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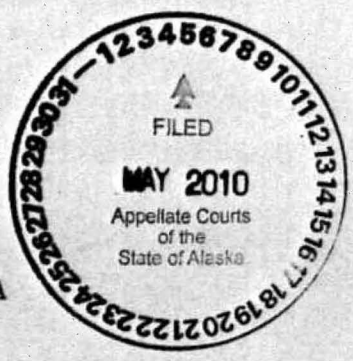

IN THE SUPREME COURT FOR THE STATE OF ALASKA

LETA TRASK,
Appellant,

vs.

KETCHIKAN GATEWAY BOROUGH,
Appellee.

Supreme Court No. S-13590

Trial Court Case No. 1KE-07-437 CI

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

BRIEF OF APPELLEE KETCHIKAN GATEWAY BOROUGH

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

Marilyn May, Clerk

By: _____
Deputy Clerk

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42 USC § 1983 Civil action for deprivation of rights.

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 proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ALASKA RULES OF CIVIL PROCEDURE

Rule 82. Attorney's Fees.

(b) Amount of Award.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.

ALASKA STATUTES

9.60.010(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court

(1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right;

(2) may not order a claimant to pay the attorney fees of the opposing party devoted to claims concerning constitutional rights if the claimant as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did not prevail in asserting the right, the action or appeal asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.

KETCHIKAN GATEWAY BOROUGH CODE

1.10.045. 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."

60.10.090

(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 three (3) square feet in area and temporary construction, real estate, governmental notices, governmental public safety signage, and political signs provided that such signs or notices meet the provisions of this section. 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 hundred eighty (180) days prior to the election date and shall be removed within five (5) working days after the election date.

(10) During a 'grand opening' not to exceed fourteen (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 (1) grand opening event may be advertised at any business location within any twelve (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 thirty-two (32) square feet per construction site, displayed no longer than one (1) year, and removed no later than ten (10) days after completion or occupancy of the project.

(12) Signs erected by government agencies for public safety or public notification may be erected in any zone without a permit.

(B) Signs permitted in residential zones:

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

(2) Subdivision signs: Signs advertising the sale or lease of lots or buildings within new subdivisions of at least two and one-half (2-1/2) acres are permitted providing they are non-illuminated or indirectly illuminated and do not exceed fifty (50) square feet in area. Not more than one (1) such sign shall be located in each major approach to the subdivision and the front, side and rear yard 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 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 the 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 home occupations and cottage industries: One (1) sign per use not exceeding two (2) square feet in area. Such sign shall be no closer than ten (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.

I. JURISDICTIONAL STATEMENT.

Appellee, Ketchikan Gateway Borough, accepts the Appellant's Statement of Jurisdiction.

II. STATEMENT OF THE ISSUES.

This appeal presents two issues:

1. After finding that Ms. Trask did not violate the Borough Code due to the factual finding that her display was not a prohibited sign, did the Trial Court properly dismiss Appellant's counterclaim challenging the Borough's ordinance under 42 U.S.C. 1983?

2. Did the Trial Court abuse its discretion when it found Trask to be the prevailing party and awarded Trask 20% of actual reasonable attorneys fees under AK R. Civ. P. 82?

III. STATEMENT OF THE CASE.

Much of the Appellant Trask's recitation of the procedural history of this case is accurate. However, certain portions are either mis-characterized or omitted by Trask. Additional relevant facts and procedural history are set forth here.

Leta Trask lives in Oregon, but owns a rental duplex in Ketchikan, Alaska. (Excerpts from the Record[1] (Exc.) 16). This house is located at 713/715 Hill Road. (Exc. 16). Ms. Trask has placed communicative signs on her roof over a period of years. (Exc. 97). When she first painted a sign on her roof it was analyzed under the then sign code and determined to not fall within the definition of sign. (Exc. 76-77, 97). Ms. Trask and her uphill neighbor litigated the display on the roof of 713/715 Hill Road, resulting in the removal of the sign in August of 2005. (Exc. 81).

In late 2004 the Ketchikan Gateway Borough amended its sign code, in part adding provisions which specifically prohibit signs painted directly on a roof. (Exc. 93, 90). In the fall of 2005, Ms. Trask inquired of the Borough Planning Department regarding putting symbols on her roof, and was advised that symbols, murals and sayings which are not directed at any public area or roadway, do not advertise any commodity or product, and are not designed to attract attention, would not be a sign needing a permit. (Exc. 80). Ms. Trask did not take action to install a sign in October 2005, but left the rooftop unadorned until June 2007. (Exc. 81).

Subsequently, in June 2007, Ms. Trask painted another display on her roof. (Exc. 81). In June 2007, Ms. Trask did not inquire as

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[1] References to the Excerpts from the Record are to the Excerpts filed by Appellant up to page 152. Excerpts pages 153-188 are in the Appellee's excerpts from the Record. These also will be referenced as Exc. 153-188. Also included is the transcript from the May 1, 2009 Hearing, which will be referenced as Exc. 189-197.

to whether a proposed display she intended to install at that time would require a sign permit. Several nearby property owners complained and requested that the Borough enforce the revised sign code. (Exc.81-85).

In response to the public complaint, the Borough contacted Ms. Trask by letter seeking voluntary compliance with the code in order to avoid issuance of a citation or other enforcement action. (Exc. 117-118). Ms. Trask refused to comply with the code voluntarily. The Borough then initiated a code enforcement action treating the roof display as a prohibited roof top sign in violation of KGB Code 60.10.090(A)(8), seeking to have the court order the roof display removed, and seeking imposition of a $200 fine. (Exc. 1-6).

Ms. Trask filed an answer on October 12, 2007, asserting the factual defense that her display was not a sign and the legal defense that the Borough's prohibition on roof top signs was unconstitutional. (Exc. 9-14). The case was set for trial on August 6, 2008, on Trasks sign code violation. (Exc. 153) Subsequently Ms. Trask filed an amended answer and counterclaim asserting claims against the Borough under 42 U.S.C. 1983, among others. (Exc. 15-27.) Shortly before trial Trask moved for a postponement of the trial, and the Borough opposed the motion. (Exc. 162-169).

Trask later filed a Motion for Summary Judgment seeking a ruling that portions of the Borough's sign code were unconstitutional. In her Motion for Summary Judgement dated

September 16, 2008, Trask sought a ruling that the Borough's sign ordinance was unconstitutional arguing that: 1) The display on her roof is not a sign; 2) That KGB Code 60.10.090(A)(8) content based restrictions on speech; 3) That KGB Code 60.10.090(A)(8) is impermissibly overbroad; 4) That KGB Code 60.10.090(A)(8) is void for vagueness; and 5) That other provisions in KGB Code 60.10.090(A) and (B) are unconstitutional. (Exc. 87-88) As to the portions of the KGB Code 60.10.090 which Trask asserted were unconstitutional, Trask challenged KGB Code section 60.10.090 (A)(1), (A)(2), (Exc. 179) and KGB Code 60.10.090(B), (B)(1), (B)(4), (B)(3), and (A)(9) (Exc. 180).

Trask's counterclaim did not allege misconduct by specific Borough officials, but was limited to allegations that the Borough's Ordinance 60.10.090 (A) and (B) deprived her of various constitutional rights, and the assertion that "by enforcing KGB Code 60.10.090(A) and (B), Ketchikan Gateway Borough, acting under color of state law, deprived and is depriving, Leta Trask or her rights guaranteed and protected by the United States Constitution." (Exc. 25, paragraph 70.) Some discovery followed, but apart from the asserted facial constitutional challenge to portions of KGB Code 60.10.090, Trask never alleged or provided specific information as to precisely what policy or practice of the Borough was asserted to be carried out in violation of her constitutional rights. Trask did not remove or paint over her roof display at any time during the pendency of the case. (Exc. 177; 192).

IV. Standard of Review

A motion to dismiss is reviewed *de novo*. See **Neese v. Lithia Chrysler Jeep of Anchorage**, 210 P.3d 1213, 1217 (Alaska 2009).

Issues of standing are reviewed *de novo*. **Neese v. Litha** Id. Citing **St. Paul Church, Inc. v. Bd. of Trs. of the Alaska Missionary Conf. Of the United Methodist Church Inc.**, 145 P.3d 541 (Alaska 2006). The trial court's findings of fact are subject to a "clearly erroneous" standard of review. See **Labrenz v. Burnett**, Slip. Op. No. 6420, decided October 16, 2009. An appellate Court will disturb those findings only when it is left with a definite and firm conviction on the entire record that a mistake has been made. **Labrenz** citing **Martens v. Metzgar**, 591 P.2d 541, 544 (Alaska 1979).

The trial Court's determination as to whether to award attorneys fees is subject to review for abuse of discretion. See **Sweet v. Sisters of Providence**, 893 P.2d 1252 (Alaska 1995). An award of attorneys fees constitutes an abuse of discretion only when it is manifestly unreasonable. See **State v. Jacob**, 214 P.3d 353, 358 (Alaska 2009).

V. ARGUMENT.

A. The Court Properly dismissed Trask's counterclaim.

1. Introduction

The Borough prosecuted Leta Trask for violation of a specific section of its sign code which prohibits signs from being painted directly on the surface of a roof.[2] Ms. Trask counterclaimed that the Borough ordinance violated her constitutional rights and sought damages under 42 USC section 1983. (Exc. 15-27). The Court determined that the display on Ms. Trask's roof was not a sign, and therefore there was no violation of KGB Code 60.10.090(A)(8). (Exc. 104-106) Accordingly, the complaint was dismissed. (Exc. 128-129) The Court also dismissed Trask's counterclaim on the basis that 1) Trask had not met the requirements to assert a section 1983 claim; and 2) because Trask did not have standing to litigate the constitutionality of the Borough sign code. (Exc. 129.) Trask now seeks to maintain a counterclaim challenging the constitutionality of the Borough's code, or alternatively, asserting "by enforcing KGB Code 60.10.090 (A) and (B)"[3] the Borough deprived Trask of her rights under the United States Constitution.

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[2]KGB Code 60.10.090(A)(8). (Exc. 1-6.)

[3]Trask Amended Answer and Counterclaim at 11, ¶ 70. (Exc. 25.)

The Superior Court was correct. First, Trask had no basis to challenge portions of the Borough sign code other than the specific subsection under which she was prosecuted, KGB Code 60.10.090(A)(8). Second, Due to the Court's factual ruling, Trask lacked standing to maintain a claim for damages under 42 USC section 1983 based upon KGB Code 60.10.090, and there was no case in controversy to continue litigating the constitutionality of that subsection of the Borough Code. Third, were the constitutionality of Borough Code section 60.10.090(A)(8) litigated to conclusion, the court would find that the prohibition on signs on rooftops withstands a challenge to the facial constitutionality. Fourth, even if Trask tries to argue that there still remains a valid section 1983 claim, there was no underlying governmental action pursuant to an unconstitutional policy alleged upon which such a claim could be based. Trask's pleadings are insufficient to state a claim or establish standing to assert a claim. Finally, the Court properly exercised its discretion when it declined Trask's request for enhanced attorneys fees.

2. Trask Cannot Maintain a Claim under 42 U.S.C. § 1983 Based upon Alleged Constitutional Defects in KGB Code 60.10.090.

a. Trask Lacks Standing to Maintain a Constitutional Challenge to Portions of the Borough Sign Code Which Do Not Apply to Her.

Trask's complaint was very broad and general in its allegations regarding the constitutionality of the Borough's

ordinances. Trask alleged that KGB Code sections 60.10.090(A) &(B) were unconstitutional. (Exc. 25). In Trask's briefing on her Summary Judgement Motion it was clear that the majority of the portions of KGB Code 60.10.090 which Trask challenged were not provisions which were applied to her. (Exc. 179-180)

The Alaska Supreme Court has held that: "Under the ripeness doctrine, the constitutionality of a statute generally may not be challenged as an abstract proposition." **State v. ACLU of Alaska**, 204 P.3d 364,366 (Alaska 2009). The Court went on to summarize the actual controversy requirement writing:

> "The "actual controversy" limitation in Alaska's declaratory judgment act reflects a general constraint on the power of courts to resolve cases. Courts should decide cases only when a plaintiff has standing to sue and the case is ripe and not moot. Because ripeness constrains the power of courts to act, courts should not rely on an agreement by the parties that a case is ripe for decision. In its recent decision in **Alaska Right to Life Political Action Committee v. Feldman**,[4] the Ninth Circuit Court of Appeals explained the basic requirement of ripeness: "While 'pure legal questions that require little factual development are more likely to be ripe,' a party bringing a pre-enforcement challenge must nonetheless present a 'concrete factual situation.' " We have similarly recognized that a case is justiciable only if it has matured to a point that warrants decision. "[W]hile Alaska's standing rules are liberal this court should not issue advisory opinions or resolve abstract questions of law."

(**State v. ACLU of Alaska** at 368-369, footnotes omitted.)

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[4]504 F.3d 840, 851 (9th Cir. 2007).

There is little question that Trask does not present facts creating an actual case in controversy with respect to those challenges to subsections of KGB Code 60.10.090 other than the relevant subsection 60.10.090(A)(8). For example, Trask's challenge to the constitutionality of KGB Code 60.10.090 (A) and (B) included the argument that KGB Code 60.10.090(A)(1) and (A)(2) are not content neutral, and therefore the Borough's ordinance is unconstitutional.[5]

KGB Code 60.10.090 (A)(1) provides that a permit is required for certain classifications of signs. KGB Code 60.10.090 (A)(2) restricts signs advertising business or activity to those engaged on the immediate premises. The display on Trask's roof was not asserted to require a permit or otherwise be in violation of either KGB Code 60.10.090 (A)(1) or (A)(2). Rather, the allegations in the complaint, the facts relevant to the case, were that her display was a roof sign which is completely prohibited under KGB Code 60.10.090(A)(8). Accordingly, KGB Code 60.10.090 (A)(1) and (A)(2), and the constitutionality thereof, were not at issue, and thus there was no case in controversy as to these code sections. Trask makes similar arguments about KGB Code 60.10.090(B)[6], and in

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[5] Trask September 16, 2008, Memorandum in Support of Motion for Summary Judgment at 10. (Exc. 179).

[6] Trask September 16, 2008, Memorandum in Support Motion for Summary Judgment at 11. (Exc. 180.)

particular subsections 60.10.090(B)(1)[7], (2)[8], (3)[9], (4)[10] and (A)(9)[11] . (Exc, 179-180). Similar to KGB Code 60.10.090 (A)(1) and (A)(2), Trask's display was not alleged to be a real estate sign; a subdivision sign; a bulletin board; a cottage industry sign; or a political sign. Thus, there was no case in controversy as to those provisions of the Borough Code.

Trask offered the Superior court two hypotheses regarding these codes subsections. The first was that because the Borough's regulatory scheme evaluated and treated signs based upon their commercial or political content under these subsections, the entire ordinance is subject to greater scrutiny. Second, because certain commercial speech is allowed in residential areas under KGB Code 60.10.090(B)(1), (2), and (4), Trask asserted that commercial speech is favored over non-commercial speech under the Borough's

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[7] This subsection allows limited real estate signs in residential zones.

[8] This section allows subdivisions signs.

[9] This subsection allows bulletin boards for churches, schools and meeting places.

[10] This subsection allows cottage industry signs.

[11] This subsection addresses political signs.

ordinance, and thus argues that the Borough's entire ordinance is subject to strict scrutiny analysis and is presumptively invalid.[12]

The flaw with these arguments is that they are not relevant or controlling for the actual subsection under which Trask was being prosecuted. The Prohibition on rooftop signs under KGB Code 60.10.090(A)(8) was absolute, and did not treat commercial speech differently form non-commercial speech, nor did it make any distinction based upon content. Further, consistent with KGB Code 1.10.045, if any of the provisions of Ordinance 1328A, the ordinance adopting KGB Code 60.10.090 (A)(8), are found to be invalid, they are severable from the other provisions. Thus the constitutionality of KGB Code 60.10.090 (A)(8) is not dependent upon the facial validity or invalidity of other subsections of KGB Code 60.10.090.

In the context of this appeal, and under the Court's ruling in **State v. ACLU**, any issue as to constitutionality of KGB Code 60.10.090 apart from 60.10.090(A) (8) is not an actual controversy, and is not ripe for adjudication. Further, Trask does not have adequate standing to challenge these provision. A plaintiff who has a sign would be a more appropriate plaintiff, and could present a

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12 Trask September 16, 2008, Memorandum in Support Motion for Summary Judgment at 12. (Exc. 181).

more ripe controversy with an applicable set of facts. See **Keller v. French,** 205 P.3d 299 (Alaska 2009).

Turning to subsection 60.10.090(A)(8) of the Borough Code, the Superior Court's ruling that the display was not a sign rendered a challenge to that section not ripe for adjudication either. See **Brause v. State**, 21 P.3d 357 (Alaska 2001).

b. The Trial Court's Factual Finding That Trask's Display Was Not a Sign Deprived the Court of Jurisdiction to Rule on the Constitutionality of KGB Code 60.10.090(A)(8).

As noted above, the Superior Court's factual conclusion that Trask's display was not a sign under the Borough Code eliminated Trask's standing to challenge the constitutionality of KGB Code 60.10.090(A)(8). If Trask has no sign prohibited by the Borough's ordinance, then there is no actual case in controversy under **State v. ACLU** and **Brause v. State**. The Superior Court correctly ruled that there was no longer a claim.

Without standing or a case in controversy to challenge the Borough's ordinance, Trask can not maintain a §1983 action based upon the constitutionality of that code section. If the claimant's conduct is not prohibited by the alleged unconstitutional provisions, then the rights of another will not support either a claim or maintenance of an action challenging the constitutionality of the ordinance. See **Keller v. French** where the Court wrote "[g]enerally, a litigant lacks standing to assert the

constitutional rights of another." **Keller** at 304, n. 23, citing **State ex rel. Dep'ts of Transportation & Labor v. Enserch Alaska Construction, Inc.**, 787 P.2d 624, 630 n.9 (Alaska 1989)(Citing **Falcon v. Alaska Public Offices Commission**, 570 P.2d 469, 475 n.20 (Alaska 1977); **Wagstaff v. Superior Court**, 535 P.2d 1220, 125 (Alaska 1975).

Thus, once the Court ruled that her display was not a sign, Trask had no standing to maintain a challenge to the sign ordinance, much less standing to maintain § 1983 action asserting that such ordinance violated her constitutional rights.[13]

c. KGB Code 60.10.090(A)(8) Is Facially Constitutional. The Complete Ban on Signs Painted Directly on the Surface of a Roof Meets the Standards for a Constitutionally Permissible Time Place and Manner Restriction.

Even if the Court were to reverse **Brause**, **Keller**, and **State v. ACLU** in order to pass on the constitutionality of an ordinance where the factual findings concluded that the ordinance was not applicable, the ordinance here is constitutional.

The Court applies a four step analysis to a free speech challenge. See **Ladue v. Gilleo**, 512 U.S. 43 (1994). The first

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13 In order to assert a claim under 42 USC §1983 it is not sufficient to allege that the ordinance is unconstitutional in some regard, but that execution of an official policy violates the claimants constitutional rights and that such action caused the claimant's injury. See discussion in Section 3a, infra.

step evaluates whether the ordinance limitation burdens any speech; 2) If so, the next issue is whether the limit is content neutral or content based; 3) If it is content neutral, the court looks at whether it serves any substantial interest of the governmental unit, and whether it narrowly tailored to further that interest; 4) Finally, the court looks at whether the limitation in the ordinance leaves open ample alternate means for communicating the desired message.

Applying this four part analysis here, the prohibition on roof signs in KGB Code 60.10.090(A)(8) does limit or burden speech; it is content neutral; it serves a substantial governmental interest and is narrowly tailored to serve that interest; and it leaves open ample alternate means of communication.

i. The Ordinance at Issue Burdens or Limits Speech.

There is little room for dispute that KGB Code 60.10.090(A)(8) limits speech. It specifically restricts signs, a traditional method of speech. It completely prohibits signs painted directly on the surface of a roof.

ii. The Ordinance is Content Neutral.

A provision which controls the substance of a speaker's message is content based. A regulation which applies independent of the content of the message is content neutral. See **Ward v. Rock Against Racism**, 491 U.S. 781, 791, 105 L Ed. 2d 661 (1989). Here,

Ordinance 1328A contains elements which are content based, and elements which are content neutral. However, the subsection at issue, states: 60.10.090(A)(8) "Roof-mounted signs, including any signs painted on the roof surface, but excluding those mounted on a marquee or canopy, are prohibited." This total prohibition on signs painted directly on the surface of a roof is a content neutral provision. The substance of the speaker's roof top message is irrelevant.

iii. The Ordinance Serves a Substantial Governmental Interest, Is Narrowly Tailored and Leaves Open Ample Other Means of Communication.

The third and fourth **Ladue** factors look at whether the content neutral provision serves any substantial interest of the governmental unit, and is it narrowly tailored to further that interest. The interests identified here, aesthetic concerns, have been recognized by numerous courts as legitimate substantial governmental interests. In general, the Alaska Supreme Court has recognized the propriety of exercise of municipal powers to regulate signs.

In **Barber v. Municipality of Anchorage**, 776 P.2d 1035 (Alaska 1989), this Court upheld an Anchorage ordinance against challenges based upon free speech, equal protection and due process. In 1985, the Municipality of Anchorage enacted amendments to an ordinance regulating new and existing signs within the municipality. The

amended ordinance prohibited off-premises advertising signs, portable signs, and roof signs. The ordinance also limited the use of temporary signs to a period of sixty days. The Court found the ordinance was narrowly tailored to meet the Municipality's aesthetic goal of eliminating visual blight. Where, as here, the community is visited by a large number of tall cruise ships and has float plane tours flying a low altitudes over various parts of the community, avoiding visual blight of numerous roof top signs is of particular importance. The means selected, a ban of signs directed upwards from the roof surface, is narrowly tailored to address the interest in avoiding visual blight directed upwards. A prohibition on such displays leaves several reasonable alternate means of communication available.

In **Ladue** the ordinance at issue prohibited all signs, even small signs in a window of the residence. The Court found that no ample alternate means of communication were offered. Here there are numerous means to present messages or speech, and these are available without a permit. For example, among the signs allowed without a permit are political signs up to 16 square feet on residential property and 32 square feet on commercial property,[14] and any sign less than 3 square feet in area. Additionally, political signs relating to views on topics not tied to a specific

[14]KGB Code 60.10.090(A)(9)

election may be posted for 60 days at a time.[15] Nothing prevents replacement of one "cause" sign with a new sign on the same topic every 60 days. The ordinance only prohibits the same cause sign from being displayed for more than 60 days in a calendar year[16].

In other cases the courts have recognized as sufficient to satisfy the alternate means test things such as the ability to put up another temporary sign later, window signs, handbills, and bumper stickers. See **City of Waterloo v. Markham**, 600 NE2d 1320 (Ill 1992). Other cases have upheld limiting residential signs to 1 sq. ft., or free standing signs to 8 sq. ft. (**Wilson v. City of Louisville**, 957 F. Supp 948 (KY 1997)).

Thus, in the place of a prohibited roof sign the message sought to be expressed, could, without a permit, be displayed on a yard sign, a window sign, any type of sign less than 3 square feet. With a permit the message could be displayed by a number of other means. A citizen is left with numerous alternate means of communication. In **Ladue** the ordinances at issue foreclosed all of these and left no alternate means of communication. The Borough's ordinance is analogous to the ordinance in **Barber** where this Court

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[15] These sorts of signs are sometimes referred to as "cause signs" as they often relate to general philosophical topics or social positions. While Trask has not asserted whether her sign is a political sign, a cause sign, a commercial sign, or some other type, it appears to be a cause sign.

[16] See KGB Code 60.10.090(A)(9).

found that a complete ban of roof top signs adopted in order to further aesthetic objectives afforded ample alternate means of communication. See **Barber** at 1038. Clearly, under controlling Alaska Supreme Court precedent, a content neutral ban on signs painted directly on the surface of a roof is a reasonable time place and manner restriction which complies with the applicable constitutional limitations. Therefore KGB Code 60.10.090(A)(8) is facially valid.

3. Trask Cannot Maintain a Claim Under 42 USC 1983 Based Upon the Borough Bringing an Action for Enforcement of the Borough Sign Code.

a. The Elements Required to Maintain a Claim Are Not Present.

Trask's counterclaim seeks damages pursuant to 42 U.S.C section 1983, based upon an alleged violation of her constitutional rights. A claim under 42 U.S.C 1983, may be asserted against a municipality. See **Hildebrandt v. Fairbanks**, 957 P.2d 974 (Alaska 1993). There the court wrote:

> "a municipality is a "person" subject to liability under Section 1983. ***Monell v. Department of Soc. Servs. Of City of N.Y.***, 436 U.S. 658, 690-91, 56 L. Ed. 2d 611, 98 S. Ct. 2018(1978). A municipality cannot, however, be held liable under 1983 on a theory of vicarious liability; it can only be held liable when it was the wrongdoer. ***Collins v. City of Harker Heights, Texas***, 503 U.S. 115, 122, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992). The United States Supreme Court has explained:

> Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort."

Hildebrandt at 976. (Emphasis supplied).

In order to establish *prima facie* section 1983 cause of action based upon a constitutional violation the claimant must prove that the defendant's conduct was a cause in fact of the claimant's constitutional deprivation. See Nahmud, **Civil Rights and Civil Liberties Litigation**, 4th ed. section 2:1 page 2-3 (2007). "A person deprives another of a constitutional right, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do so under the Constitution that causes the deprivation of which the Plaintiff complains." **Miniken v. Walter**, 978 F. Supp. 1356 (E.D. Wash 1997).

Accordingly, there must be some action which causes the injury or damage complained of. This was also recognized by the U.S. Supreme Court in **City of Los Angeles v. Heller**, 475 U.S. 796 (1986), "A local government cannot be held liable for a constitutional deprivation if a determination has been made that there was no constitutional violation committed by anyone in the first place." This is also consistent with the Trial Court's decision.[17]

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[17] "Before a county or municipality can be held liable under section

In **Monell v. Department of Social Services of City of New York**, where the City of New York was found to be liable where there is a cause and fact of the claimants constitutional deprivation only "where execution of a governments policy or custom ... inflicts the injury." (Emphasis supplied). The United States Supreme Court requires that a party seeking to impose liability on a municipality under §1983 identify a municipal policy or custom that caused the claimant's injury. **Board of County Commissioners of Bryan County, Oklahoma v. Brown**, 520 U.S. 397, 403 (1997). "Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." **Id.** at 403-404. "It is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality, the plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." **Id.**

Here, the only "policy or custom" identified in Trask's counterclaim is KGB Code 60.10.090 (A)and (B). (Exc.25). As discussed above, those subsections of KGB Code 60.10.090 which do

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1983, a plaintiff must establish that he suffered a constitutional deprivation and that the deprivation resulted from an official custom or policy." **Bradberry v. Pinellas County,** 789 F.2.d 1513, 1515 (11th Cir. 1986).

not apply to Trask's display are not at issue because they are not applicable to the facts here, and therefore do not cause any injury. As to KGB Code 60.10.090 (A)(8) two levels of analysis merit discussions. First, the Superior Court's factual conclusion that the display was not a sign, and accompanying lack of a determination as to the facial validity of KGB Code 60.10.090(A)(8) due to the lack of a case in controversy, eliminates any claim based upon the constitutionality of the Borough's ordinance. A second level of analysis is appropriate in the first amendment context where, as here, Trask argues in her brief that the underlying policy or custom at issue inflicts a constitutional injury due to its chilling effect on the claimant's exercise of free speech.

In her brief,[18] Trask asserts that her situation is like that of Wendy Faustin, whose case was litigated in the Tenth Circuit under **Faustin I**[19] and **Faustin II**[20]. Trask also relies on the Tenth Circuit decision in or **Ward v. Utah**[21]. Based on this analogy Trask

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[18] Appellant's brief at 15-18.

[19] **Faustin v. City County of Denver**, 104 F. Supp 2d, 1280 (D. Colorado 2000), affirmed in part, reversed in part, and remanded by 268 F. 3d 942 (10th Cir. 2001).(**Faustin I**)

[20] **Faustin v. City County of Denver**, 423 F.3d 1192 (10th Cir. 2005) (**Faustin II**).

[21] **Ward v. Utah**, 321 F.3d 1263 (10th Cir. 2003).

argues the Court should entertain a challenge to the constitutionality of KGB Code 60.10.090 (A)(8), and accordingly claims that this subsection inflicts damages compensable under 42 USC § 1983. The reference to **Faustin I** and **Faustin II** is not new. In fact, following dismissal of the prosecution of the code violation, the Superior Court directed the parties to brief the issue of whether any § 1983 claim remained. (Exc. 194) In response to the Court's direction, Trask filed a memorandum regarding the possible liability of the Borough through a §1983 action for damages following a ruling that her display was not a sign under the Borough's ordinance. In that memorandum, as in her opening brief, Trask relied almost entirely on the Tenth Circuit Court of Appeals and its decisions in **Faustin I** and **Faustin II**.

In addition to the fact that a case from a different federal circuit is merely persuasive authority at best, the proceedings in **Faustin I** and **Faustin II** do not support a finding of a viable claim here. Not only is that case factually distinguishable, but it does not offer the rule of law sought to be applied by Ms. Trask. Ms. Faustin displayed a banner protesting abortion from a highway overpass. Ms. Faustin was repeatedly ordered to stop displaying her banner on at least four separate occasions by police officers. **Faustin I** 268 F.3d at 945-947. The officers could not consistently articulate a particular law which Faustin was allegedly violating. **Faustin I** 268 F.3d at 945. In contrast here, all communications

were very clear as to the specific code section Ms. Trask was alleged to have violated.

What is not as clear from the portions of **Faustin I** relied upon by Trask, is that **Faustin I** and **Faustin II** do not stand for the rule of law that a party accused of a violation, but who is found not to have violated an ordinance, has a claim against the governmental entity. Rather, **Faustin I** and **Faustin II** fit with the accepted rule of law that there is no municipal liability unless an official policy or custom caused the constitutional injury. See **Bryan County v. Brown** at 403.

In fact, the underlying policy or practice at issue in **Faustin I** and **Faustin II** was not a law which Faustin was charged with violating, but an unwritten police custom of preventing expression from overpasses. The Tenth Circuit made clear in **Faustin II** that the heart of Faustin's § 1983 claim for which she had standing was her challenge to Denver's unwritten policy relating to expression on overpasses. See **Faustin I** 268 F3.d at 950 and **Faustin II** 423 F.3d at 1195.[22] It is worth noting that the Court in **Faustin I** held that Faustin lacked standing to challenge a section of the law which was not applied to her. This result is consistent with the Borough's position that Trask has no standing to challenge the

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[22] In **Faustin II** the Court went on to uphold this policy against the constitutional challenge. **Faustin II** 423 F.3d at 1202.

constitutionality of other subsections of KGB Code 60.10.090 (A) and (B).

b. Trask Has No "Chilling Effect" Standing.

The **Faustin** and **Ward v. Utah** decisions do contain analysis which requires further discussion. In **Ward v. Utah** the 10th Circuit recognized a limited standing in the First Amendment context based upon a "chilling" of speech. The Court there wrote that in order to have standing based upon the "chilling" effect on speech that a claimant must either allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder," **Ward v. Utah**, at 1207,[23] or if the claimant "faces a credible threat of future prosecution and thus suffers from an ongoing injury resulting from the Statute's chilling effect on his desire to exercise his first amendment rights," **Ward v. Utah**, at 1267.[24]

The claimant in **Ward v. Utah** presented sworn testimony that he would persist in the conduct that precipitated his past felony charge but for his fear of being charged with the same felony. The Court found that for purposes of a motion to dismiss on the

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[23] Citing **Phelps v. Hamilton**, 122 F.3d 1326 (10th Cir. 1997) (quoting **Babbitt v. United Farm Workers Union**, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed 2d. 201 (1979)).

[24] Citing **Wilson v. Stocker**, 819 F.2d 943, 946 (10th Cir. 1987).

pleadings Ward had presented a credible threat of future prosecution, and suffered an injury in the form of a chilling effect on his desire to engage in first amendment activities. **Ward v. Utah**, at 1269.

Here Trask makes no allegation that she intends to engage in a course of conduct which is chilled by KGB Code 60.10.090 (A)(8). The Trial Court even noted that she remained distinctly unchilled. (Exc. 192, lines 9-11.) As a claimant Trask lacks the "credible threat of prosecution" which would be needed to show an "ongoing injury resulting from the Statute's chilling effect" as was required for standing in **Ward v. Utah**. Further, even if she were to make such allegations, the ordinance here is facially valid.

c. Trask Cannot Maintain a 42 USC § 1983 Claim Based Upon Acts Taken in Prosecution of a Violation of KGB Code 60.10.090(A)(8).

Trask has not alleged any Borough policy or custom separate from KGB Code 60.10.090(A)(8) and the Borough efforts to enforce that ordinance. Without an applicable policy or custom which causes injury to her constitutional rights, Trask has nothing upon which to base her claim for damages. As discussed above, the policy expressed in the text of KGB Code 60.10.090(A)(8) does not provide the basis for a claim. Apart from that, Ms. Trask does not allege any individual's wrong doing in her counterclaim. There has been

no physical action taken towards Ms. Trask. There has been no detention, imprisonment, adverse employment action, or any other action which might constitute an actionable tort. There is no asserted decision amounting to an official Borough policy or custom.

The only action with respect to Ms. Trask, has been the initiation of prosecution of a violation of the Borough's Zoning Code. Such an action is entitled to absolute immunity. See **Imbler v. Pactman**, 424 U.S. 409 (1976). The prosecution of a violation of an ordinance is not actionable under § 1983.[25] Further, Trask here does not specifically allege malicious prosecution or any other type of individual misconduct attributable to a Municipal entity. Trask's general allegation that enforcement of 60.10.090(A)and (B) violates her constitutional rights falls well short of alleging some municipal policy or practice separate from the ordinance itself.

There is no underlying policy here to confer standing or to form the basis for a claim. Nor does Trask allege that such a policy exists. To the extent there is a policy or custom at work,

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[25] "An action for malicious prosecution, by itself, is not punishable under Section 1983 because it does not allege a constitutional injury." **Pace v. City of Des Moines**, 201 F. 3rd 1050, 1055 (8th Cir. 2000).

that policy is enforcement of Borough Code in response to complaints. This policy is not unconstitutional.

The Borough, through a reasonable interpretation of its sign ordinance, brought suit to enforce that ordinance, and the court interpreted the ordinance in favor of Ms. Trask. This is a far cry short of the standard of conduct which would give rise to liability or a Borough policy which violates the constitutional rights of Trask or other citizens.

Trask has failed to identify any unconstitutional municipal policy or custom that caused her alleged injury. Therefore the Superior Court properly dismissed Trask's counterclaim.

B. Trask Is Not Entitled to Enhanced Attorneys Fees.

Trask seeks enhanced attorney's fees arguing that 1) Trask's attorney time is reasonable, and 2) the Borough engaged in vexatious and bad faith conduct by bringing an enforcement action. The Trial Court considered and rejected these arguments, and awarded fees under Rule 82 without enhancement. An award of attorney's fees is reviewed for abuse of discretion. **Sweet v. Sisters of Providence**, 893 P.2d 1252 (Alaska 1995). Attorney fee awards pursuant to Rule 82 are presumptively correct. **McGlothin v. Municipality of Anchorage**, 991 P.2d 1273 (Alaska 1999).

Here the Trial Court received substantial briefing and issued a reasoned opinion. The Trial Court concluded that the Borough did not engage in bad faith or vexatious conduct. This finding is entitled to deference, and cannot be overturned unless the Court finds that the Trial Court abused its discretion. Such evidence is lacking here.

The only evidence which Trask points to in support of her assertions of bad faith are 1) an argument that a prior version of the ordinance was determined to not clearly prohibit a rooftop display; and 2) a memorandum from 2005 that a contemplated rooftop mural would not need a permit. The Trial Court considered and rejected these arguments. (Exc. 136-137, 149) Such rejection was not an abuse of discretion. See **Burnett v. Cowell**, 191 P.3d 985 (AK 2008).

Further, activities such as Trask's prior litigation with third parties or correspondence years before the present case are not relevant to the issue of good faith or bad faith under Rule 82 (B)(3)(6). Conduct undertaken "in bad faith" for the purposes of section (B)(3)(G) of rule 82 must relate to conduct during the litigation, and not to actions taken during the underlying transaction or other litigation between the parties. **Alderman v. Iditarod Properties**, 104 P.3d 136 (Alaska 2004).

Trask does not identify any conduct of the Borough **during the litigation** which allegedly shows bad faith. In fact, a review of the record shows that the Borough attempted to expedite resolution of the case, and much of the delay is attributable to Trask's conduct. The matter was set for trial August 6, 2008, but was delayed on Trask's request. (Exc. 162-169).

The dismissal of the prosecution based upon a factual determination that there is no sign does not show bad faith any more then any ruling that an essential element of any offense is factually absent. Were it otherwise, any adverse factual ruling by the Court or finding by a jury would arguably support an enhanced fee award.

Trask also asserts an argument that she is a public interest litigant under AS 9.60.010(c). This argument necessarily would require that Trask lacked sufficient incentive to bring suit on her own. Trask offered no evidence to support the assertion that she lacked incentive to bring suit on her own. The Court properly found that Trask had a direct personal interest. (Exc. 193 at 5, line 15-17.) Further, Trask did not, in fact, initiate a suit on her own. Rather, she raised her constitutional arguments as a counterclaim, and a defense to the charge of violating the Borough's sign ordinance, an infraction offense.

CONCLUSION

The Superior Court found, as a factual matter, that Trask's display is not a sign. This finding, which is not challenged on appeal, necessarily disposes of the entire case as it leaves Trask with no allegation of constitutional injury upon which to maintain a claim. Accordingly, the Court properly dismissed the counterclaim. The Court did not abuse its discretion when it denied enhanced attorneys fees.