

FILE COPY



IN THE SUPREME COURT FOR THE STATE OF ALASKA

**LETA TRASK,
Appellant,**

vs.

**KETCHIKAN GATEWAY BOROUGH,
Appellee.**



Superior Court:1KE-07-437 CI

**APPEAL FROM THE SUPERIOR COURT, FIRST JUDICIAL DISTRICT AT
KETCHIKAN, THE HONORABLE TREVOR N. STEVENS PRESIDING**

APPELLEE'S EXCERPT OF RECORD
VOLUME 1 OF 1

Dated this 20th day of April, 2010.

SCOTT A. BRANDT-ERICHSEN
Borough Attorney
Ketchikan Gateway Borough
1900 1st Ave., Suite 215
Ketchikan, Alaska 99901
(907) 228-6635

ABA #8811175

**Attorney for Appellee
Ketchikan Gateway Borough**

Filed this 28th day of April, 2010, in
the Supreme Court for the State of Alaska.

Clerk of the Appellate Court.

By:
Deputy Clerk

EXCERPT OF RECORD

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

KETCHIKAN GATEWAY BOROUGH,)
)
) Plaintiff,)
)
) v.)
)
) LETA TRASK,)
)
) Defendant.)
 _____)

FILED IN OPEN COURT
Superior Court
KETCHIKAN
Date 2-28-08 JB

Case No. 1KE-07-437 CI

PRETRIAL SCHEDULING ORDER

A Pretrial Scheduling Conference in this matter was held on 2/28/08.

The Conference was attended by: Scott Brandt-Erichsen for KGB and Amanda Skiles for Ms. Trask.

A. COURT DATES

1. This matter is set for a 2 day jury (if counterclaim filed) trial to commence on 8/6/08 at 8:30 a.m. Will be a court trial if no counterclaim is filed.
2. The calendar call will occur on 7/25/08 at 4:00 p.m.
3. A party or counsel for a party may participate in the calendar call or any other pre-trial hearing by telephone by calling the Ketchikan Court at the appointed time. If counsel or a party plan to participate in such a proceeding by telephone the counsel or party (if the party has counsel, counsel for the party) shall contact counsel for the other parties prior to the proceeding in order to ascertain whether other persons also intend to participate by telephone. If more than two (2) phone lines will be required the counsel who appear by telephone or whose client(s) appear by telephone shall be responsible for making arrangements for an operator assisted teleconference.

B. INITIAL DISCLOSURES

1. By 2/28/08 all parties shall make full and complete initial disclosure as required by Alaska Civil Rule 26(a)(1).
2. Initial disclosures shall be supplemented as required by Alaska Civil Rule 26(e)(1). At "appropriate intervals" in this case means within **thirty (30) days** of a party learning that supplementation is required under Alaska Civil Rule 26(e)(1).

C. AMENDMENT TO PLEADINGS

1. A party may amend their pleadings without motion until 3/24/08.
2. The deadline for joining parties is 4/18/08.
3. By 4/18/08 parties shall specifically identify potentially responsible persons pursuant to AS 09.17.080(a)(2). Motions to join specifically identified potentially responsible persons shall be filed by 4/18/08. Motions to determine whether sufficient opportunity to join a potentially responsible person is lacking shall be filed by 4/18/08. If such a motion is filed and it is determined that there is sufficient opportunity, the moving party has 14 days from the date of said determination to move to join the party if the determination is made on or after 6/18/08.

If a new party is joined herein, the party responsible for the joinder shall serve on the new party(s) a copy of this Pretrial Scheduling Order within **fourteen (14) days** after entry of appearance or answer by the new party, whichever occurs first, and shall file proof of such service with the court.

Nothing herein prevents a plaintiff from withdrawing a claim or a defendant from withdrawing a defense.

D. DISCOVERY

1. Discovery shall be conducted in accordance with Alaska Civil Rules 26 – 37 and the Discovery Plan set forth in the Report of the parties' planning meeting that has been filed with the court.
2. Discovery must be completed by 6/9/08. "Completed" means that interrogatories, requests for production, and requests for admissions must be served sufficiently in advance of this date that responses are due under the time periods set forth in the Alaska Civil Rules on or before the date. Discovery requests that do not allow response by this date are deemed untimely and no response need be provided.

3. Discovery responses must be supplemented in accordance with Alaska Civil Rule 26(e)(2). "Seasonably", in this case, means within **thirty (30) days** of learning that a discovery response is in some material respect incomplete or incorrect.

E. EXPERTS

1. Each party must disclose the identity of any person who may be used at trial to present evidence under Alaska Evidence Rules 702, 703, 705 or 706. This disclosure must occur as follows. Disclosures by a party with the burden of proof must occur on or before 4/4/08, and the other parties have until 4/18/08 to identify responding experts.
2. Each party must disclose a written report setting forth the information required under Alaska Civil Rule 26(a)(2)(B) as follows. Expert's reports are due within **14 days** of the date of the disclosure required under the preceding paragraph.
3. The limit on the number of expert witnesses set forth in Alaska Civil Rule 26(a)(2)(D) is applicable in this case except _____.
4. The parties shall supplement their expert witness disclosures (identity and report) in accordance with Alaska Civil Rules 26(a)(2)(C) and 26(e)(1) and within the time period set forth in Section B(2) hereof.

F. WITNESS LISTS

1. Each party must file and serve a preliminary witness list by 3/31/08. The list must identify each lay, expert, and known rebuttal witness whom the party intends to call at trial. "Identify" means providing the name, address, and telephone number for each such witness. The list must also identify the subject on which each witness will testify. This statement need not be detailed, but must be specific enough to avoid surprise and delay at trial and to give the other parties an adequate basis to determine whether or not to take the witness's deposition. The list shall identify the witnesses in alphabetical order.
2. Each party must file and serve a final witness list pursuant to Alaska Civil Rule 26(a)(3) by 6/16/08. Only witnesses on this list will be permitted to testify at trial. This list shall contain the same information and be in the same format as is required in Section F(1) hereof for preliminary witness lists. If a witness was listed on the preliminary witness list and the information was provided on that list, and the information is still complete and accurate, the party may comply with this requirement by referencing the prior list. The final witness list shall also identify all witnesses who will testify at trial by deposition or by telephone.

3. Each party must file and serve a deletion witness list at least **twenty-one (21) days** prior to trial. This list shall identify each witness previously listed by the party that the party no longer intends to call as a witness at trial.

G. WITNESS TESTIMONY

1. A party who has provided notice in their final witness list per Section F(2) hereof, that they intend for a witness to testify by means of a deposition shall, at least **thirty (30) days** prior to trial, file and serve a document specifically designating, by page and line, those portions of the deposition which are proposed to be read or shown. Any objections or counter-designations must be filed and served at least **twenty one (21) days** prior to trial. Absent a showing of good cause, objections which are not timely filed, other than objections under Alaska Evidence Rules 402 and 403, will be deemed waived, and the objecting party will be deemed to have accepted the original designations. On the **first day of trial** the party in custody of the original deposition shall file the deposition in court and file and serve a list identifying each deposition filed.
2. If a party objects to a witness testifying by telephone as designated in another party's final witness list per Section F(2) hereof the party shall file and serve such objection at least **fourteen (14) days** prior to trial or the objection will be deemed waived.
3. In a jury trial, on the **first day** of jury selection, the plaintiff shall file and serve a witness list stating the precise order in which the party intends to call each witness during trial.
4. In a court trial, the plaintiff shall file and serve a witness list stating the precise order in which the party intends to call each witness during trial on the **Thursday before the week that the trial is to start.**
5. The defendant shall file and serve the defendant's witness list stating the precise order in which the defendant intends to call each of the defendant's witnesses on the **day before** the defendant calls the defendant's first witness to the stand to testify.
6. No witness may be called out the numerical sequence so listed by a party unless opposing counsel is notified prior to the end of the preceding trial day.

H. MOTIONS

1. All motions, oppositions, and replies, shall comply with the applicable requirements of Alaska Civil Rule 77 and/or any other Alaska Civil Rule that is applicable. When service is accomplished by means of placing the document in

an attorney's court tray in Ketchikan such service shall be considered the same as mailing for purposes of computing time under Alaska Civil Rule 6(c).

2. Dispositive motions and motions to establish or determine a rule of law in a case shall be filed by 6/16/08.
3. Discovery motions filed under any provision of Alaska Civil Rule 37 shall be filed within **twenty one (21) days** of the moving party learning of the circumstances that give rise to the motion.
4. Other motions, including motions in limine or for a protective order, shall be filed at least **thirty (30) days** prior to the start of trial. The other party shall have **ten (10) days** within which to file an opposition and the moving party will then have **three (3) days** within which to file a reply.

I. TRIAL BRIEF

1. Each party shall file and serve a trial brief **one (1) week** prior to the first day of trial.
2. The trial brief must contain:
 - (a) A concise statement of the facts of the case.
 - (b) A statement of admitted facts for which no proof need be offered at trial. Counsel shall enter into a stipulation of these facts. A copy of this stipulation must be attached as an exhibit to each party's trial brief.
 - (c) A concise statement of each contested issue of fact which remains to be litigated.
 - (d) A concise statement of each contested issue of law which remains to be litigated.
 - (e) A concise legal brief supporting the party's position as to each contested issue of law, and each question of law or evidence that the party reasonably anticipates may arise during the course of the trial. The party shall state any objections to proposed jury instructions in accordance with Section J(2)(c) hereof. The party shall state any objection to an exhibit to be offered by another party in accordance with Section K(7) hereof. Pertinent, persuasive or controlling legal authority must be cited. In presenting matters of law to the court, a party must disclose controlling legal authority that is known to the party to be directly adverse to the party's position.

J. JURY INSTRUCTIONS

1. Each party shall propose instructions and verdict forms appropriate to the case, except (1) the court will provide standard preliminary and closing instructions; and (2) a party need not propose instructions on issues on which another party bears the burden of proof except as provided in Section J(2)(c) below.
2. Each party shall:
 - (a) Serve on the opposing party at least **five (5) weeks** prior to the first day of trial one set of proposed jury instructions with citations to appropriate authority. Copies of non-Alaska authority must be attached.
 - (b) Meet with opposing counsel prior to the filing of trial briefs and at least **three (3) weeks** prior to the first day of trial to discuss and resolve objections to the proposed instructions.
 - (c) Include in their trial brief any remaining objections to the instructions proposed by another party with citations to appropriate authority. An objection on the grounds that a proposed jury instruction contains an incorrect statement of the law or is inappropriately worded must be accompanied by a proposed substitute instruction.
 - (d) File their proposed instructions with their trial brief. Two sets of such proposed instructions shall be filed. One shall be a numbered working copy with citations to appropriate authority and copies of all non-Alaska authority. The other shall be a clean unmarked original with each instruction designated as "Instruction No. _____". The instructions in each set shall be grouped and identified as those about which there is no dispute and those to which any party objects, accompanied by the objections, authority, and proposed substitute instructions.

K. EXHIBITS

1. During or before the meeting of counsel required by Section J(2)(b) hereof, the parties shall also exchange exhibit lists and copies of exhibits sought to be admitted at trial. If the trial will be a court trial the parties shall meet at least **three (3) weeks** before the first day of trial. The parties shall use the appropriate court exhibit form (i.e. TF-200). All exhibits must be marked for identification in accordance with Alaska Civil Rule 43.1 and Administrative Bulletin No. 9.
2. At the meeting of counsel, counsel shall have their actual trial exhibits reasonably available for inspection.

3. At the meeting of counsel, counsel shall stipulate to the extent possible to (a) the existence of adequate foundation for exhibits; (b) waiver of the best evidence rule; and (c) admissibility of exhibits. In the "admitted" column of the exhibit list, each counsel shall initial each exhibit for which all counsel stipulate admissibility.
4. Counsel shall eliminate duplicative designation of exhibits. Each exhibit may be listed only on the final exhibit list of the party who anticipates introducing the exhibit first. If it is unclear which party may first introduce a particular exhibit, it shall appear only on the final exhibit list of the party first named in the caption who might introduce it at trial. Any party may utilize and seek admission of any exhibit appearing on any party's exhibit list.
5. At the beginning of trial, prior to opening statements, each party shall file the original and one copy of its final exhibit list with the in-court clerk.
6. At the beginning of trial, counsel shall bring all original exhibits to the courtroom and copy of the exhibits for the Judge's use. All exhibits must be legible or they will not be admitted into evidence.
7. All objections to foundation or best evidence shall be made in the objecting party's trial brief.
8. Exhibits that are not submitted as required herein will not be admitted at trial, except upon a showing of good cause.

L. SETTLEMENT

1. A party requesting the appointment of a settlement judge should file and serve a written request at least **sixty (60) days** prior to the first day of trial. Unless the settlement judge advises the parties to the contrary, each party shall file with the settlement judge a short, plain, concise settlement brief that contains a candid discussion of the legal and factual strengths and weaknesses of the parties' respective positions. The settlement brief is not to be filed with the court or served on the other parties. The settlement brief shall be no more than 5 pages in length, not including any exhibits that the party reasonably believes should be considered by the settlement judge. The settlement judge will communicate directly with the parties concerning the time, date, and location of the settlement conference. Once the settlement judge selects a time, date, and location the parties and their counsel are hereby ordered to attend and fully participate. If a settlement is reached during the conference the same, if practical under the circumstances, shall be promptly placed on the record in open court (even if it is contemplated that a later settlement agreement and/or release(s) will be prepared and signed by the parties). Counsel and their client shall attend the settlement conference in person unless prior permission to appear telephonically has been obtained from the settlement judge or the court.

2. If a case settles prior to trial, plaintiff shall promptly advise the court of the same so that the case can be removed from the trial calendar. Plaintiff shall do so by means of a letter or pleading and serve a copy of the same on each other party.
3. A notice of dismissal under Alaska Civil Rule 41(a)(1) or a stipulation for dismissal must contain the certificate of compliance with Alaska Civil Rule 41(a)(3), if applicable, as required under Alaska Civil Rule 41(a)(1).

M. TRIAL

1. Trial Time consists of a party's opening statement, closing argument, direct examination of their own witnesses and cross-examination of other party's witnesses. Trial time in this case is allocated as follows:
 - (a) Plaintiff: 1 day.
 - (b) Defendant: 1 day.
2. Unless the Court orders otherwise, jury selection shall occur as follows:
 - (a) One alternate shall be seated pursuant to Alaska Civil Rule 47(b)(2)(B). This entitles the parties to 1 additional preemptory challenge under Alaska Civil Rule 47(b)(1)(B).
 - (b) The names of 13 jurors will be drawn and these jurors will be seated in the jury box. The parties may conduct voir dire. Each party shall take no more than five (5) minutes to question a prospective juror during general jury selection except that a reasonable amount of additional time will be permitted for examination of the first prospective juror so that routine questions may be disposed of by a blanket question to subsequent jurors (i.e. "you heard the questions I asked Ms. Doe concerning _____, would you have responded any differently?").
 - (c) When all parties have passed the panel (jurors in the jury box) for cause the Court will call upon the parties to exercise preemptory challenges. Each party will be entitled to exercise one (1) preemptory challenge each round until their allotment is exhausted. If a party declines to exercise a preemptory challenge during any round the party thereby waives the right to preempt any of the jurors then in the panel (in the jury box). The parties shall verbally thank and excuse the prospective jurors that they are preempting. The first round the plaintiffs will go first followed by the defendants. If there is more than one plaintiff or defendant the parties will exercise their preemptory challenges in the order that the parties' names

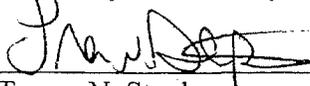
appear in the case caption. The second round the defendants will go first followed by the plaintiffs. If there is more than one plaintiff or more than one defendant the party who went first the first round shall go last and the party who went second shall go first, with the other parties in the order their names appear in the case caption. This process will continue until a jury is finally selected.

3. The Court's trial days are generally are as follows. The parties will convene at 8:30 a.m. to address any issues that need be resolved before the trial commences. If the trial is by jury the prospective jurors will not be present. The trial will then start. A ten (10) minute break will be taken mid-morning. A lunch break will be taken at noon for one hour and fifteen minutes. A ten (10) minute break will be taken mid-afternoon. The trial will proceed to as close to 4:30 p.m. as the Court's schedule will permit. It is possible that the court will require the parties to remain to address issues not appropriate for discussion in front of the jury (i.e. jury instructions).

N. OTHER

1. Other Orders: _____.
2. The provisions of this Order are binding on all parties. Failure to comply with any provision of this Order may result in the imposition of sanctions against a party or attorney, including but not limited to those sanctions authorized y Civil Rules 37 and 95.

Dated at Ketchikan, Alaska this 28th day of February 2008.


Trevor N. Stephens
Superior Court Judge



I certify that on: 1-3-08
I mailed a copy of this Order to:

S. Brandt-Erickson
A. Stiles
calendar

SMH
Secretary/Deputy Clerk

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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,

JUN 26 2008

Plaintiff,

Clerk of the Trial Courts
By _____ Deputy

v.

LETA TRASK,

No. 1KE-07-437 Civil

Defendants.

OPPOSITION TO MOTION TO VACATE TRIAL DATE
AND RESET PRE-TRIAL DEADLINES

The Plaintiff, Ketchikan Gateway Borough, Opposes the Defendant, Leta Trask's, Motion to Vacate Trial Date and Reset Pre-Trial Deadlines. This case was filed in September 18, 2007, and is a straightforward code enforcement case. The Trask counterclaim does not allege any complicated facts, but rather alleges that the Borough's ordinance is unconstitutional and that the Borough's prosecution of an action to enforce its Municipal Code somehow has caused her compensable damages.

The counterclaim was not filed until March 28, 2008. Trask could have sought an extension at that time. Further, Trask has

KGB v. Leta Trask et al.
1KE-07-437 CI
Opposition to Motion to Vacate Trial date
and reset Pretrial Deadlines

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

1
2 not been diligent about pursuing discovery on her claim, and
3 does not detail what additional discovery she believes would be
4 needed which could justify an extension. The Borough has
5 already provided its final witness list, and is ready for
6 trial. The longer this is delayed, the longer Trask is allowed
7 to continue violating the Borough Code.
8

9
10 It is significant that when the February 20, 2008, parties
11 Planning Report was prepared (copy attached) and the February
12 28, 2008, Pretrial Conference was held, Trask did not object to
13 the Trial Schedule. Nor did Trask identify subjects on which
14 discovery would be needed. Rather, the report indicates "None"
15 in the space for identification of subjects upon which discovery
16 will be needed.
17

18 Clearly, Trask contemplated a counterclaim at that time.
19 The report so indicates. If Trask knew of her counterclaim then,
20 she agreed to the trial schedule and indicated the lack of a
21 need for extensive discovery with that knowledge.
22

23 The Planning report also indicated that the right to a jury
24 trial was disputed. Rule 38 requires the demand to be made
25 within 10 days or it is waived. There is no right to a jury
26

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1KE-07-437 CI
Opposition to Motion to Vacate Trial date
and reset Pretrial Deadlines

1
2 trial on the Complaint filed by the Borough as it is an
3 enforcement action seeking relief in equity. See Noey v.
4 Bledsoe, 978 P.2d 1264 (Alaska 1999).
5

6
7 The issues identified in the joint statement are whether
8 the Trask sign violates the Borough Code and whether the sign
9 ordinance violates Trask's constitutional rights. With these as
10 the issues stated, which are essentially legal issues, it is
11 difficult to imagine what additional discovery could be
12 required. Trask's motion does not identify the issues upon which
13 discovery is sought other than a general reference to
14 affirmative defenses.
15

16 Trask indicates an intent to file a summary judgment
17 motion. Such action could have been taken earlier. The case here
18 easily lends it self to disposition on motions as there is
19 little dispute that Trask painted the words on the roof of her
20 house. The only issues are, as stated in the parties' planning
21 report, does her sign violate the Borough Code and is the
22 Borough Code constitutionally defective. The Borough would not
23 oppose resolution of the case through briefing of these legal
24 issues on stipulated facts, but Trask has not indicated a
25

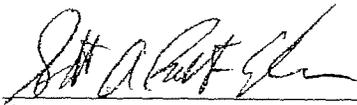
26 KGB v. Leta Trask et al.
1KE-07-437 CI
Opposition to Motion to Vacate Trial date
and reset Pretrial Deadlines

1
2 willingness to do so.
3

4
5 At its core this case is a straight forward code
6 enforcement action, and Trask's claims are merely a challenge to
7 the constitutionality of the duly adopted Borough Code.
8 Proceedings for abatement of a nuisance code violation should
9 not be postponed simply because the Defendant asserts
10 unconstitutionality of the Borough Code as a counterclaim rather
11 than an affirmative defense. The longer the violation continues,
12 the longer the public interest suffers. The legal issue of
13 whether the Code provision is defective does not require
14 additional discovery. The current trial date should be
15 maintained.

16
17 DATED at Ketchikan, Alaska, this 26th day of June, 2008.

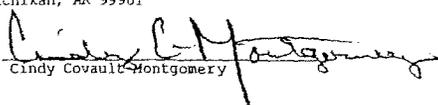
18 KETCHIKAN GATEWAY BOROUGH

19 By: 

20 Scott A. Brandt-Erichsen
21 Borough Attorney
22 Attorney for Appellee
23 Alaska Bar No. 8811175

24 I certify that a true and correct
25 copy of the foregoing was delivered
26 this 26th day of June, 2008, via
Court Tray Receptical to:

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

31 By: 

Cindy Covault-Montgomery

32 KGB v. Leta Trask et al.
33 1KE-07-437 CI
34 Opposition to Motion to Vacate Trial date
35 and reset Pretrial Deadlines

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA
AT KETCHIKAN

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

FEB 20 2008

Clerk of the Trial Courts
By _____ Deputy

Ketchikan Gateway Borough,

Plaintiff(s),

vs.

Leta Trask,

Defendant(s).

CASE NO. 1KE-07-437 CIVIL

REPORT OF PARTIES' PLANNING MEETING

Pretrial Scheduling Conference date: 2/28/2008 Judge assigned: Trevor Stephens

Type of action: Injunction

The parties' planning meeting was held February 20, 2008 and attended by:
Scott A. Brandt-Erichsen for Ketchikan Gateway Borough
Amanda Skiles for Leta Trask

1. **Issues.** Preliminary joint statement of issues: (Include separate statements where parties disagree.) Does the sign on Trasks roof violate the Borough Sign Code?
Does the Sign ordinance violate Trask's Constitutional Rights?

2. **Initial Disclosures.** The initial disclosures required by Civil Rule 26(a)(1) have been exchanged will be exchanged by _____

The parties agree that supplementations under Rule 26(e) will be due at the following times or intervals: 60 Days

3. **Discovery Plan.** The parties jointly propose to the court the following discovery plan:

a. **Subjects.** Brief description of subjects on which discovery will be needed:

None

b. **Deadline.** All discovery must be commenced in time to be completed by June 30, 2008 except that discovery on the following issues must be completed by the dates shown.

Issues for Early Discovery	Deadline for Completion
_____	_____
_____	_____
_____	_____

c. **Limits.**

(1) Interrogatories. Civil Rule 33(a) allows each party to serve a maximum of 30 interrogatories upon any other party. Responses are due 30 days after service. The parties stipulate to the following changes in these limits:

- No change.
- Maximum of _____ interrogatories.
- Responses due _____ days after service.

(2) Requests for Admission. Civil Rule 36 does not limit the number of requests for admission that each party may serve. Responses are due 30 days after service. The parties stipulate to the following changes:

- No change.
- Maximum of _____ requests for admission.
- Responses due _____ days after service.

(3) Depositions. Civil Rule 30(a) allows each side to depose the following persons as a matter of right: other parties; independent experts expected to be called at trial; treating physicians; document custodians; and any three other persons. The depositions of a party, expert witness, or treating physician may not exceed six hours. Other depositions may not exceed three hours. Civil Rule 30(d)(2). The parties stipulate to the following changes in these limits:

- No change.
- _____ may depose the following additional witnesses:

- Deposition of _____ not to exceed _____ hours.

d. **Other Provisions of Discovery Plan.** NONE

4. **Trial.**

a. Complete either (1) or (2). (You must tell the judge when the case will be ready for trial or for a trial setting conference. Civil Rule 16(b)(1)(G).)

(1) The case will be ready for trial by First Week in August

Estimated trial time ("Trial time" for any party includes the party's opening statement, closing argument, and direct and cross-examination of all witnesses.):

Plaintiff(s) 1 days
Defendant(s) 1 days
Other parties _____ days

(2) Trial cannot be scheduled now because _____
 The case will be ready for a trial setting conference by _____

b. Jury trial requested not requested disputed. Explain:
 Defendant intends to file a counterclaim and is filing a jury demand. Plaintiff
 asserts that the demand is untimely.

5. **Proposed Pretrial Deadlines.**

	Plaintiff(s)	Defendant(s)
a. Joinder of parties	_____	_____
b. Amendment of pleadings	_____	_____
c. Preliminary witness lists	_____	_____
d. Expert witness lists under Rule 26(a)(2)(A)	_____	_____
e. Expert reports under Rule 26(a)(2)(B)	_____	_____
f. Dispositive motions	_____	_____
g. Other motions	_____	_____
h. Final witness lists under Rule 26(a)(3)	_____	_____
i. Final exhibit lists under Rule 26(a)(3)	_____	_____
j. Objections under Rule 26(a)(3): _____ days after disclosure of relevant list.		

6. **Settlement.**

a. The parties have discussed the possibilities for a prompt settlement or resolution of the case, including the following alternative dispute resolution procedures (check all that apply):

- settlement conference
- mediation
- non-binding arbitration
- other: _____

Comments: _____

b. **Settlement Conference.**

- The parties request a settlement conference.
- The parties agree that the deadline for requesting a settlement conference will be: _____
- Other: _____

c. **Mediation.**

- The parties request appointment of a mediator under Civil Rule 100.
- The parties agree that the deadline for requesting appointment of a mediator will be: _____
- Other: _____

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.)

8 LETA TRASK,)

9 Plaintiff/Counterclaimant,)

10 vs.)

11 KETCHIKAN GATEWAY BOROUGH,)

12 Defendant.)

RECEIVED
SEP 18 2008
Borough Attorney's Office

Case No. IKE-07-437 CI

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

SEP 16 2008

Clerk of the Trial Courts
By _____ Deputy

13
14
15
16 **MEMORANDUM IN SUPPORT OF LETA TRASK'S**
17 **MOTION FOR SUMMARY JUDGMENT**

18 I. Summary Judgment Standard

19 A motion for summary judgment shall be granted if "the pleadings,
20 depositions, answers to interrogatories, and admissions on file, together with affidavits,
21 show that there is no genuine issue as to any material fact and that any party is entitled to
22 a judgment as a matter of law."¹ On a motion for summary judgment, all proofs must be
23 viewed in the light most favorable to the non-moving party.² All inferences of fact are to
24 be drawn in favor of the party opposing summary judgment and against the moving
25
26
27

28 ¹ Alaska R. Civ. P. 56(c).

29 ² *Gablick v. Wolfe*, 469 P.2d 391, 396 (Alaska 1970).

1 party.³ The moving party bears the initial burden of proving through admissible evidence
2 the absence of genuine factual disputes and its entitlement to judgment.⁴ “The non-
3 moving party need not demonstrate the existence of a genuine issue ‘until the moving
4 party makes a prima facie showing of its entitlement to judgment on established facts.’”⁵
5
6 When the moving party has demonstrated that there is no genuine issue of fact to be
7 litigated, the non-moving party must state its position or defense and show how it plans to
8 support its position or defense with facts that would be admissible at trial.⁶ Irrelevant or
9 unnecessary factual disputes do not create genuine issues of material fact.⁷
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11

12 II. Facts

13 On November 15, 2004, the Ketchikan Gateway Borough Assembly adopted
14 Ordinance No. 1328A, amending Ketchikan Gateway Borough Code of Ordinances, Title
15 60, Sections 60.10.090 and 60.10.140. Pursuant to the Recitals section of the ordinance,⁸
16

17 A. These amendments are presented at the request of the
18 Ketchikan Gateway Borough Planning Commission and the
19 Borough Assembly, as established as part of the approved
20 Zoning Reform priorities, Phase 1.

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

27 ³ Alaska Rent-A-Car, Inc. v. Ford Motor Co., 526 P.2d 1136, 1139 (Alaska 1974).
28 ⁴ Shade v. Co. & Anglo Alaska Service Corp., 901 P.2d 434 (Alaska 1995).
29 ⁵ Ball v. Birch, Horton, Bittner & Cherot, 58 P.3d 481, 487 (Alaska 2002).
⁶ McKean v. Hammond, 445 P.2d 679 (Alaska 1968).
⁷ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).
⁸ A complete copy of Ordinance No. 1328A, which was attached to KGB’s Motion to Dismiss, is attached as Exhibit A and incorporated by reference.

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C. Recognizing the unique cultural and historic quality of downtown Ketchikan, and importance of aesthetics and architectural integrity to the long term economic viability of our community, these amendments will provide consistency in style, placement, scale and harmony with buildings, natural settings, and other signs.

D. These amendments will provide for adequate and effective downtown signage without dominating the physical landscape, signs that are subordinate and complimentary to rather than overpowering a building façade, that enhance rather than detract from the historic architectural character of the downtown core, which also serves to boost property values.

E. These amendments balance the needs of local businesses with the desire to preserve and enhance the unique historic and visual character of the downtown, especially the Central Commercial Zone.

F. The amendments will control the proliferation of flimsy signs and deteriorating temporary vinyl banner signs that have overtaken many historic buildings in the downtown.

G. New definitions help clarify the code requirements and facilitate enforcement.

H. The existing code makes no provision for signage for hotels and lodges in the FD zone, nor for any signage in the Public Lands and Institution zones.

I. In 2003, the Borough Assembly voted that changes to the Sign Ordinance were a priority for Zoning Code Reform and directed staff to work with the Planning Commission to make changes to the Code.

J. After reviewing and amending this Ordinance on October 26 and November 10, 2004, the Planning Commission voted to forward it to the Borough Assembly with a recommendation of approval.

1
2 Ketchikan Gateway Borough Code § 60.10.140, defines a sign as:

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

10 It defines a roof sign as, "A sign projecting over the coping of a flat roof, or over the
11 ridge of a gable, hip or gambrel roof, and supported by or attached to said roof, or any
12 sign that uses the roof for support."

13 Pursuant to Ketchikan Gateway Borough Code §60.10.090(A), *General*

14 *Requirements:*

15 (1) A permit shall be obtained from the administrative
16 official for the chapter prior to the installation of any exterior
17 sign, nameplate, advertising sign or advertising structure
18 excepting those less than two (2) square feet in area and
19 temporary construction, real estate, and political signs that
20 meet the provisions of this ordinance. Sign permit
21 applications shall include plans for all signs to be placed. The
22 plans shall illustrate sign elevations, cross sections,
23 dimensions, placement on the site, materials, colors, and
24 lighting, designed to withstand winds. Construction and
25 erection of signs shall be in accordance with this chapter.

26 (2) Signs permitted under this section shall advertise only
27 the business or activity engaged in on the immediate
28 premises. In the case of building complexes with multiple
29 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 directory sign that lists all commercial tenants in a

1 building complex is allowed per building façade, either
2 mounted flush or as a free-standing or monument sign.

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

7 (4) No sign shall be placed within forty (40) feet of any
8 intersection measured at the center line of the intersecting
9 streets.

10 (5) Flashing signs and intermittent illumination are
11 permitted only in commercial and industrial zones, with the
12 exception of the Central Commercial Zone, where flashing,
13 blinking, or intermittently illuminated signs visible from the
14 exterior of the building are prohibited with the exception of
15 intermittently illuminated neon non-textual symbols,
16 revolving barber shop poles, and clocks.

17 (6) In all residential zones, lighting shall be indirect and
18 shielded from adjacent property.

19 (7) Abandoned signs shall be removed by the property
20 owner within six (6) months of the cessation of the advertised
21 business or activity.

22 (8) Roof-mounted signs, including any signs painted on
23 the roof surface, but excepting those mounted on a marquee
24 or canopy, are prohibited.

25 (9) Political signs up to 16 square feet each on residential
26 property and up to 32 square feet on commercial or industrial
27 property may be displayed on private property without a sign
28 permit. Signs may be installed no sooner than 120 days prior
29 to the election date and shall be removed within five working
30 days after the election date. Political signs not related to a
31 specific election shall be limited to a display period not to
32 exceed 60 days within one calendar year. Unlighted political
33 signs of up to four square feet may be displayed on private

1 property up to 180 days prior to the election date and shall be
2 removed with five working days after the election date.

3 (10) During a 'grand opening' not to exceed fourteen (14)
4 days, temporary grand opening signs of up to twenty four (24)
5 square feet may be displayed without a sign permit and
6 regulations with respect to sign area, placement, and sign
7 type, with the exception that not more than one (1) grand
8 opening event may be advertised at any business location
9 within any twelve (12) month period, provided that each
10 separate business location with a multiple-business complex
11 shall be entitled to a grand opening event separate from a
12 grand opening event for the complex as a whole.

13 (11) Temporary construction signs may be displayed
14 without a sign permit in all zones, limited to a total sign area
15 of thirty-two (32) square feet per construction site, displayed
16 no longer than one (1) year and removed no later than ten
17 (10) days after completion or occupancy of the project.

18 Ketchikan Gateway Borough Code § 60.10.090(B), *Signs permitted in residential*
19 *zones*, provides:

20 (1) *Real estate signs*: One (1) sign not exceeding three (3)
21 square feet advertising only the sale, rental or lease of the
22 building or on premises on which it is maintained is allowed
23 without a permit.

24 (2) *Subdivision signs*: Signs advertising the sale or lease
25 of lots or buildings within new subdivisions of at least two
26 and one-half (2 ½) acres are permitted providing they are
27 non-illuminated or indirectly illuminated and do not exceed
28 fifty (50) square feet in area. Not more than one (1) such sign
29 shall be located in each major approach to the subdivision and
the front, side and rear requirements applying to principal
structures shall apply to the location of such signs. The
display of such signs shall be limited to a period of two (2)
years. Prior to the expiration thereof, the applicant may
request an extension from the board of adjustment. The sign
shall be removed prior to the expiration of the two (2) year

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period or extension thereof. If the sign has not been removed, the city or borough may enter upon the premises upon which the sign is located and remove such sign at no liability to the city or borough and at the expense of the owner.

(3) *Bulletin boards:* Bulletin boards used to display announcements of meetings to be held on premises on which such boards are located shall be permitted for churches, schools, community centers and public, charitable or institutional uses. Unless otherwise permitted in the zone, such signs shall contain no more than twenty (20) square feet in area; may be used as wall signs; may be used as ground signs when located a minimum of ten (10) feet from the street lot line; may be indirectly illuminated; and one (1) such sign shall be permitted for each street frontage.

(4) *Signs identifying occupations and cottage industries:* One (1) sign per use not exceeding two (2) square feet in area. Such sign shall be no closer than (10) feet to any property line or shall be flat against the building. No lighting is permitted.

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

KGB's Complaint to Enjoin Sign Code Violation, filed September 18, 2007, alleges that Leta Trask maintains a roof sign in violation of KGB Code § 60.10.090(A)(8).⁹ Among other arguments, Leta Trask contends that KGB Code §§ 60.10.090 (A) & (B) violate her free speech rights under Article I § 5 of the Alaska Constitution and the 1st and 14th Amendments to the U.S. Constitution.¹⁰

⁹ KGB's Complaint to Enjoin Sign Code Violation p. 2, ¶ 6.
¹⁰ Leta Trask's Amended Answer pp. 4-5, ¶¶ 20-33, pp. 10-12, ¶¶ 62-73.
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Since filing its Complaint, KGB adopted amended Ordinance No. 1463.¹¹ The

Recitals provide as follows:

A. The intent of this ordinance is to further streamline Title 60 of the Borough Code of Ordinances, clarifying the definition of signs and providing exemptions from the requirement to obtain permits;

B. The Planning Department is implementing a policy of posting signs in front of properties that are subject to public hearing before the Planning Commission;

C. The purpose of the signs is to provide additional public notice that a land use application has been received and is being considered. Such notices are common in other areas and would require a permit under Borough Code as currently written.

D. As currently drafted KGB Code Ch 60.10.090 can be interpreted to require permits for traffic signals, public notices, and other devices that clearly should not need permits...

Pursuant to the ordinance, KGB Code § 60.10.090 was amended to increase the size of signs exempted from the permit requirement to those less than three square feet. It also added additional exemptions for governmental notices and governmental public safety signage.

There is no dispute that Leta Trask is an owner of record of the property located at 713/715 Hill Road, Ketchikan, Alaska, or that the property is in a medium density residential area. There is also no dispute that Leta Trask presently maintains a painting on her roof as depicted in Attachment 1 to KGB's Complaint to Enjoin Sign Code

¹¹ A copy of Ordinance No. 1463 Amended, which was previously attached to KGB's Motion to Dismiss is attached as Exhibit B.

1 Violation.¹² As indicated by KGB's Complaint and Leta Trask's Amended Answer, there
2 is no dispute about KGB's authority to enact ordinances pursuant to its planning, zoning
3 and police powers or that based upon those powers, it passed Ordinance 1328A,
4 amending KGB Code § 60.10.090 and § 60.10.140.¹³ Any facts that might be disputed
5 are not material to this summary judgment motion.
6

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8 III. Legal Analysis

9 The First Amendment to the U.S. Constitution provides "Congress shall make no
10 law respecting an establishment of religion, or prohibiting the free exercise thereof; or
11 abridging the freedom of speech, or of the press; or the right of the people peaceably to
12 assemble, and to petition the Government for a redress of grievances." Article I § 5 of
13 the Alaska Constitution provides that, "Every person may freely speak, write, and publish
14 on all subjects, being responsible for the abuse of that right." Signs are a form of
15 expression protected by the Free Speech Clause.¹⁴
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17

18 A. Invalid Content-Based Speech Restriction

19 In evaluating a law that governs speech, the court must first determine whether the
20 regulation is content-neutral or content-based and then apply the proper level of
21 scrutiny.¹⁵ A regulation is content-neutral if it can be justified without reference to the
22 content of the regulated speech.¹⁶ A law that controls the substance of a speaker's
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26 ¹² Exhibit C.

27 ¹³ KGB's Complaint and Leta Trask's Amended Answer.

28 ¹⁴ City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994).

29 ¹⁵ Id. at 59 (concurring opinion).

¹⁶ Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), quoting, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

1 message is not content-neutral, even if it has broad application.¹⁷ “As a general rule, laws
2 that by their terms distinguish favored speech from disfavored speech on the basis of the
3 ideas or views expressed are content based.”¹⁸
4

5 KGB’s sign ordinance is not content neutral. As noted above, Leta Trask is
6 charged with maintaining a roof sign in violation of KGB Code § 60.10.090(A)(8), for
7 painting phrases directly upon her roof. At first glance, this section would appear to be
8 content neutral. Nowhere within KGB Code § 60.10.090 does it provide a specific
9 exemption for flags to be painted directly upon roofs. However, it is apparent that the
10 code administrator is allowing such an exemption.¹⁹ Therefore, KGB Code
11
12 § 60.10.090(A)(8) is being applied in the case at hand with reference to content.
13

14 KGB Code § 60.10.090 (A)(1) exempts certain signs from the permit requirements
15 based upon content, i.e. temporary construction signs, real estate signs, and political
16 signs. This was recently amended to also exempt governmental notices and
17 governmental public safety signage. Furthermore, KGB Code § 60.10.090 (A)(2)
18 requires that permitted signs only advertise the business or activity engaged in on the
19 immediate premises. To determine whether one is required to apply for a permit, the
20 content of the speech must be ascertained. Furthermore, to determine whether one is
21 entitled to a permit, again, the content of the speech must be ascertained.
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27 ¹⁷ Hill v. Colorado, 530 U.S. 703, 767 (2000).

28 ¹⁸ Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).

29 ¹⁹ See, Exhibits D, E, F, and I at p. 6.

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A review of KGB Code § 60.10.090(B) also reveals a lack of content neutrality. This section limits signs in residential areas to real estate signs; subdivision signs that advertise the sale or lease of lots or buildings; bulletin boards which display announcements of meetings to be held on the premises of churches, schools, community centers, and public, charitable, or institutional uses; and signs identifying occupations and cottage industries. Pursuant to KGB Code § 60.10.090(B)(1), real estate signs must advertise only the sale or lease of the building. This is commercial speech. Pursuant to KGB Code § 60.10.090(B)(2), subdivision signs advertise the sale or lease of lots or buildings within new subdivisions. Again, this is commercial speech. Signs that identify occupation and cottage industries, as set forth in KGB Code § 60.10.090(B)(4) also contain commercial speech. Essentially, except for political speech allowed pursuant to KGB Code § 90.10.090(A)(9), which is limited to a certain time period for display based upon whether the sign is related to a specific election, and bulletin boards used to display announcements of meetings for churches, schools, community centers, and public, charitable, or institutional uses, as set forth in KGB Code § 60.10.090(B)(3), commercial speech is favored over non-commercial speech in residential areas. Certain non-commercial speech is also favored over other non-commercial speech. When commercial speech is favored over non-commercial speech, the Court has found an unconstitutional

1 content-based restriction on speech.²⁰ Such regulation has also been found to run afoul of
2 the Equal Protection Clause.²¹

3
4 When restrictions are content based, the Court must determine whether the
5 restrictions involve commercial or non-commercial speech. Commercial speech is
6 expression related solely to the economic interests of the speaker and its audience, or
7 speech proposing a commercial transaction.²² Non-commercial speech is accorded
8 greater protection than commercial speech.²³ As noted above, the ordinance regulates
9 both commercial and non-commercial speech, but puts more restriction on non-
10 commercial speech. Content-based restrictions on non-commercial speech are analyzed
11 under a strict scrutiny test and are presumptively invalid.²⁴ To survive under strict
12 scrutiny it must be shown that the regulation is necessary to serve a compelling state
13 interest and that it is narrowly drawn to achieve that purpose.²⁵ The narrow tailoring
14 analysis requires a least restrictive alternative analysis.²⁶

15
16 This ordinance does not survive strict scrutiny. As specifically applied to Leta
17 Trask, KGB can provide no compelling state interest for allowing flags to be painted
18 directly upon roofs and not other non-commercial messages. Furthermore, KGB can
19 offer no legitimate compelling justification as to why commercial signs are permitted
20 while most non-commercial signs are not. It also cannot justify why a billboard
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25 ²⁰ See, Metromedia, Inc. v City of San Diego, 453 U.S. 490, 513-16 (1981).

26 ²¹ See, Young v. American Mini Theatres, Inc., 427 U.S. 50, 64-65, (1976). See also, Gilleo, 512 U.S. at 51, n. 9.

27 ²² Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995).

28 ²³ Metromedia, 453 U.S. at 513.

29 ²⁴ R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

²⁵ Id.

²⁶ See, Ward, 491 U.S. at 798 n.6.

1 advertising a meeting for a church or school is allowed, but not a billboard simply stating
2 those phrases such as are painted on Leta Trask's roof. Any justifications set forth are
3 compromised by the exemptions.²⁷ Aesthetics and safety are not compelling enough
4 interests to justify content-based restrictions on fully protected speech.²⁸
5

6 Based upon the foregoing, KGB Code §§ 60.10.090(A) and (B) are
7 unconstitutional as applied and facially.
8

9 B. Invalid Time, Place, or Manner Restriction

10 As argued above, the ordinance is not content neutral. However, even if it were, it
11 would not be a reasonable time, place, and manner restriction. Such restrictions are valid
12 if they are narrowly tailored to serve a substantial governmental interest and leave open
13 ample alternative channels for communication of the information.²⁹ To be a valid time,
14 place, or manner restriction, the content neutrality must extend to the speaker's choice of
15 topic as well as the speaker's position.³⁰
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18 The ordinance at issue is not narrowly tailored to serve a substantial government
19 interest. It burdens more speech than necessary. With regard to KGB Code
20 § 60.10.090(A)(8), if aesthetics is the governmental interest, allowing roof signs that are
21 mounted on a marquee or canopy while disallowing those painted directly upon the roof
22 seems to be contradictory as those mounted on a marquee or canopy would be more
23 visible. It would also seem they would be more of a safety hazard.
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27 ²⁷ Gileo, 512 U.S. at 52-53.

28 ²⁸ Metromedia, 453 U.S. at 507-08, 514-15.

29 ²⁹ Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

30 ³⁰ Boos v. Barry, 485 U.S. 312, 319 (1988).

1 Furthermore, KGB Code §§ 60.10.090(A) & (B) essentially ban all non-
2 commercial speech unless it fits on a sign less than (2) two square feet in size.³¹ Virtually
3 the only non-commercial speech allowed is political speech, which has a time restriction
4 based upon whether or not the speech is related to a specific election (this again supports
5 a finding that the ordinance is content-based) and announcements for meetings of
6 religious and social groups. Pursuant to recent amendments, governmental signs are also
7 exempted. In effect, KGB has elevated its own right to free speech over that of its own
8 citizens. The recitations of the ordinance essentially cite to aesthetics as the
9 governmental interest. This interest is not substantial enough to justify the elimination of
10 virtually all non-commercial speech in one's own home. Again, if aesthetics is the
11 governmental interest, the exemptions compromise KGB's position.
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16 There are also not ample alternative channels. Communication via residential
17 signs is unique, important, and relatively inexpensive.³² "Displaying a sign from one's
18 own residence often carries a message quite distinct from placing the sign someplace
19 else, or conveying the same text or picture by other means."³³ When a person puts up a
20 sign at his or her residence, the intent is often to reach neighbors versus the general
21 public.³⁴ There is a special respect for individual liberty in the home. "[T]hat principal
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27 ³¹ Now signs less than three (3) feet are exempted.

28 ³² *Gilleo*, 512 U.S. at 54, 57.

29 ³³ *Id.* at 56.

³⁴ *Id.* at 57.

1 has special resonance when the government seeks to constrain a person's ability to *speak*
2 there."³⁵

3
4 With regard to roof signs, mounting one on a marquee or canopy would be more
5 expensive than painting the sign directly on the roof, which only requires paint. In it's
6 complaint, the KGB asserts that ample alternatives exist given § 60.10.090(A)(9), which
7 allows political signs on residential property.³⁶ Allowing residents to put up political
8 signs does not allow them free expression on non-political issues. Furthermore, even
9 political speech is restricted. If an individual wishes to post a sign on the private
10 residence, they may do so without a permit, so long as the sign is related to a particular
11 election, is no larger than 16 square feet, and is installed no sooner than 120 days prior to
12 the election date and removed within 5 days after the election. If the sign does not relate
13 to a specific election, the display period may not exceed 60 days within one year. It is
14 not clear that the painting displayed by Leta Trask constitutes political speech.
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17 Therefore, this exception would not permit her speech. Furthermore, it is not clear why
18 Leta Trask must be forced to speak upon political matters or not speak at all. Even if her
19 speech is classified as political, being that it is not related to a particular election, it would
20 be limited to 60 days each year. Given the respect for individuals' liberty in the home,
21 this does not provide an ample alternative channel.
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28 ³⁵ *Id.* at 58.

29 ³⁶ KGB's Complaint, p. 4, ¶ 13.

1 Based upon the above arguments, even if found to be content neutral, KGB Code
2 §§ 60.10.090(A) & (B) fail to meet the requirements of a valid time, place or manner
3 restriction either as applied or facially.
4

5 C. Illegal Prior Restraint/Overbreadth

6 When a citizen is required to obtain official permission to exercise a constitutional
7 right, a prior restraint exists. A system of prior restraint bears ““a heavy presumption
8 against its constitutional validity.””³⁷ To be a valid prior restraint, the statute must
9 require permit decisions to be made within a brief period of time, there must be an
10 independent, speedy, judicial review if permission is denied, and the status quo must be
11 maintained during judicial review.³⁸
12

13 KGB Code § 60.10.090(A) provides what information must be presented with a
14 permit application. Sign permit applications are required to include plans for all signs to
15 be placed and the plans must illustrate sign elevations, cross sections, dimensions,
16 placement on the site, materials, colors, and lighting. Construction and erection of the
17 signs must be in accordance with KGB Code § 60.10.090. However, nowhere in KGB
18 Code § 60.10.090 does it provide a time period for a decision or judicial review for a
19 denial. Lack of safeguards from the unbridled discretion of the code administrator has a
20 potentially chilling effect upon protected speech. As such, KGB Code § 60.10.090 is an
21 illegal prior restraint and is unconstitutional on its face.
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27 ³⁷ Freedman v. State of Maryland, 380 U.S. 51, 56 (1965). quoting, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70
28 (1963).

29 ³⁸ Id. at 59.

1 A showing that a law punishes a “substantial” amount of protected speech can
2 invalidate all enforcement of that law.³⁹ Such a remedy is allowed as an overly broad law
3 may deter or have a chilling effect on protected speech.⁴⁰ As set forth in III.A., III.B.,
4 and III.C. above, KGB Code §§ 60.10.090(A) & (B) punishes protected speech and is
5 therefore, unconstitutionally overbroad.
6

7
8 D. Void-for-Vagueness

9 “A statute can be impermissibly vague for either of two independent reasons.
10 First, if it fails to provide people of ordinary intelligence a reasonable opportunity to
11 understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary
12 and discriminatory enforcement.”⁴¹ When one reviews the provisions of KGB Code §§
13 60.10.090(A) & (B) and the definition of sign in KGB Code § 60.10.140, it is difficult to
14 figure out exactly what is allowed and what is not. Even the employees of KGB are
15 confused. As seen in Exhibit G, which was exchanged in initial disclosures, Leta Trask
16 had contacted KGB about obtaining a permit. She attached a drawing of what she
17 intended to put on her roof. As shown in Exhibit H, also exchanged in initial disclosures,
18 Erin Reeve, the Assistant Planner, did not believe the painting was a sign. However, as
19 evidenced by its complaint, KGB is now asserting that the painting is a sign. Moreover,
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27 ³⁹ Virginia v. Hicks, 539 U.S. 113, 118-19 (2003).

28 ⁴⁰ Id. at 119.

29 ⁴¹ Hill, 530 U.S. at 732, citing, Chicago v. Morales, 527 U.S. 41, 56-57 (1999).

1 KGB found it necessary to further amend the law since it could be interpreted to require
2 permits for traffic signals, public notices, and other devices.⁴²

3
4 Furthermore, as shown in KGB's answer to Interrogatory No. 7, attached as
5 Exhibit I, KGB has determined that a flag painted directly upon a roof is not a sign.⁴³ As
6 evidenced by Exhibits D, E, and F, there are at least two roofs that have flags painted
7 directly upon them. The flags would seem to be emblems, be visible from a public area,
8 and used to attract attention.

9
10 Also evidenced by KGB's Answer to Interrogatory No. 7 is arbitrary enforcement.
11 According to KGB, "While grave markers could be interpreted to be signs and permits
12 could be required for them, it has been decided that discretion dictates the Borough not
13 prosecute these cases, past, present, or future."⁴⁴ It further states, "The decorations are
14 being treated the same way grave markers are."⁴⁵

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16
17 Based upon the foregoing, KGB Code §§ 60.10.090(A) & (B) are void-for
18 vagueness.

19
20 E. Conclusion

21 KGB Code §§ 60.10.090(A) & (B) reach too far into the realm of protected
22 speech. The law is an unconstitutional content-based regulation as it does not survive
23 strict scrutiny. As it is content based, it cannot be a valid time, place, or manner
24 restriction. Even if found to be content neutral, it is not a valid time, place or manner
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27 ⁴² Exhibit B at 1, Recital D.

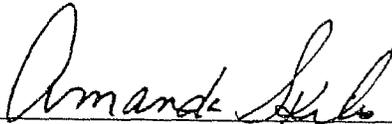
⁴³ Exhibit I at 6.

⁴⁴ Id.

⁴⁵ Id.

1 restriction as it is not narrowly tailored to serve a substantial government interest and it
2 does not leave open ample alternatives. Furthermore, the law constitutes an illegal prior
3 restraint, is overbroad, and void-for-vagueness. Therefore, KGB Code §§ 60.10.090(A)
4 & (B) must be declared unconstitutional and struck down.
5

6 Dated at Ketchikan, Alaska, this 16th day of September, 2008.
7

8 
9

10 Amanda M. Skiles
11 Attorney for Leta Trask
12 AK Bar No. 0206025
13
14

15 Certified: A true and correct copy of the above and its attachments is being served via court tray to Scott-
16 Brandt-Erichsen, Borough Attorney, on 9/16/08, by Amanda Skiles.
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SCHULZ AND SKILES, Attorneys at Law

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

KETCHIKAN GATEWAY BOROUGH)
)
Plaintiffs,)
)
vs.)
)
LETA TRASK)
)
Defendant.)
)

No. 1KE-07-437 CI

VOLUME I

HEARING
BEFORE THE HONORABLE TREVOR N. STEPHENS
Superior Court Judge

Ketchikan, Alaska
May 1, 2009
4:01 p.m.

APPEARANCES:	
FOR THE PLAINTIFFS:	MR. SCOTT BRANDT-ERICHSEN
	Ketchikan Gateway Borough
	1900 First Avenue
	Ketchikan Alaska, 99901
FOR THE DEFENDANT:	MS. AMANDA SCHULZ
	SCHULZ & SKILES
	307 Bawden Street
	Ketchikan Alaska, 99901

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P R O C E E D I N G S

Room A-407

4:01:47

THE COURT: Okay, we're on record in the Ketchikan Gateway Borough v. Trask case, 07-437 CI. Mr. Brandt-Erichsen is here on behalf of the plaintiff, Ms. Skiles on behalf of the defendant. I had scheduled a hearing to discuss whether we need to set another hearing, and what may remain of this case. Ms. Skiles, Mr. Brandt-Erichsen?

MR. BRANDT-ERICHSEN: Your Honor, from the Borough's perspective we've read the court's order. As we see the case, the case at this point is essentially a draw. Neither party prevailing, with the conclusion that the display on the roof is not a sign, the purpose for the Borough in proceeding with the case is eliminated and we have no interest in going forward. The civil rights claim that Ms. Trask brought as a counterclaim without there being a sign at issue there is no basis for the claim, as the court found in its order.

As far as any proceeding to determine attorneys fees, each party prevailed on some part of the case and we would see it as neither party being clearly the prevailing party.

1 The Borough has no further claims its planning
2 on pressing, if Ms. Trask is seeking to continue some
3 sort of claim based upon the fact that the Borough
4 brought an enforcement action, the Borough addressed
5 that previously in its 12 b(6) motion and believes
6 that there wouldn't be any valid claim. And if the
7 case is to go forward from this point the Borough
8 would be seeking attorney fees when it prevails.

9 We would see the case as wrapped up at this
10 point.

11 THE COURT: Ms. Skiles?

12 MS. SKILES: Your Honor, I would disagree with
13 the Borough, I believe that the 1983 action
14 regardless of whether the painting qualified as a
15 sign still -- is still a viable claim. And they did
16 in fact sue her. They attempted to restrict her free
17 speech rights, and it turns out under a statute that
18 didn't in fact apply, and one which they had
19 previously determined didn't apply. But after
20 receiving a petition changed their position. I don't
21 think simply because the.....

22 THE COURT: What's the constitutional violation
23 they based the 1983 action on?

24 MS. SKILES: I believe that they still
25 suppressed her, or at least attempted to suppress her

1 freedom of speech.

2 THE COURT: But again, what's the violation?

3 MS. SKILES: Your Honor, I think it would be, if
4 I can put this in some.....

5 THE COURT: I mean under United States -- or
6 City of Los Angeles versus Heller, there is no 1983
7 damages ^{without here} that being a constitutional violation. I
8 found that she doesn't have standing to raise
9 theoretical issues; and as far as her particular
10 instance is concerned the sign's there, it's always
11 been there, it hasn't been removed.

12 MS. SKILES: Your Honor, she -- I mean she was
13 forced to defend her constitutional right to do this.
14 And in fact if people don't -- I mean I think in
15 these first amendment cases if people don't do this,
16 you know, we're going to see people's first amendment
17 rights constantly suppressed, just because their not
18 willing to stand up against the government.

19 THE COURT: So do you have a case that says
20 attorney's fees to defend against an unsuccessful
21 enforcement action, or damages under 1983. I mean I
22 would have reached the same decision if we'd gone to
23 trial and I decided that it didn't fit. And found
24 your client not guilty so to speak. What's the
25 constitutional violation?

1 MS. SKILES: Your Honor, in my head right now --
2 and I've been in fact when Mr. Brandt-Erichsen and I
3 were talking about this I was researching so that I
4 could hopefully give the court a case; but I wasn't
5 able to get back to it after we spoke. But I think
6 even -- I mean if you want to equate it to criminal
7 actions, when someone is -- even someone who's found
8 guilty on a resisting arrest, they can still turn
9 around -- I mean even though they had violated the
10 law and they have a cause of action. I don't think
11 just because -- the Borough did sue her. She had to
12 defend against this I think if anything, I mean at a
13 minimum she's got to be a public interest litigant.
14 Because again if people aren't willing to.....

15 THE COURT: But the only public interest part I
16 found she didn't have standing, and she had direct
17 personal interest in what's on her roof.

18 MS. SKILES: She had to defend herself and make
19 these constitutional claims. Because.....

20 THE COURT: Right. But anytime a person is
21 charged with violating the law, they have to defend
22 themselves and in the criminal context if someone is
23 found not guilty at trial, or the state dismisses the
24 case they don't get to turn around and ask for
25 attorneys fees.

1 MS. SKILES: Not attorneys fees, but depending
2 on the case there may be a wrongful arrest action or
3 a malicious prosecution action.

4 THE COURT: Well then you can file a case of
5 action for malicious prosecution, I guess. I'm going
6 to do this, I'll give you 30 days to file a brief not
7 to exceed five pages that explains to me why there's
8 still a viable cause of action for violation of
9 constitutional rights. And then if I find there is
10 one, I'll put it on for a trial.

11 MR. BRANDT-ERICHSEN: Your Honor, would that be
12 both parties, or would the Borough have an
13 opportunity to respond?

14 THE COURT: I would give you two weeks after
15 that to respond to anything.

16 MR. BRANDT-ERICHSEN: Thank you, Your Honor.

17 THE COURT: No more than five pages. I don't
18 think it would take more than that. Then I guess if
19 the case does proceed then, as I put in the footnote;
20 Whether the Borough has the authority to limit the
21 speech or not -- but I found the Borough hasn't
22 limited the speech. But, the parties didn't address
23 in the briefing thus far whether it's even
24 constitutionally protected speech. I mean it's
25 equivalent to spite fence. I mean from what's in the

1 record now she's doing it to jab her -- take a jab at
2 her neighbor. Right?

3 MS. SKILES: I don't believe that that's the --
4 I mean I realize that that's what.....

5 THE COURT: Well there's evidence of that in the
6 record. Let's put it that way, based on what's in
7 the Lybrand decision which I had nothing to do with
8 that case, I just read the report of decision. I
9 mean I don't know -- can you stand outside your door
10 and shout at your neighbor 24/7, isn't this the
11 equivalent of it. I don't know.

12 MS. SKILES: Our opinion, and I realize that
13 we're not in argument at this stage, but I don't
14 think it meets any of the unprotected -- I don't
15 think it would fall under fighting words, or.....

16 THE COURT: I'm not saying it does one way or
17 the other, I'm just saying that's an issue that needs
18 to be addressed if we're -- if the case is going to
19 proceed. All right. Anything else?

20 MR. BRANDT-ERICHSEN: No, Your Honor.

21 THE COURT: Sorry it took so long. I got well
22 into it and then decided I wanted the additional
23 briefing and so -- all right, well thank you very
24 much.

25 And I guess we can go off record.

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(Off record)

4:09:31

END OF REQUESTED PORTION

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TRANSCRIBERS CERTIFICATE

I, JUDY A. ZENGE, hereby certify that the foregoing pages numbered 2 through 8 are a true, accurate, and complete transcript of proceedings in Case No. 1KE-07-437 CI, Ketchikan Gateway Borough versus Leta Trask, transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability.

Date Judy A. Zenge, Transcriber