

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

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

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

Case No. 1KE-07-437 CI

12 MEMORANDUM AND ORDER

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

18 I. ISSUES

19 The potential issues are:

- 20 a. Whether Ms. Trask's writings constitute a "sign" under KGB Code §
21 60.10.140(B);
- 22 b. Whether Ms. Trask has standing to assert that KGB Code §§
23 60.10.090(A), (B) are unconstitutional;
- 24 c. Whether KGB Code § 60.10.090(A)(8) contains unconstitutional content
25 based restrictions on speech.
- d. Whether KGB Code § 60.10.090(A)(8) is impermissibly overbroad.
- e. Whether KGB Code § 60.10.090(A)(8) is void for vagueness.

87

MEMORANDUM AND ORDER

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

Page 1 of 24

Alaska Court System

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

3 **II. FACTS**

4 **a. KGB Ordinances**

5 KGB Code § 1.10.020, in part, provides:

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

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

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

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

24 KGB Code § 1.10.045 provides:

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

88

MEMORANDUM AND ORDER

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

Page 2 of 24

Alaska Court System

1 KGB Code § 60.10.090¹, in part, provides:

2 (A) *General Requirements:*

- 3 (1) A permit shall be obtained from the administrative official for this
4 chapter [title] prior to the installation of any exterior sign,
5 nameplate, advertising sign or advertising structure except those
6 less than THREE (3) square feet in area and temporary
7 construction, real estate, GOVERNMENTAL NOTICES,
8 GOVERNMENTAL PUBLIC SAFETY SIGNAGE, and political
9 signs PROVIDED that SUCH SIGNS OR NOTICES meet the
10 provisions of this ordinance. Sign permit applications shall include
11 plans for all signs to be placed. The plans shall illustrate sign
12 elevations, cross sections, dimensions, placement on the site,
13 materials, colors, and lighting, designed to withstand high winds.
14 Construction and erection of signs shall be in accordance with this
15 chapter [title].
- 16 (2) Signs permitted under this section shall advertise only the business
17 or activity engaged in on the immediate premises. In the case of
18 building complexes with multiple tenants, immediate premises
19 shall be considered the actual store frontage or parts of the building
20 adjacent to lease space. Subject to the other requirements of this
21 ordinance, one directory sign that lists all commercial tenants in a
22 building complex is allowed per building facade, either mounted
23 flush or as a free-standing or monument sign.
- 24 (3) No sign shall be erected at any location where, by reason of the
25 position, shape or color of such sign, it may interfere with, obstruct
the view of, or be confused with any authorized traffic sign, signal
or device.

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

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

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

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

MEMORANDUM AND ORDER

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

Page 4 of 24

Alaska Court System

90

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

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

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

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

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

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

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

MEMORANDUM AND ORDER

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

91

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

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

8 60.10.040(B)(3)(b) provides that the planning commission can permit: “. . . Public utility and
9 community facilities, churches, convents, marinas, libraries, museum and art galleries, day
10 nurseries, children’s homes, orphanages, community and recreational clubs, hospitals,
11 sanitariums, nursing homes, homes for the aged, convalescent homes, schools (public and
12 private), professional-medical and dental clinics (occupied by ten (10) or less persons), funeral
13 and mortuary establishments, and cemeteries and related uses.”

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

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

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

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

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

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

MEMORANDUM AND ORDER

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

Page 6 of 24

Alaska Court System

92

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

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

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

- 10 (1) Signs located flat against a building or a marquee.
- 11 (2) Two (2) ground poles or projecting signs per business not to
12 exceed fifty (50) square feet in area, provided that signs projecting
13 beyond the lot line may be no closer than six (6) inches from the
14 curblin e and must be at least eight (8) feet above the finished
15 sidewalk grade. Free-standing signs can be no taller than thirty
16 (30) feet maximum.
- 17 (3) Each multiple-business complex is allowed one monument or
18 ground pole per street frontage for a directory sign. The sign area
19 of each such directory sign shall not exceed sixteen (16) square
20 feet plus six (6) square feet per separate business advertised, but
21 not larger than sixty-four (64) square feet.
- 22 (4) One hanging sign is allowed per tenant per street frontage entry,
23 provided that each sign cannot exceed ten (10) square feet total,
24 and must be mounted such that it is no closer than twelve (12)
25 inches from the curb line and there is at least eight (8) feet of
clearance above the finished sidewalk grade, with the exception
that signs hanging under an existing canopy that is less than eight
(8) feet six (6) inches above the finished sidewalk grade must have
at least seven (7) feet of clearance above the finished sidewalk
grade.

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

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

MEMORANDUM AND ORDER

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

Page 7 of 24

Alaska Court System

93

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

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

8 (b) Commercial banners or pennants . . .

9 (D) Signs in the Central Commercial Zone:

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

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

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

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

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

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

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

MEMORANDUM AND ORDER

KGB v. Trask et al., Case No. 19E-07-427 CI

Page 8 of 24

94

Alaska Court System

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

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

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

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

8 (F) Signs in the Future Development zone:

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

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

13 (G) Elimination of nonconforming signs:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Ms. Trask's Evidence

Ms. Trask has presented evidence that:

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

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

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

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

public "area" was made in 2004.

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

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

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

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

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

YOU'RE
WELCOME⁹

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

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

⁸ She wrote:

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

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

⁹ A white cross has been painted next to this.

MEMORANDUM AND ORDER

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

Page 12 of 24

98

Alaska Court System

- 1 11. The KGB recognizes that some holiday decorations and grave markers at
2 the local cemetery could be interpreted to be signs for which permits are
3 required but it has exercised its discretion not to prosecute the same.
4 12. The KGB has received a few sign complaints. It has investigated. In one
5 instance the sign owner obtained a one-year variance. In another instance,
6 the owner removed the sign.

7 **c. KGB's Evidence**

8 The KGB has presented the following evidence:

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

17 **d. Pleadings**

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

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

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

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

4 III. DISCUSSION

5 a. Summary Judgment Standards

6 Alaska R. Civ. P. 56(c) provides that summary judgment:
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8 shall be rendered forthwith if the pleadings, depositions, answers to
9 interrogatories, and admissions on file, together with the affidavits, show that
10 there is no genuine issue as to any material fact and that any party is entitled to
11 judgment as a matter of law.

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

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

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

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

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

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

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

3 **b. Issues**

4 **1. Sign**

5 **A. Parties' Positions**

6 Ms. Trask contends that the writings and symbols on her roof are not a "sign"
7 under KGB Code § 60.10.090(A)(8) and KGB Code § 60.10.140(B) because KGB Code §
8 60.10.140(B) addresses commercial advertising.
9

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

12 **B. Law**

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

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

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

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

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

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

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

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

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

16 ²⁰ *Ayres v. United Services Automobile Association*, 160 P.3d 128, 129 (Alaska 2007). A
17 "heavy burden" is placed on a party who urges the adoption of an interpretation that appears to
18 be contrary the legislation's plain language. *Ranney v. Whitewater Engineering*, 122 P.3d 214,
19 217 (Alaska 2005) (citation omitted).

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

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

21 ²³ *Alaskans for Efficient Government v. Knowles*, 91 P.3d 273 276 n. 4 (Alaska 2004) (quoting
22 2A Norman J. Singer, *Sutherland Statutory Construction*, section 47.28 (6th ed. 2000)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 **C. Decision**

2 KGB Code § 60.10.140(B) is not a model of clarity for three reasons. First, the
3 definition of “roof mounted sign” in KGB Code § 60.10.090(A)(8) implicitly incorporates the
4 definition of “sign” in KGB Code § 60.10.140(B). Second, the punctuation used in KGB Code
5 § 60.10.140(B) is problematic. Specifically, the use of all commas and no semi-colons. This
6 section could be read in a limited manner, as including in the definition of “sign” any “words”
7 and “figures” “by which anything is made known, such as are used to designate an individual, a
8 firm, an association, a corporation, a profession, a business or a commodity or product,” and
9 “which are visible from any public area and used to attract attention.” It could also be read in a
10 broader manner, as applying to any “words” and “figures” “which are visible from any public
11 area and used to attract attention.”³⁶ Third, the former construction would be consistent with
12 much of the rest of the KGB sign ordinances, which focus on commercial activities.³⁷ But the
13 KGB sign ordinances also regulate “signs” that do not involve commercial activities.³⁸
14

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

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

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

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

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

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

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

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

3 **2. Standing**

4 **A. Parties' Positions**

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

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

12 **B. Law**

13 The "standing" requirement is based "on the principle that courts should not
14 resolve abstract questions or issue advisory opinions."⁴⁰ The general rule is that a person has
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19 ³⁹ The court gave the parties the additional opportunity to present supplemental briefing and
20 evidence, and to have an evidentiary hearing. The parties submitted additional evidence and
21 briefing. Neither requested an evidentiary hearing. So it appears that the record is complete as
22 to the issue the court decided – that the above-discussed limited construction is applicable and it
23 is not necessary for the court to decide the same under the summary judgment standards. In this
24 regard the court also notes that this determination is ultimately one to be made by the court and
25 not a jury (and again, the factual record appears to be complete). To the extent that the summary
judgment standards apply to this issue, summary judgment is appropriate as there are no genuine
issues of material fact with respect to the same and Ms. Trask is entitled to judgment as a matter
of law. The court notes that there are genuine issues of fact with respect to whether the words
and symbols on the roof are used to attract attention from a public area (the court reads those two
requirements as being intertwined). But those issues are not material given the court's
conclusion that the symbols and writing on the roof are not a "sign" for a different reason.

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

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

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

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

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

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

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

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

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

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

21 ⁴³ *Municipality of Anchorage v Leigh*, 823 P.2d 1241, 1245-46 n. 11 (Alaska 1992) (quoting
22 *County Court of Ulster v. Allen*, 442 U.S. 140, 154-55 (1979)); *see also*, *Gottschalk v. State*,
23 575 P.2d 289, 290 n. 2 (Alaska 1978), and *Marks v. City of Anchorage*, 500 P.2d 644, 656 n. 7
24 (Alaska 1972).

25 ⁴⁴ AS 22.10.020(g).

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

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

⁴⁷ *Id.* at 359.

⁴⁸ *ACLU of Alaska* at 8-9.

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

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

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

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

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

13 C. Decision

14 Ms. Trask does not have standing to claim KGB Code § 60.10.090(A)(8) and
15 other portions of KGB Code §§ 60.10.090(A), and (B) violate constitutional free speech rights
16 for two reasons. First, § 60.10.090(A)(8) does not apply to the writings and symbols on her roof.
17 Second, to the extent that *Municipality of Anchorage v. Leigh* remains good law after *American*
18 *Civil Liberties Union of Alaska*, she has not shown that the KGB sign ordinances, as construed
19 by the court herein, "broadly" prohibit speech protected by the First Amendment.
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23 ⁵⁰ *Id.* at 8-9 (quoting *Brause*, 21 P.3d at 359 (quoting Wright, *supra* note 48, § 3532 at 114-15))

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

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

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

1 Ms. Trask's declaratory judgment claims are not ripe for three reasons. First,
2 there is no longer an actual concrete sign-related controversy between her and the KGB.⁵⁴
3 Second, the limited circumstances under which this requirement is relaxed in free speech cases
4 does not apply as she has not shown that she is in danger of sustaining any direct injury as the
5 result of a civil or criminal enforcement action based on the KGB's sign ordinances. The only
6 sign-related speech she has engaged in, attempted to engage in, or contemplated engaging in is
7 the writings and symbols on her roof. The same do not violate the KGB's sign ordinances as
8 discussed above. Third, the balance between a need for a decision and the risk of a decision
9 favors no decision. The court would be forced to decide the case on the basis of hypothetical
10 facts.⁵⁵ This litigation would "dissipate judicial energies better conserved for litigants who have
11 a real need for official assistance."⁵⁶ The KGB "should not be forced to bear the burdens of
12 litigation without substantial justification."⁵⁷ The decisions would involve "lawmaking" as
13 finding in Ms. Trask's favor requires that the court declare at least portions of the KGB sign
14 ordinances unconstitutional and "[d]ue respect for the legislative branch of government [the
15 KGB] requires that [the court] exercise [its] duty to declare a[n] [ordinance] unconstitutional
16 only when squarely faced with the need to do so."⁵⁸ Ms. Trask would suffer little, if any,
17 hardship if the court did not address the merits of her declaratory relief cause of action. Again,
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22 ⁵⁴ Ms. Trask has brought a § 1983 action. The court discussed the same in its May 23, 2008
23 Memorandum and Order. She claims that the KGB has violated her constitutional rights by
24 attempting to penalize her under KGB § Code 60.10.090(A)(8) for the writings and symbols on
25 her roof. The KGB is no longer able to do so under the court's ruling herein.

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

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

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

⁵⁸ *Id.* at 19.

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

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

5 **IV. CONCLUSION**

6 KGB § Code 60.10.090(A)(8) does not cover the writings and symbols on Ms.
7 Trask's roof because they do not constitute a "sign" under KGB Code § 60.10.140(B). So the
8 KGB's related enforcement action is dismissed. This ruling also appears to result in the
9 dismissal of the KGB's nuisance cause of action. Ms. Trask does not have standing to litigate
10 the constitutionality of the KGB's sign ordinances and declaratory relief is otherwise
11 inappropriate under the facts and circumstances of this case. The court is not addressing whether
12 or to what extent Ms. Trask's § 1983 cause of action remains viable⁵⁹ as the parties have not
13 addressed this issue.
14

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

17 **IT IS SO ORDERED.**

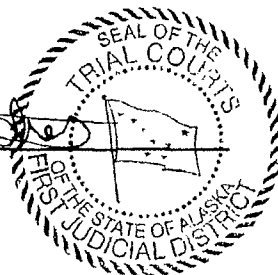
18 Dated at Ketchikan, Alaska this 13th day of April 2009.

19 **CERTIFICATION**

20 **Copies Distributed**

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

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



23 CF

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



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

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

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

JUN 24 2009

Clerk of the Trial Courts
By _____ Deputy

Case No. 1KE-07-437 CI

11 MEMORANDUM AND ORDER

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

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

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

MEMORANDUM AND ORDER

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

Page 1 of 2

Alaska Court System

128

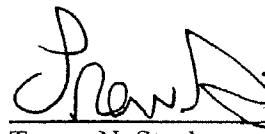
1 A status hearing occurred on May 1, 2009. The KGB's counsel advised that the
2 KGB's position was that the court's decision in effect dismissed the entire case and that neither
3 party was entitled to an award of costs or fees since both had prevailed in part. Ms. Trask's
4 counsel advised that Ms. Trask's position was that her § 1983 action remained viable. The court
5 requested briefing on that issue. The parties have submitted the additional briefing.
6

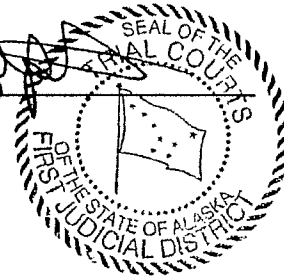
7 The court finds that Ms. Trask's § 1983 action should be dismissed for two
8 reasons. First, per the discussion in the court's May 23, 2008 Memorandum and Order, § 1983
9 claims have two elements – one of which is a constitutional violation. Second, the court has
10 found she does not have standing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

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

14 **IT IS SO ORDERED.**

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

16
17 
18 Trevor N. Stephens
19 Superior Court Judge



20 **CERTIFICATION**

21 Copies Distributed

22 Date 6/25/09

23 To S. Brandt-Erichsen
A. Skiles

24 By OK

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

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

Filed in the Trial Courts
State of Alaska
First Judicial District
at Ketchikan
AUG 30 2009
Clerk of the Trial Courts
By _____ Deputy

Case No. 1KE-07-437 CI

10 MEMORANDUM AND ORDER

11 Ms. Trask has moved for an award of attorney's fees. The Ketchikan Gateway
12 Borough (KGB) opposes her motion. Neither party has requested oral argument or an
13 evidentiary hearing.

14 Ms. Trask's motion for an award of attorney's fees is granted. She is the
15 "prevailing" party for four reasons. First, the "prevailing party" is the party which is successful
16 with respect to the "main issue" in the case, even if the other party received some affirmative
17 recovery.¹ Second, she prevailed on the KGB's claim that the writings on the roof of a house she
18 owns violate its sign ordinance. Third, that finding resulted in the court dismissing her
19 counterclaim. Fourth, the court, in dismissing the counterclaim, did not rule on the merits of her
20 constitutional claims.
21

22 Ms. Trask's request that the court award enhanced fees under Alaska Civil Rule
23 82(b)(3) is denied. The court does not find that the KGB engaged in vexatious or bad faith
24

25

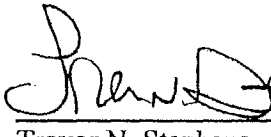
¹ *Alaska Placer Company v. Lee*, 553 P.2d 54, 63 (Alaska 1976).

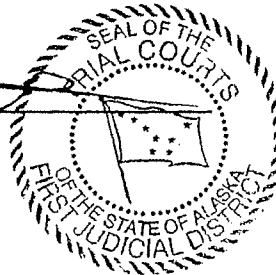
1 conduct. The KGB took the position that the writings at issue came within the scope of its sign
2 ordinances. The issue was not so clear that the court must necessarily conclude that the KGB's
3 position was the result of bad faith. The KGB did not engage in vexatious conduct. The record
4 does not otherwise support an enhanced fee award under the other factors set forth at Civil Rule
5 82(b)(3).

6
7 Given the above, Ms. Trask is entitled to an award of 20% of her actual
8 reasonable attorney's fees under Alaska Civil Rule 82(b)(2). She has until September 10, 2009
9 to file an affidavit from her counsel and counsel's time and work detail that show counsel's
10 hourly rate, the work performed on this matter, and the amount of fees Ms. Trask incurred with
11 respect to the same. The KGB shall have 2 weeks to file an opposition. She shall have 1 week
12 to file a reply.

13 **IT IS SO ORDERED.**

14 Dated at Ketchikan, Alaska this 30th day of August 2009.

15
16 
17 Trevor N. Stephens
18 Superior Court Judge



19 **CERTIFICATION**

Copies Distributed

20 Date 9/13/09

To _____

Scott Brandt-Erickson

Amanda Schulz

22 By (Signature)