign code amounted to a
7 constitutional deprivation. The only action with respect to Ms.
8 Trask, has been the initiation of prosecution of a violation of
9 the Borough's Zoning Code. Such an action is entitled to
10 absolute immunity. See Imbler v. Pachtman, 424 U.S. 409 (1976).

11
12 The United States Supreme Court requires that a party
13 seeking to impose liability on a municipality under §1983
14 identify a municipal policy or custom that caused the claimant's
15 injury. Board of County Commissioners of Bryan County, Oklahoma
16 v. Brown, 520 U.S. 397, 403 (1997). "Locating a 'policy'
17 ensures that a municipality is held liable only for those
18 deprivations resulting from the decisions of its duly
19 constituted legislative body or of those officials whose acts
20 may fairly be said to be those of the municipality." Id. at
21 403-404. Ms. Trask has not pointed to any Borough policy that
22 would support the claim for damages. The only thing that could
23 remotely be considered a policy or "custom" in this case is the
24 Borough's enforcement of its Zoning Code in response to
25 complaints. That policy is not constitutionally infirm.

26 PLAINTIFF KGB'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM-
1KE-07-437 CI

1
2
3 Assuming the Ms. Trask's claim that she was not able to
4 modify her signs or do any maintenance is sufficient to provide
5 standing, the Borough's custom of enforcing the Zoning Code in
6 response to complaints still does not amount to action that
7 would render the Borough liable for damages. "It is not enough
8 for a §1983 plaintiff merely to identify conduct properly
9 attributable to the municipality, the plaintiff must also
10 demonstrate that, through its deliberate conduct, the
11 municipality was the 'moving force' behind the injury alleged."

12 Id. Without an overt action on the part of the policy makers of
13 the Borough, there is no basis for a claim for damages pursuant
14 to §1983.

15 Again, Ms. Trask has relied entirely on a single case to
16 support her claim for damages. Not only is that case factually
17 distinguishable, but it does not offer the rule of law sought to
18 be applied by Ms. Trask. Ms. Faustin was repeatedly ordered to
19 stop displaying her banner on at least four separate occasions
20 by police officers. Faustin I at 1281-1284. The officers
21 could not consistently articulate a particular law which Faustin
22 was allegedly violating. Faustin I at 945. In contrast here, all
23 communications were very clear as to the specific code section
24 Ms. Trask was alleged to have violated.

25
26 PLAINTIFF KGB'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM-
LKE-07-437 CI

1
2
3 What is not as clear from the portions of Faustin I relied
4 upon by Trask, is that Faustin I and Faustin II do not stand for
5 the rule of law that a party accused but not found to have
6 violated an ordinance has a claim against the governmental
7 entity. Rather, Faustin I and Faustin II fit with the accepted
8 rule of law that there is no municipal liability unless an
9 official policy or custom caused the constitutional injury. See
10 Bryan County v. Brown. In fact, the underlying policy or
11 practice at issue in Faustin I and Faustin II was not a law
12 which Faustin was charged with violating, but an unwritten
13 police custom of preventing expression from overpasses. The
14 Tenth Circuit made clear in Faustin II that the heart of
15 Faustin's § 1983 claim for which she had standing was her
16 challenge to Denver's unwritten policy relating to expression on
17 overpasses. See Faustin I at 950 and Faustin II at 1195.²

18 There is no such policy here to confer standing or to form
19 the basis for a claim. To the extent there is a policy or custom
20 at work, that policy is enforcement of Borough Code in response
21 to complaints. This policy is not unconstitutional.

22 The Borough, through a reasonable interpretation of its
23

24 ²

25 In Faustin II the Court went on to uphold this policy against
26 the constitutional challenge. Faustin II at 1202.

26 PLAINTIFF KGB'S
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM-
1KE-07-437 CI

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Borough Attorney
1900 1st Avenue,
Suite 215
Ketchikan, Alaska
99901
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Fax(907)228-6683

1
2 sign ordinance, brought suit to enforce that ordinance, and the
3 court interpreted the ordinance in favor of Ms. Trask. This is
4 a far cry short of the standard of conduct which would give rise
5 to liability or a Borough policy which violates the
6 constitutional rights of Trask or other citizens. Ms. Trask's
7 counterclaim fails to state a viable cause of action. "A local
8 government cannot be held liable for a constitutional
9 deprivation if a determination has been made that there was no
10 constitutional violation committed by anyone in the first
11 place." City of Los Angeles v. Heller, 475 U.S. 796 (1986).

12
13 Trask has failed to identify any unconstitutional municipal
14 policy or custom that caused her alleged injury. Therefore this
15 case is concluded, and Trask has no remaining claims.

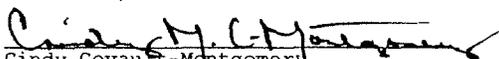
16
17 DATED at Ketchikan, Alaska, this 9th day of June, 2009.

18 KETCHIKAN GATEWAY BOROUGH

19 By: 
20 Scott A. Brandt-Erichsen
21 Borough Attorney
22 Attorney for Plaintiff
23 Alaska Bar No. 8811175

24
25 I certify that a true and correct
26 copy of the foregoing was delivered
this 9th day of June, 2009,
via Court Tray to:

27 Amanda Skiles
28 Schulz & Skiles
29 307 Bawden Street
30 Ketchikan, Alaska 99901

31 
32 Cindy Covault-Montgomery

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT KETCHIKAN

3
4 KETCHIKAN GATEWAY BOROUGH,)
5)
6 Plaintiff,)
7)
8 v.)
9 LETA TRASK,)
10)
11 Defendant.)

Filed in the Trial Courts
State of Alaska
First Judicial District
at Ketchikan

JUN 24 2009

Clerk of the Trial Courts
By _____ Deputy

Case No. 1KE-07-437 CI

10 MEMORANDUM AND ORDER

11 The Ketchikan Gateway Borough (KGB) cited Ms. Trask for violating its sign
12 ordinance and for thereby committing nuisance. She denied the allegations. She claimed that
13 the writings on her roof were not a "sign" for purposes of the ordinance. She filed a
14 Counterclaim in which she requested relief under 42 U.S.C. § 1983. The KGB denied that she
15 was entitled to the same.

16 The court issued a Memorandum and Order on April 13, 2009 in which it
17 dismissed the Ketchikan Gateway Borough's (KGB) claims¹ against Ms. Trask because her
18 writings were not a "sign" under the KGB sign ordinance; found that she does not have standing
19 to litigate the constitutionality of the KGB's sign ordinance; and raised the question of whether
20 her § 1983 action remained viable.
21

22
23
24
25 ¹ The court's decision focused on the alleged sign ordinance violation. The court noted that its
disposition of that claim apparently also in effect resulted in dismissal of the KGB's nuisance
claim. The KGB apparently agreed that such is the case during the May 1, 2009 hearing.

1 A status hearing occurred on May 1, 2009. The KGB's counsel advised that the
2 KGB's position was that the court's decision in effect dismissed the entire case and that neither
3 party was entitled to an award of costs or fees since both had prevailed in part. Ms. Trask's
4 counsel advised that Ms. Trask's position was that her § 1983 action remained viable. The court
5 requested briefing on that issue. The parties have submitted the additional briefing.

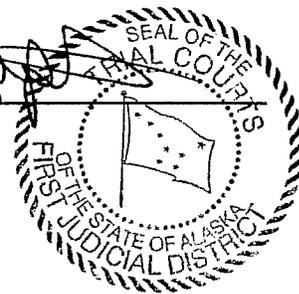
6 The court finds that Ms. Trask's § 1983 action should be dismissed for two
7 reasons. First, per the discussion in the court's May 23, 2008 Memorandum and Order, § 1983
8 claims have two elements – one of which is a constitutional violation. Second, the court has
9 found she does not have standing to litigate the constitutionality of the KGB's sign ordinance.

10 If either party believes that they are the "prevailing" party and thus entitled to an
11 award of costs and attorney's fees they have until July 10, 2009 within which to file a cost bill
12 and motion for attorney's fees.

13
14 **IT IS SO ORDERED.**

15 Dated at Ketchikan, Alaska this 24th day of June 2008.

16
17 
18 Trevor N. Stephens
19 Superior Court Judge



20 **CERTIFICATION**

Copies Distributed

21 Date 6/25/09

22 To S. Brandt-Erichsen
A. Skiles

23 By OK

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FIRST JUDICIAL DISTRICT AT KETCHIKAN

3 KETCHIKAN GATEWAY BOROUGH,)
4)
5 Plaintiff,)
6 vs.)
7 LETA TRASK,)
8)
9 Defendant.)

FILED in the Trial Courts State of Alaska
First Judicial District at Ketchikan

JUL 10 2009

Clerk of the Trial Courts

By _____ Deputy

Case No. 1KE-07-437 CI

10 **MOTION FOR ATTORNEY'S FEES**

11 COMES NOW Leta Trask, by and through counsel, Amanda M. Schulz of
12 Schulz and Skiles, and moves this Court for an award of attorney's fees pursuant
13 to Civil Rule 82. This motion is supported by the following and the Affidavit of
14 Counsel filed this same day.

15 I. Background

16 On September 18, 2007, Ketchikan Gateway Borough filed a complaint
17 against Robert and Leta Trask, Jane Doe, and John Doe. The complaint alleged
18 that Robert and Leta Trask maintained a "roof sign" in violation of KGB Code
19 60.10.090(A)(8) and that maintaining the sign was a public nuisance per se in
20 accordance with KGB Code 60.10.105(D). KGB sought injunctive relief and
21 imposition of a civil penalty in the amount of \$200.00.
22
23
24

25 On October 12, 2007, Leta Trask, proceeding pro se, filed her Answer
26 alleging eleven affirmative defenses and counterclaimed for attorney's fees. As
27 part of her affirmative defenses, Leta Trask alleged that KGB Code 60.10.090
28

29 Motion for Attorney's Fees
KGB v. Trask, 1KE-07-437 CI
Page 1 of 9

SCHULZ AND SKILES, Attorneys at Law
307 Bawden
Ketchikan, AK 99901
Ph: (907) 225-9401 Fax: (907) 225-5513

1 violated the constitutions of both Alaska and the United States and also that KGB
2 failed to state a claim.

3
4 KGB submitted interrogatories to Leta Trask. Leta Trask answered the
5 interrogatories, pro se, on December 27, 2007.

6
7 On January 25, 2008, KGB filed a Notice of Dismissal Without Prejudice
8 as to Robert Trask. On February 19, 2008, counsel entered an appearance on
9 behalf of Leta Trask. Trial was set for August 6, 2008. On March 28, 2008, an
10 Amended Answer was filed on behalf of Leta Trask. Again, various affirmative
11 defenses were asserted including violations of the constitutions of Alaska and the
12 United States and failure to state a claim. In addition, Leta Trask's answer
13 contained two counterclaims. The first counterclaim was filed pursuant to 42
14 U.S.C. §1983 for the alleged violations of the United States Constitution. The
15 second counterclaim alleged violations of the Alaska Constitution. The relief
16 sought by Leta Trask included declaratory relief, a permanent injunction,
17 compensatory damages for deprivation of her constitutional rights, actual
18 attorney's fees as a public interest litigant and pursuant to 42 U.S.C. § 1988, and
19 denial of the relief requested by KGB.
20
21
22
23

24 On April 8, 2008, Leta Trask submitted her First Interrogatories to KGB.
25 She also submitted her First Requests for Production. The interrogatories were
26 relevant to KGB's complaint as well as Leta Trask's affirmative defenses and
27 counterclaim.
28

1 On April 9, 2008, KGB filed a Motion to Dismiss Leta Trask's
2 counterclaim for failure to state a claim. KGB only addressed the 42 U.S.C. §
3 1983 claim. KGB alleged that no physical action had been taken toward Ms.
4 Trask. Furthermore, KGB asserted it had absolute immunity. Leta Trask's
5 opposition was filed on April 28, 2008. The opposition addressed only the 42
6 U.S.C. § 1983 claim. A reply was filed by KGB on April 30, 2008. The Court
7 granted the motion in part and denied it in part. The Court dismissed the
8 counterclaim to the extent that it was based upon violations of the Alaska
9 Constitution because § 1983 does not apply to such violations of state law.
10 However, the Court denied the motion with regard to the counterclaim based upon
11 violations of the United States Constitution. The Court noted that KGB does not
12 have absolute or qualified immunity, that KGB is responsible for the sign
13 ordinance, that there is a direct connection between the sign ordinance and the
14 alleged federal constitutional violations, and that KGB did not persuade the Court
15 that one or more of Leta Trask's constitutional rights was not violated by KGB's
16 conduct.

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22
23 On May 19, 2008, KGB answered Leta Trask's interrogatories and
24 produced requested documents. On May 23, 2008, Leta Trask submitted her
25 Second Set of Interrogatories to KGB. KGB answered on June 6, 2008.

26
27
28 KGB filed its Answer to Leta Trask's counterclaim on June 9, 2008, the
29 day discovery closed. On June 10, 2008, Leta Trask filed a Motion to Vacate Trial

1 Date and Reset Pre-Trial Deadlines, which was opposed by KGB on June 26,
2 2008. On July 10, 2008, KGB requested oral argument on the motion to vacate.
3
4 The trial date was vacated.

5 On September 16, 2008, Leta Trask filed a Motion for Summary Judgment
6 based upon the constitutional violations alleged in her affirmative defenses. KGB
7 opposed the motion asserting that a complete ban on roof signs was a permissible
8 time, place and manner restriction. KGB also asserted the ordinance was not
9 overbroad and was not void-for-vagueness. Leta Trask's Reply was filed on
10 October 3, 2008, with a request for oral argument. Oral argument was scheduled
11 for October 24, 2008. KGB filed a Notice of Supplemental Authority on the
12 morning of oral argument. Following oral argument, Leta Trask filed a response
13 to the supplemental authority.
14
15
16

17 On March 1, 2009, the Court issued an order requesting additional briefing
18 as to the scope of the prohibition of KGB Code 60.10.090(A)(8). On March 13,
19 2009, the Court clarified that the additional briefing requested was on the issue of
20 whether or not the painting on Leta Trask's roof was a sign under KGB Code
21 60.10.140. In supplemental briefing, Leta Trask asserted that the painting on her
22 roof did not meet the definition of sign. KGB asserted it did.
23
24

25 On April 13, 2009, the Court issued a Memorandum and Order granting in
26 part and denying in part Leta Trask's Motion for Summary Judgment. The Court
27 concluded, based upon the rules of statutory construction, that the ordinance did
28

1 not apply to the painting on Leta Trask's roof, which resulted in the dismissal of
2 KGB's complaint. With regard to statutory construction, one thing noted by the
3 Court was that, "This construction is reasonable and substantially limits, if not
4 eliminates, dangers of unconstitutionality." With this ruling, the Court determined
5 that Leta Trask lacked standing to challenge the constitutionality of the ordinance.
6
7 As such, the Court made no further analysis. With regard to Leta Trask's
8 counterclaim, the Court set a hearing to further address whether the claim
9 remained viable now that KGB's Complaint was dismissed.
10

11
12 KGB did not file a new Motion to Dismiss Counterclaim. A brief hearing
13 was held on May 1, 2009. The parties submitted additional briefing on whether
14 Leta Trask's claim pursuant to 42 U.S.C. § 1983 could continue. On June 24,
15 2009, the Court issued a Memorandum and Order dismissing Leta Trask's
16 counterclaim. The Court reasoned that since KGB could no longer sue Leta Trask,
17 there was no constitutional violation and that she did not have standing to litigate
18 the constitutionality of the ordinance. The Court gave the parties until July 10,
19 2009, to file motions for fees and costs.
20

21
22 II. Law

23
24 Alaska Civil Rule 82 provides that the prevailing party in a civil case shall
25 be awarded attorney's fees. Pursuant to Alaska Civil Rule 82(b)(2), if a prevailing
26 party recovers no money judgment in a case resolved without trial, the party shall
27 be awarded 20% of its actual fees. According to Alaska Civil Rule 82(b)(3), the
28

1 Court may vary an award if it determines a variation is warranted upon
2 consideration of various factors, including:

3
4 (A) the complexity of the litigation; (B) the length of trial;
5 (C) the reasonableness of the attorneys' hourly rates and the
6 number of hours expended; (D) the reasonableness of the
7 number of attorneys used; (E) the attorneys' efforts to
8 minimize fees; (F) the reasonableness of the claims and
9 defenses pursued by each side; (G) vexatious or bad faith
10 conduct; (H) the relationship between the amount of work
11 performed and the significance of the matters at stake; (I)
12 the extent to which a given fee award may be so onerous to
13 the non-prevailing party that it would deter similarly
14 situated litigants from the voluntary use of the courts; (J) the
15 extent to which the fees incurred by the prevailing party
16 suggest that they had been influenced by considerations
17 apart from the case at bar, such as a desire to discourage
18 claims by others against the prevailing party or its insurer;
19 and (K) other equitable factors deemed relevant.

20 Leta Trask is clearly the prevailing party with regard to the complaint filed
21 by KGB. She successfully defended against the action. The Court found that the
22 ordinance did not apply to the painting on Leta Trask's roof and dismissed KGB's
23 cause of action.

24 With regard to Leta Trask's counterclaim, despite KGB's contention at the
25 hearing on May 1, 2009, KGB is not the prevailing party. The Court did not rule
26 against Leta Trask with regard to her claim pursuant to 42 U.S.C. § 1983. In fact,
27 at least with regard to KGB's initial motion to dismiss the claim, the Court ruled in
28 favor of Leta Trask. Only after finding that KGB sued Leta Trask under an
29 inapplicable ordinance did the Court dismiss the counterclaim, concluding that

1 since the ordinance did not apply, there was no constitutional violation and no
2 standing. But for KGB suing Leta Trask under an inapplicable ordinance, it would
3 not have been necessary for Leta Trask to counterclaim against KGB.
4

5 Pursuant to Alaska Civil Rule 82(b)(3), the Court should vary the award of
6 attorney's fees and award Leta Trask full reasonable fees. While KGB has always
7 contended that this was a straightforward code enforcement case, that clearly was
8 not the case, since the code did not even apply. While the Court was able to
9 resolve the matter without ruling on constitutional issues, the constitutional claims
10 were reasonable given the poorly written ordinance and the importance of the
11 constitutional right to free speech. KGB on the other hand continued to raise
12 defenses such as absolute and legislative immunity, despite the Court's prior
13 ruling that KGB was not immune.
14
15
16

17 Aware of the prior suits against Leta Trask, including an appeal, counsel
18 was aware that Ms. Trask had previously expended a great deal of money
19 defending herself. As such, counsel attempted to do all she could to minimize fees
20 and costs. Other than to review motion work prior to filing and brainstorming,
21 only one attorney worked on this case. Much time was donated and any time
22 billed for work by counsel's partner was billed at a reduced rate.
23
24

25 KGB proceeded based upon vexatious and bad faith conduct. KGB filed
26 suit against Leta Trask pursuant to an inapplicable ordinance. As the record
27 shows, KGB did so despite its own earlier determinations that Leta Trask did not
28

1 need a permit because her painting was not a "sign" and despite the fact that
2 KGB's attorney had previously determined that the code was aimed at commercial
3 speech and not Leta Trask's painting.
4

5 The issue of being able to use your private residence to exercise your First
6 Amendment Right is very significant and Leta Trask found it necessary to stand
7 up for that right. Given the importance of the issue to her and to citizens in
8 general, the amount of work performed was more than reasonable.
9

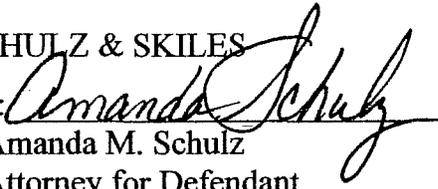
10 Given the reasonableness of the fees, an award of attorney's fees, whether
11 20% or full fees, will not be so onerous as to deter other litigants from using the
12 courts. In addition, Leta Trask's motive behind defending herself and standing up
13 for her constitutional rights has nothing to do with recovering attorney's fees or
14 discouraging claims. She simply believes that one must stand up for oneself, as
15 she has shown time and time again, despite the expense to her and the lack of
16 monetary recovery.
17

18 With regard to other equitable factors, it should be noted that part of Leta
19 Trask's defense was based upon affirmative defenses which included
20 constitutional violations. However, in determining the ordinance was inapplicable
21 to Leta Trask's painting, the Court found Leta Trask no longer had standing to
22 challenge the constitutionality of the ordinance, thereby avoiding making any
23 constitutional rulings. As this action involved the "establishment, protection, or
24 enforcement of a right under the United States Constitution or the Constitution of
25
26
27
28

1 the State of Alaska," she is a public interest litigant or constitutional claimant
2 under AS 09.60.010(c). If Leta Trask prevailed in asserting some or all of her
3 constitutional claims she would be entitled to full reasonable fees and costs so
4 long as she did not have sufficient economic incentive to bring the suit. This was
5 not a suit about money but about defending one's constitutional rights. The Court
6 should consider this in varying the award of fees. This same provision protects
7 Leta Trask from having to pay attorney's fees for any constitutional claims on
8 which she did not prevail, including her counterclaim.
9
10
11

12 Dated this 10th day of July, 2009.

13 SCHULZ & SKILES

14 By: 
15 Amanda M. Schulz
16 Attorney for Defendant
17 AK Bar No. 0206025

18
19
20
21
22
23 This is to certify that a true and correct copy of the
24 foregoing is being delivered via court tray to the
25 Ketchikan Gateway Borough Attorney.

26 Date: 7-10-09

27 By: Jano Malane

28
29 Motion for Attorney's Fees
KGB v. Trask, 1KE-07-437 CI
Page 9 of 9

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FIRST JUDICIAL DISTRICT AT KETCHIKAN

3 KETCHIKAN GATEWAY BOROUGH,)

FILED In the Trial Courts State of Alaska
First Judicial District at Ketchikan

4)
5 Plaintiff,)

JUL 10 2009

6 vs.)

Clerk of the Trial Courts

7 LETA TRASK,)

By _____ Deputy

8)
9 Defendant.)

Case No. 1KE-07-437 CI

10 **AFFIDAVIT OF COUNSEL FOR LETA TRASK**

11 **IN SUPPORT OF MOTION FOR ATTORNEY'S FEES**

12 STATE OF ALASKA)

13)ss.

14 FIRST JUDICIAL DISTRICT.)

15 AMANDA M. SCHULZ AFFIRMS AS FOLLOWS:

16 1. I am counsel for Leta Trask in the above captioned matter.

17 2. From February 2008 through June 2009, I billed 93.1 hours at a rate of
18 \$150.00/hour. The total amount billed for fees, including sales tax, was \$14,802.90.
19 An additional 4.1 hours was spent on this motion during the month of July 2009.

20 3. The majority of the time spent on this matter cannot be easily split apart
21 as research on many of the affirmative defenses also covered the counterclaims. The
22 same goes for tasks such as drafting the Amended Answer and Counterclaim

23 4. Counsel has reviewed her time sheets and bills and has used her best
24 efforts to distinguish time that is solely related to the counterclaim, such as the
25 opposition to KGB's motion to dismiss counterclaim, research on damages and the
26 supplemental briefing requested by the Court with regard to the counterclaim.

27 5. Of the 93.1 hours, 15.5 hours were spent on matters related solely to the
28 counterclaim.

29 Affidavit of Counsel for Leta Trask
1KE-07-437 CI
Page 1 of 2

SCHULZ AND SKILES, Attorneys at Law
307 Bawden
Ketchikan, AK 99901
Ph: (907) 225-9401 Fax: (907) 225-5513

JUL 27 2009

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN
Filed in the Trial Courts
State of Alaska
First Judicial District
at Ketchikan

JUL 27 2009

KETCHIKAN GATEWAY BOROUGH,

Plaintiff,

vs.

LETA TRASK,

Defendant.

Clerk of the Trial Courts
By _____ Deputy

Case No. 1KE-07-437 CI

RESPONSE TO DEFENDANT'S
MOTION FOR ATTORNEY'S
FEES.

The prevailing party is the party who has successfully prosecuted or defended against the action, the one who is successful on the main issue of the action and in whose favored the decision or verdict is rendered and the judgment entered. Keenan v. Wade, 182 P.3d 1099, 1109 (Alaska 2008). The determination of who is the "prevailing" party is within the broad discretion of the trial court. Id. The trial court's discretion under Rule 82 is broad enough to warrant the denial of attorney's fees altogether. Fernandes v. Portwine, 56 P.3d 1, 8 (Alaska 2002). The denial of attorney's fees to either party has been upheld when neither party can be readily classified as the "prevailing" party. Id. (Referencing Haskins v. Sheldon, 558 P.2d 487, (Alaska 1976).

Office of the
Borough Attorney
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907)228-6635
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PLAINTIFF KGB'S
RESPONSE TO DEFENDANT'S MOTION FOR ATTORNEY'S FEES
1KE-07-437 CI

1
2
3 This action can conceptually be separated into two separate
4 lawsuits. The first was the Borough's complaint against
5 Defendant for allegedly violating the Borough's sign ordinance.
6 The second action is the Defendant's counterclaim regarding
7 infringement of civil rights guaranteed both by the Alaska State
8 Constitution and by the United States Constitution.

9 In the first lawsuit, this Court ruled that the Borough's
10 sign ordinance was not applicable to Defendant's roof display
11 and partial summary judgment was entered in favor of Defendant.
12 Defendant was clearly the prevailing party regarding this
13 portion of the action.

14 The second lawsuit, the counterclaim asserted against the
15 Borough, continued after the partial summary judgment was
16 entered. This counterclaim, based on 42 U.S.C. §1983, was
17 decided in the Borough's favor on June 24, 2009. The Borough
18 was clearly the prevailing party in this decision.

19 In both instances, it was the same factual determination
20 that the display was not a sign which brought an end to the
21 respective claims. The Borough's claim against Defendant was
22 dismissed when the Court determined that the display was not a
23 sign. The Defendant's counterclaim was dismissed because it was
24 determined that they did not have standing to challenge an
25

26 PLAINTIFF KGB'S
RESPONSE TO DEFENDANT'S MOTION FOR ATTORNEY'S FEES
1KE-07-437 CI

1
2 inapplicable sign ordinance. Were the display to have been
3 found to be a sign, any conclusion as to either claim would be
4 speculative at best.
5

6 It appears that we essentially have a tie. As it stands,
7 Defendant successfully defended against allegations that it was
8 violating the Borough's sign ordinance and the Borough
9 successfully defended against the allegations that it had
10 infringed on Defendant's civil rights. As such, this Court
11 could allow the Defendant to recover attorney's fees based on
12 their defense of the alleged sign code violation and allow the
13 Borough to recover attorney's fees based on their defense of the
14 alleged civil rights violations.
15

16 In the alternative, and in the Borough's view the more
17 prudent choice, is to not allow either party to recover any
18 attorney's fees. There is no clear prevailing party if you look
19 at the action as a whole; therefore it would not be an abuse of
20 discretion for this Court to disallow the recovery of attorney's
21 fees. Further, the lack of a separation of the time spent on
22 the respective claims weighs in favor of denying any award of
23 fees.
24

25 ///

26 ///

PLAINTIFF KGB'S
RESPONSE TO DEFENDANT'S MOTION FOR ATTORNEY'S FEES
1KE-07-437 CI

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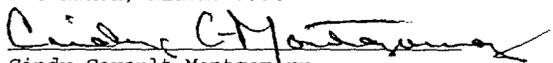
DATED at Ketchikan, Alaska, this 27th day of July, 2009.

KETCHIKAN GATEWAY BOROUGH

By: 
Scott A. Brandt-Erichsen
Borough Attorney
Attorney for Plaintiff
Alaska Bar No. 8811175

I certify that a true and correct
copy of the foregoing was delivered
this 27th day of July, 2009,
via Court Tray to:

Amanda Skiles
Schulz & Skiles
307 Bawden Street
Ketchikan, Alaska 99901


Cindy Covault-Montgomery

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Borough Attorney
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PLAINTIFF KGB'S
RESPONSE TO DEFENDANT'S MOTION FOR ATTORNEY'S FEES
1KE-07-437 CI

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT KETCHIKAN

KETCHIKAN GATEWAY BOROUGH,)
)
Plaintiff,)
)
vs.)
)
LETA TRASK,)
)
Defendant.)

KETCHIKAN
State of Alaska
First Judicial District
of Ketchikan

AUG 05 2009

Clerk of the Trial Courts
By _____

Case No. 1KE-07-437 CI

**REPLY TO KGB'S RESPONSE TO DEFENDANT'S
MOTION FOR ATTORNEY'S FEES**

COMES NOW Leta Trask, by and through counsel, Amanda M. Schulz of Schulz and Skiles, and files this Reply.

In its response, KGB concedes that Leta Trask is the prevailing party with regard to the complaint filed by KGB. However, KGB contends that it is the prevailing party on the counterclaim and therefore, the Court should find a wash and not award Leta Trask any fees. Given the procedural history of this case, such would not be a fair and just outcome.

To begin with, KGB did not successfully defend against the counterclaim. Rather, because Leta Trask was successful in asserting that the ordinance did not apply to her, the Court found she lacked standing to continue the counterclaim. It was her successful defense of KGB's lawsuit that resulted in the dismissal of the counterclaim, not any argument on KGB's part. To consider KGB the prevailing party because they sued Leta Trask under an inapplicable ordinance would

Reply
KGB v. Trask, 1KE-07-437 CI
Page 1 of 3

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produce an absurd result. As KGB points out at page 2 of its response, "In both instances, it was the same factual determination that the display was not a sign which brought an end to the respective claims." This was an argument of Leta Trask, not KGB. As such, KGB did not clearly prevail on the counterclaim.

In addition, even if it were the prevailing party on the counterclaim, KGB's contention that the Court could allow KGB to recover attorney's fees is inaccurate. As a constitutional claimant under AS 09.60.010(c)(2), even when the constitutional claims are unsuccessful, the Court cannot order a claimant to pay attorney fees of the opposing party so long as the action was not frivolous and the claimant did not have sufficient economic incentive to bring the action. The counterclaim pursuant to 42 U.S.C. § 1983 was not frivolous. In fact, the claim survived one motion to dismiss prior to the Court's ruling that the ordinance did not apply to Leta Trask. In addition, this is not a case about money such as a breach of contract case. Rather, this is a case about defending one's constitutional rights despite the great personal expense.

Based upon the foregoing, the original motion, and the fact that KGB pursued the law suit despite the prior written opinions of Erin Reeve, Assistant Planner, and the Borough Attorney that the ordinance did not apply, the Court should find that Leta Trask is the prevailing party and should vary the award of fees above 20%.

Dated this 5th day of August, 2009.

Reply
KGB v. Trask, 1KE-07-437 CI
Page 2 of 3

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SCHULZ & SKILES

By: Amanda Schulz
Amanda M. Schulz
Attorney for Defendant
AK Bar No. 0206025

This is to certify that a true and correct copy of the foregoing is being delivered via court tray to the Ketchikan Gateway Borough Attorney.

Date: 8.5.09
By: Jaromeelane

Reply
KGB v. Trask, 1KE-07-437 CI
Page 3 of 3

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT KETCHIKAN

Filed in the Trial Courts
State of Alaska
First Judicial District
at Ketchikan

AUG 30 2009

Clerk of the Trial Courts
By _____ Deputy

4 KETCHIKAN GATEWAY BOROUGH,)
5)
6 Plaintiff,)
7)
8 v.)
9 LETA TRASK,)
10)
11 Defendant.)

Case No. 1KE-07-437 CI

12 MEMORANDUM AND ORDER

13 Ms. Trask has moved for an award of attorney's fees. The Ketchikan Gateway
14 Borough (KGB) opposes her motion. Neither party has requested oral argument or an
15 evidentiary hearing.

16 Ms. Trask's motion for an award of attorney's fees is granted. She is the
17 "prevailing" party for four reasons. First, the "prevailing party" is the party which is successful
18 with respect to the "main issue" in the case, even if the other party received some affirmative
19 recovery.¹ Second, she prevailed on the KGB's claim that the writings on the roof of a house she
20 owns violate its sign ordinance. Third, that finding resulted in the court dismissing her
21 counterclaim. Fourth, the court, in dismissing the counterclaim, did not rule on the merits of her
22 constitutional claims.

23 Ms. Trask's request that the court award enhanced fees under Alaska Civil Rule
24 82(b)(3) is denied. The court does not find that the KGB engaged in vexatious or bad faith
25

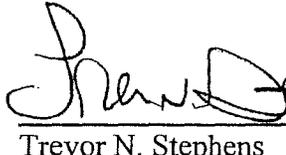
¹ *Alaska Placer Company v. Lee*, 553 P.2d 54, 63 (Alaska 1976).

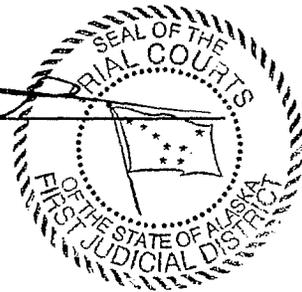
1 conduct. The KGB took the position that the writings at issue came within the scope of its sign
2 ordinances. The issue was not so clear that the court must necessarily conclude that the KGB's
3 position was the result of bad faith. The KGB did not engage in vexatious conduct. The record
4 does not otherwise support an enhanced fee award under the other factors set forth at Civil Rule
5 82(b)(3).

6
7 Given the above, Ms. Trask is entitled to an award of 20% of her actual
8 reasonable attorney's fees under Alaska Civil Rule 82(b)(2). She has until September 10, 2009
9 to file an affidavit from her counsel and counsel's time and work detail that show counsel's
10 hourly rate, the work performed on this matter, and the amount of fees Ms. Trask incurred with
11 respect to the same. The KGB shall have 2 weeks to file an opposition. She shall have 1 week
12 to file a reply.

13 **IT IS SO ORDERED.**

14 Dated at Ketchikan, Alaska this 30th day of August 2009.

15
16 
17 Trevor N. Stephens
18 Superior Court Judge



19 **CERTIFICATION**

20 Copies Distributed

21 Date 9/3/09

22 To _____

23 Scott Brandt-Erickson

24 Amanda Schulz

25 By (Signature)

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT KETCHIKAN

3 KETCHIKAN GATEWAY BOROUGH,)

FILED in the Trial Courts State of Alaska
First Judicial District at Ketchikan

4 Plaintiff,)

SEP 09 2009

5 vs.)

Clerk of the Trial Courts

6 LETA TRASK,)

By _____ Deputy

7 Defendant.)

8 Case No. IKE-07-437 CI

9
10 **STIPULATION RE: ATTORNEY'S FEES**

11 COME NOW Leta Trask, by and through counsel, Schulz and Skiles, and Ketchikan
12 Gateway Borough, by and through counsel, Scott Brandt-Erichsen, and hereby file this
13 Stipulation Re: Attorney's Fees.

14 In its Memorandum and Order dated August 30, 2009, and distributed September 3,
15 2009, the Court ordered that Ms. Trask was entitled to 20% of her actual reasonable attorney's
16 fees. The Court gave counsel for Ms. Trask until September 10, 2009, to file an affidavit of her
17 time and work detail and gave KGB two weeks to file an opposition.

18 On July 10, 2009, counsel for Ms. Trask filed an affidavit indicating that she worked 93.1
19 hours on the matter at a rate of \$150.00 plus sales tax, for a total of \$14,802.90. In addition,
20 counsel worked 4.1 hours on the Motion for Attorney's Fees. The parties hereby agree that 93.1
21 hours at a rate of \$150.00 per hour are the actual reasonable attorney's fees upon which the 20%
22 should be calculated. The parties agree to allow the Court to decide whether the additional 4.1
23 hours at a rate of \$150.00 per hour plus sales tax, for a total of \$651.90, shall also be included as
24 actual reasonable attorney's fees upon which the 20% should be calculated.

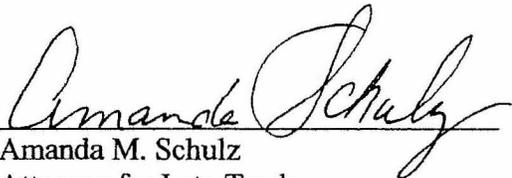
25 The parties further agree that this stipulation does not affect either party's right to appeal
26 the court's holding regarding attorney's fees set forth in the above-mentioned Memorandum and
27 Order.

28 Stipulation Re: Attorney's Fees
29 Ketchikan Gateway Borough v. Trask
Case No. IKE-07-437 CI
Page 1 of 2

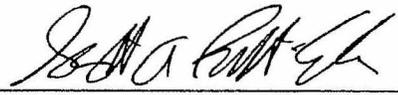
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150

1 9/9/09
2 Date


Amanda M. Schulz
Attorney for Leta Trask
AK Bar No. 0206025

3
4
5 9/9/09
6 Date


Scott Brandt-Erichsen
Attorney for KGB
AK Bar No. 8811175

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Stipulation Re: Attorney's Fees
Ketchikan Gateway Borough v. Trask
Case No. 1KE-07-437 CI
Page 2 of 2

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 FIRST JUDICIAL DISTRICT AT KETCHIKAN
3

4 KETCHIKAN GATEWAY BOROUGH,)
5)
6 Plaintiff,)
7)
8 v.)
9 LETA TRASK,)
10)
11 Defendant.)

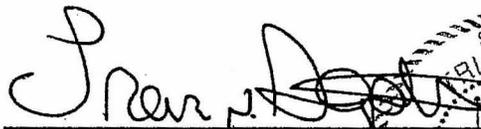
Case No. 1KE-07-437 CI

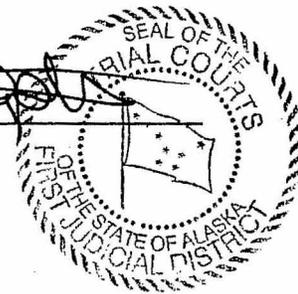
12 MEMORANDUM AND ORDER

13 The parties filed a Stipulation Re: Attorney's Fees in response to the court's
14 August 30, 2009 Memorandum and Order. Based on the Stipulation, Ms. Skiles' July 10, 2009
15 affidavit, the August 30, 2009 Memorandum and Order, and the parties' implicit agreement that
16 this court retains jurisdiction over this case for purposes of awarding prevailing party attorney's
17 fees, the court awards Ms. Trask attorney's fees in the amount of \$3,090.96 (\$14,802.90 +
18 \$651.90 divided by .20).

19 IT IS SO ORDERED.

20 Dated at Ketchikan, Alaska this 10th day of September 2009.

21 
22 Trevor N. Stephens
23 Superior Court Judge



24 CERTIFICATION

25 Copies Distributed

Date 9/11/09

To S. Brandt-Erichsen
A. Schulz

By CF