

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**Cozy Inn, Incorporated,** )  
**d/b/a The Cozy Inn; Stephen Howard,** )  
) )  
**Plaintiffs,** ) **CIVIL ACTION**  
) **CASE NO. 6:24-cv-01027-TC-ADM**  
**v.** )  
) )  
**City of Salina, Kansas,** )  
) )  
**Defendant.** )

**BRIEF IN SUPPORT OF DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Defendant, City of Salina, Kansas (“City”), by and through its attorneys Fairfield and Woods, P.C. and Clark, Mize & Linville, Chartered, respectfully requests judgment in favor of the City on all claims pursuant to F.R.C.P. 56, and in support thereof states as follows:

## I. INTRODUCTION

Recently, the Supreme Court approvingly described sign regulation as a “tradition” dating back more than 150 years—and observed that during that time, such regulations have addressed “signs . . . that promote ideas, products, or services . . . [or] promote or identify things located onsite.” *City of Austin v. Reagan Nat’l Advert.*, 596 U.S. 61, 65 (2022). K.S.A. § 12-101 empowers the City to regulate its local affairs, and the City has specifically regulated signs for about 58 years. This First Amendment challenge stems from Plaintiffs painting of a sign on the North wall of the Cozy Inn (“Cozy Sign”) that is more than 50 times larger than the Plaintiffs’ available sign allowance under the City’s sign regulations.

There are no material facts in dispute regarding the central issues of this First Amendment case: (1) whether the text of Salina Code of Ordinances (“Salina Code”) Chapter 42 Article X (along

with related definitions in Chapter 42 Article XIV, “Sign Code”) is content-neutral, specifically as it relates to the definition of “sign” (Salina Code § 42-764) upon which the applicability of the Sign Code relies; and (2) whether the Sign Code passes intermediate scrutiny, which involves the questions of whether: (a) the City’s articulated interests in aesthetics, traffic and pedestrian safety, and property values are substantial (b) the Sign Code advances at least one of those interests in a manner that “would be achieved less effectively absent the regulation”; and (c) the Sign Code leaves open “ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 799 (1989).

The Court decides whether the face of the Sign Code is content neutral as a matter of law. *Austin*, 596 U.S. at 64, 76; *Harmon v. Norman*, 981 F.3d 1141, 1148 (10th Cir. 2020). The Court also decides as a matter of law whether the content-neutral Sign Code passes intermediate scrutiny. *Harmon*, 981 F.3d at 1148-49. To that end, the definition of “sign” that is the central issue of this case is agnostic as to content. It turns on whether a display is used to “announce, direct attention to, or advertise” and is “not located inside a building.” Salina Code § 42-764. The Sign Code is not concerned with what is announced, to what attention is directed, or what is advertised. The City submits that the Sign Code, and specifically the definition of “sign”—a definition that is substantially similar to the definition of sign in the *Austin* case—is content-neutral. Like Salina Code § 42-764, which subjects a display used to “announce, direct attention to, or advertise” to regulation as a “sign,” the City of Austin’s regulation also triggered regulation as a “sign” based on whether the display was used to “advertis[e]” or “direct[] persons to.” *Austin*, 596 U.S. at 1469.

The face of the Sign Code is content-neutral because it neither regulates based on the “topic discussed” or the “idea or message expressed,” nor targets speech “based on its communicative

content” or “viewpoint.” *Austin*, 596 U.S. at 69 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)); *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); (Salina Code §§ 42-764, 42-781). The text of the challenged definition of “sign” does not refer to content at all. It simply defines “sign” in a way that is consistent with common understandings, recognizing that unlike architectural features, gazebos, trellises, statuary, and other decorative displays that provide visual interest, signs are “used to announce, direct attention to, or advertise.” Salina Code § 42-764.

Salina Code § 42-500 enumerates the City’s government interests, which include aesthetics, traffic and pedestrian safety, and property values. As a matter of law, these interests are both substantial and justified without reference to the content of the regulated speech (content-neutral). *Taxpayers for Vincent*, 466 U.S. at 795, 805-06 (property values and community aesthetics); *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243, 1251 (10th Cir. 2023) (aesthetics and traffic safety). Therefore, the Sign Code satisfies the first prong of the three-prong intermediate scrutiny test.

As a matter of law, the Sign Code advances the City’s substantial government interests in community aesthetics, traffic and pedestrian safety, and property values because it includes limitations upon the size, number, and placement of signs. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981); *Outdoor Sys., Inc. v. City of Lenexa*, 67 F. Supp. 2d 1231, 1238 (D. Kan. 1999); *see also Contest Promotions, LLC v. City and County of San Francisco*, 874 F.3d 597, 603 (9th Cir. 2017); *Wag More Dogs, Ltd. v. Cozart*, 680 F.3d 359, 369 (4th Cir. 2012); *CBS Outdoor, Inc. v. Village of Plainfield*, 959 F. Supp. 2d 1054, 1064 (E.D. Ill. 2013); *Signs for Jesus v. Town of Pembroke*, 977 F.3d 93, 106 (1st Cir. 2020); *Naser Jewelers, Inc. v. City of Concord*,

513 F.3d 27, 35 (1st Cir. 2008). As the Court observed in *Metromedia*, it is not “speculative” that the substantial, content-neutral objectives of sign regulations would be achieved less effectively absent the regulations. *Id.* at 510-11. Therefore, the Sign Code satisfies the second prong of the three-prong intermediate scrutiny test.

It is clear that Plaintiffs have “ample alternative channels for communication of the information.” First, Plaintiffs could have painted the exact same display, scaled to about 10 square feet, or if other signs were removed, about 63 square feet. Second, deposition testimony reveals that Plaintiffs communicate in many ways, including Facebook, branded merchandise worn or used by their customers, community events, radio advertising, interviews, banner advertising at indoor football events, billboards, bumper stickers, and a sign located at Jenni’s Liquors in a nearby town. Therefore, the Sign Code satisfies the third prong of the three-prong intermediate scrutiny test.

There is no genuine dispute of material fact as to the content-neutrality of the Sign Code or three-pronged intermediate scrutiny test that the First Amendment requires for such regulations. Summary judgment for Defendant on the First Amendment claims is proper.

Further, the Sign Code is not a prior restraint. The Sign Code provides for a brief, specified period of time within which the City must issue or deny a sign permit. Salina Code § 42-502(b). Work on the Cozy Sign started on November 3, 2023, without a required permit. Three days later, the City asked Plaintiff, Mr. Howard, to stop the work, advising him that the display was a sign and that it was too large to qualify for a sign permit, and Mr. Howard thereafter submitted an application for the sign fully understanding that it could not be approved. The City’s determination to ask Mr. Howard to stop the work was not “arbitrary enforcement.” It was an application of the letter of the Sign Code, the plain language of which provides constitutionally sufficient standards to limit the



discretion of City officials.

Similarly, the Sign Code is not unconstitutionally vague because it provides people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Vagueness is not about “the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved.” *U.S. v. Williams*, 553 U.S. 285, 306 (2008). Instead, it is about “the indeterminacy of precisely what that fact is.” *Id.* The Sign Code is only concerned with outdoor displays that “announce,” “direct attention to,” or “advertise.” These are uncomplicated words and phrases that ordinary people understand. The Sign Code is not concerned with whether a sign may also be artistic. The bottom line is that whether it is artistic or not, Plaintiffs’ display is a sign because it “announces,” “directs attention to,” or “advertises,” and the City’s determination of that question is conclusive due to issue preclusion, and by Plaintiffs’ own admission. *See B & B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 148 (2015).

Neither Mr. Howard nor Ms. Windholz (the Cozy Inn owners) have read or even tried to read the Sign Code, let alone make any effort to comply with it. In fact, the record of this case shows that they have no regard for the City’s reasonable, content-neutral regulations. Upset about the Sign Code being applied to them, Plaintiffs ask this Court to second guess the City’s administrative decision to stop the installation of the Cozy Sign. In the constitutional dimensions of this case, Plaintiffs’ insistence that pictures of “burgers” are actually “burger-esque flying saucers,” and that their sign is just “art” and not “advertisement” is immaterial. That is the stuff of ordinary disputes about code application. This Court should “decline to sit as ‘[a] zoning board[ ] of appeals’” where, as here, “‘presented with claims which, although couched in constitutional language, at bottom amount only to the run of the mill dispute’” between the City and a business

owner. *Gunkel v. City of Emporia, Kan.*, 835 F.2d 1302, 1305 (10th Cir. 1987) (citations omitted).

There are no material facts in dispute. The constitutional claims presented are without merit. Summary judgment in the City's favor is appropriate.

## **II. STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. The City regulates signs pursuant to Chapter 42 Article X of Salina Code of Ordinances along with related definitions in Chapter 42 Article XIV (collectively, "Sign Code").

**Ex. A** (Dean Andrew Affid) at ¶ 3.

2. The City applies the Sign Code as written. **Ex. B** at 6, Resp. to Int. No. 5. (City's Response to Plaintiffs' First Set of Interrogatories).

3. Sign is defined by Salina Code § 42-764 as:

*Sign* is any writing (including letters, words or numerals), pictorial representation (including illustrations or decorations), emblem (including devices, symbols, or trademarks), flag, banner, streamer, pennant, string of lights, or display calculated to attract the attention of the public, or any other figure of similar character which:

- (1) Is a structure or any part thereof, or a portable display, or is attached to, painted on, or in any other manner represented on a building or other structure or on the ground;
- (2) Is used to announce, direct attention to, or advertise; and
- (3) Is not located inside a building.

The City requests that pursuant to Federal Rule of Evidence 201, the Court take judicial notice of the municipal ordinance provisions cited herein. *See* Fed. R. Evid. 201; *North Mill Street, LLC v. City of Aspen*, 6 F.4th 1216, 1221 n.3 (10th Cir. 2021) ("Federal Rule of Evidence 201 authorizes federal courts to take judicial notice of adjudicative facts, including provisions in municipal ordinances, at any stage of the proceedings."). The relevant citations to Salina Code are attached hereto as **Ex. C**. The Salina Code may be accessed at [https://library.municode.com/ks/salina/codes/code\\_of\\_ordinances](https://library.municode.com/ks/salina/codes/code_of_ordinances).

4. The purposes of the Sign Code, codified at Salina Code § 42-500, set forth

the City's governmental interests in regulating signs:

This article promotes the public health, safety and welfare of the community through a comprehensive system of reasonable, effective, consistent, content-neutral and nondiscriminatory sign standards and requirements, narrowly drawn to:

- (1) Ensure that all signs installed in the city are compatible with the character and visual environment of the community and promote the goals, objectives and policies of the comprehensive plan;
- (2) Balance public and private objectives by allowing adequate avenues for both commercial and non-commercial messages;
- (3) Improve pedestrian and traffic safety by promoting the free flow of traffic and the protection of pedestrians and motorists from injury and property damage caused by, or which may be fully or partially attributable to, unsecured, cluttered, distracting, and/or illegible signage;
- (4) Protect the aesthetic appearance of the city's natural and built environment for its citizens and visitors;
- (5) Prevent property damage, personal injury, and litter caused by signs that are improperly constructed or poorly maintained;
- (6) Protect property values, the local economy, and quality of life by preserving and enhancing the appearance of the streetscape; and
- (7) Provide for the placement of temporary signs in limited circumstances, without regard to the communicative content of the sign.
- (8) Provide consistent design standards that enable the fair and consistent enforcement of these sign regulations.
- (9) Enhance the city's ability to maintain its public rights-of-way.

**Ex. C; Ex. B** at 4, Resp. to Int. 4.

5. Wall sign is defined in Salina Code § 42-781 as:

*Wall sign* is a sign fastened to or painted on a wall of a building or structure in such a manner that the wall becomes merely the supporting structure or forms the background surface, and which does not project more than twelve (12) inches from such building.

**Ex. C.**

6. Salina Code § 42-501 requires a sign permit to be obtained before a sign is constructed or painted. It provides:

No sign, except for normal repair and for signs listed in sections 42-504 and 42-505, shall be painted, constructed, erected, remodeled, relocated or expanded until a zoning certificate (sign permit) for such sign has been obtained pursuant to the procedure set forth in this article.

**Ex. C.**

7. Salina Code § 42-502(b) provides:

A zoning certificate (sign permit) shall be either issued or refused by the zoning administrator within ten (10) days after the receipt of an application therefore or within such further period as may be agreed to by the applicant. No zoning certificate for any sign shall be issued unless the sign complies with the regulations of this article.

**Ex. C.**

8. Building is defined in Salina Code § 42-637 as:

*Building* is any covered structure built for the support, shelter or enclosure of persons, animals, chattels or moveable property of any kind, and which is permanently affixed to the land.

**Ex. C.**

9. The applicable size limitations of the Sign Code are set forth in § 42-521(4)(b). They provide:

(1) *Maximum gross surface area:* \* \* \*

b. In the C-4 district, three (3) square feet of sign area for each lineal foot of building frontage for allowable signage other than a ground/pole sign or a

projecting sign; where no building frontage exists, one (1) square foot of sign area for each lineal foot of street frontage. Irrespective of building or street frontage, no property or zoning lot shall be restricted to less than thirty-six (36) square feet of sign area. No more than sixty-seven (67) percent of allowable sign area may be displayed on any building wall or street frontage.

**Ex. C.**

10. Salina Code § 1-11 articulates that intent: “If for any reason any chapter, article, section, subsection, sentence, clause or phrase of this Code or the application thereof to any person or circumstances, is declared to be unconstitutional or invalid or unenforceable, such decision shall not affect the validity of the remaining portions of this Code.” **Ex. C.**

11. Dean Andrew is the City’s Zoning Administrator and has been in that position since 2009. He has a Bachelor’s and Master’s degree from Kansas State University in urban geography and planning and a Juris Doctorate degree from the University of Iowa. He has been employed as a planner for 37 years. **Ex. D** (Dean Andrew Depo.) at 9:14-25, 10:1-8.

12. Dustin Herrs is a City Planner and has held that position since April 2006. Dustin Herrs is certified by the American Institute of Certified Planners. As part of that certification he has taken continuing education credits in planning law, which included sign regulations. Dustin Herrs studied Regional and Community Planning at Kansas State University. **Ex. E** (Dustin Herrs Depo.) at 8:15-21, 8:24-25, 9:1-6; **Ex. F** (Dustin Herrs Aff’d).

13. The Cozy Inn is owned by Steve Howard and his daughter, Andrea Windholz. **Ex. G** at 2, Stipulated Fact ii (Amended Pretrial Order, ECF 101)

14. On November 3, 2023, Plaintiffs started painting the Cozy Sign. **Ex. G** at 2, Stipulated Fact v.

15. Plaintiffs did not seek a sign permit before constructing the Cozy Sign. **Ex. H**

(Stephen Howard Depo.) at 91:11-17, 140:12-15, 19-21.

16. Plaintiffs knew the City regulated signs, but did not review the sign regulations. **Ex. H** at 82:2-25, 83:1-3, 87:2-25, 88:1-25, 89:1-5, 240:15-17; 241:4-15; **Ex. I** (Andrea Windholz Depo.) at 71:7-12.

17. Plaintiffs have no intent to read the sign regulations. **Ex. H** at 240:15-17; 241:4-15.

18. Plaintiffs have no regard for the City's reasonable, content-neutral regulations. **Ex. H** at 190:24-25; 191:1-25; 192:1-9; 233:1-25; **Ex. J** (Colin Benson Depo.) at 57:23-25; 58:1-24.

19. On November 6, 2023, the City reviewed the Cozy Sign, which at the time was fully outlined and partially painted on the North wall of the Cozy Inn. **Ex. K** (Dustin Herrs 30(b)(6) Depo.) at 82:1-20, 85:7-21; **Ex. L** (Photo of Cozy Sign Plaintiffs' Bates 58); **Ex. G** at 2, Stipulated Fact No. vi (stipulating to Plaintiffs' Bates 58).

20. On November 6, 2023, the City informed Plaintiff, Mr. Howard, that the Cozy Sign was too large to qualify for a sign permit and asked him to pause the Cozy Sign. **Ex. K** at 110:2-22, 85:7-21; **Ex. H** at 138:11-25, 139:4-18; **Ex. J** at 78:20-25, 79:1; 80:14-24.

21. On February 19, 2024, Plaintiffs filed suit against the City. *See* (ECF 1).

22. Before Mr. Howard even submitted a Sign Permit application, he knew the Cozy Sign, as proposed, was too large to qualify for a sign permit. **Ex. H** at 137:22-25, 138:1-25, 139:1-18, 140:2-21, 180:3-14, 181:4-12, 182:7-25, 183:1-13; **Ex. M** (Cozy Sign Permit Application); **Ex. J** at 78:20-25, 79:1; 80:14-24.

23. Not only did the City inform Mr. Howard that the Cozy Sign would not qualify for a sign permit within the 10-day period of § 42-502(b), but the City also understood that Mr. Howard agreed that his sign permit application (submitted on November 13, 2023) would be placed on hold.

**Ex. D** at 229:4-24, 230:1-24, 231:1-25, 232:1-24.

24. The City determined the Cozy Sign was a sign as defined by Salina Code § 42-764 and, more specifically, as “wall sign” as defined by Salina Code § 42-781. **Ex. K** at 82:10-20; **Ex. B** at 10, Resp. to Int. No. 11; **Ex. D** at 63:18-24, 64:1-3, 159:1-25, 160:1-10, 234:13-21, 346:10-16.

25. The City interprets and applies Salina Code § 42-764 to require that subparagraphs (1), (2), and (3) therein be met for any display to be considered a “sign” that is subject to the regulations of the Sign Code. The City has interpreted Salina Code § 42-764 consistently for decades. **Ex. D** at 48:8-16, 50:5-11, 51:6-11, 55:10-24; 62:16-24. **Ex. N** (Dean Andrew 30(b)(6) Depo.) at 11:14-25, 12:1.

26. Applying Salina Code § 42-764, the City determined that the Cozy Sign is a “writing” “pictorial representation” “emblem” “flag, banner, streamer pennant, string of lights, or display calculated to attract the attention of the public” or “any other figure of similar character” that is “a structure or any part therefor, or a portable display, or is attached to, painted on, or in any manner represented on a building or other structure or on the ground,” that “is used to announce, direct attention to, or advertise, and is not located inside a building.” **Ex. B** at 9, Resp. to Int. 11.

27. The Cozy Sign is used to announce, direct attention to, or advertise, and it is not located inside of a building. Specifically, the Cozy Sign contains a tag line announcing the infamous smells of the Cozy, it has an arrow directing attention to the building entrance and ordering window, and it advertises the hamburgers and toppings available for sale at the Cozy by depicting representations of them. **Ex. B** at 9, Resp. to Int. 11.

28. The City applies the plain language and ordinary use of the words and phrases

“announce,” “direct attention to,” and “advertise.” The City determines whether a display is used to “announce” by evaluating whether the display makes a declaration about a fact, occurrence, or intention or proclaims or gives notice of, or identifies, a business, product, or event. The City determines whether a display is used to “direct attention to” by evaluating whether the display indicates, points to, points out, or specifies a location (in general, like a particular property, or specifically, like a building entrance or pickup window). The City determines whether display is used to “advertise” by evaluating whether the display is meant to attract customers, encourage a commercial transaction, offer products or services in exchange for consideration (e.g., a display that says, “sliders, 5 for \$5.00”); call attention to a brand, products, or services in order to encourage the purchase of products or services, in that it pertains to or references the goods or services for sale. **Ex. B** at 6, Resp. to Int. 5.

29. The City prepared The Cozy Inn Sign Analysis. During the November 13, 2023 meeting with Mr. Howard at the Smoky Hill museum, the City provided The Cozy Inn Sign Analysis to Mr. Howard. **Ex. E** at 112:6-9; **Ex. J** at 81:4-24; **Ex. O** (Cozy Inn Sign Analysis); **Ex. P** (Michael Schrage Depo.) at 128:6-19.

30. The Cozy Inn occupies a property that is 20.8 feet in width and 44.4 feet in depth facing North Seventh Street. The building frontage occupies the entire property line. Thus, the building frontage of the Cozy Inn is 20.8 feet. The City rounded up, calculating the building frontage as 21 feet. Under Salina Code § 42-521(4)(b) the Cozy Inn had 63 square feet of allowable sign area. The City advised Mr. Howard if he wanted to erect the Cozy Sign he could reduce the size of the Cozy Sign down to the remaining 10 square feet, or remove existing signs to try to fit the sign within the allowable 63 square feet. **Ex. K** at 92:15-24, 93:1-16. 94:11-25, 96:3-25, 97:1-



8, 98:1-13, 116:16-25, 117:1-2; **Ex. E** at 117:1-25, 118:19-25, 119:1-9.

31. The Cozy Sign occupies the entirety of the North wall of the Cozy Inn. **Ex. E** at 27:25, 28:1-4; **Ex. Q** (Photo of Cozy Sign at Plaintiffs' Bates 51); **Ex. G** at 2, Stipulated Fact vii (stipulating to Plaintiffs' Bates 51); **Ex. J** at 121:1 and 130:6-8.

32. Prior to constructing the Cozy Sign, the Cozy Inn had three other signs, with a total sign area of 52.88 square feet. At the time of constructing the Cozy Sign, the Cozy Inn had 10.12 square feet of allowable sign area remaining. **Ex. E** at 117:19-25, 118:25, 119:1-9.

33. Using the dimensions of the North wall of the Cozy Inn, the City determined the Cozy Sign was approximately 528 square feet in area. **Ex. K** at 96:3-25, 97:1-8, 98:1-13.

34. Plaintiffs did not administratively appeal the City's determination that the Cozy Sign was a sign and therefore subject to the requirements of the Sign Code. **Ex. D** at 234:11-21; **Ex. C** (Salina Code § 42-597).

35. The Cozy Inn sells hamburgers with chopped onions, pickles, ketchup, and mustard, but does not offer any other toppings or condiments. **Ex. H** at 36:9-15, 37:10-25, 38:1-9.

36. The smell of onions is distinct to the Cozy Inn. **Ex. H** at 42:23-25, 43:1-15.

37. The smell of onions at the Cozy Inn "tags" anyone who enters. **Ex. H** at 42:23-25, 43:1-15.

38. According to Mr. Howard the arrow on the Cozy Sign directs people to the entrance of the Cozy Inn. **Ex. H** at 136:2-11.

39. Mr. Howard admitted he could "upsell" better to customers who came inside of the Cozy Inn. **Ex. H** at 41:13-15; 43:22-25, 44:1-4; 48:2-9.

40. The Cozy Sign advertises hamburger, chopped onions, pickles, ketchup, and

mustard. The Cozy Sign directs attention to the front door of the Cozy Inn by way of an arrow that points to the front door of the Cozy Inn. The Cozy Sign announces the infamous onion smell by announcing, “Don’t Fear the Small, the Fun is Inside.” **Ex. H** at 76:1-14, 136:5-11, 142:20-25, 143:1-25, 144:1-25; **Ex. E** at 82:23-25, 83:1,115:3-10.

41. The City also reviewed the rendering of the Cozy Sign Mr. Howard submitted with the sign permit application, which Mr. Howard alleged was intended to be the final rendering of the Cozy Sign. The City confirmed the display that Mr. Howard intended to be the final rendering of the Cozy Sign was a sign under the Sign Code. **Ex. K** at 108:4-13, 127:22-25, 128:1-22; **Ex. D** at 246:10-16; **Ex. M**; **Ex. Q**.

42. The City, via its Zoning Administrator, reviewed industry specific publications in anticipation of the City of Salina’s 2017 amendment to the Sign Code. The 2017 amendment, Ordinance Number 17-108882, was prompted by *Reed v. Town of Gilbert* (the City’s Governing Body amended the Sign Code in order to ensure compliance with the First Amendment). The industry specific publications reviewed by the City addressed how signs are a significant driver distraction and how sign regulations promote traffic safety and aesthetics. **Ex. A**.

43. The City regulates signs in the aggregate. **Ex. K** at 62:1-2.

44. The City regulates the time, place, and manner of the display of signs. **Ex. D** at 127:1-2; **Ex. K** at 45:10-16.

45. These time, place, and manner regulations limit the size, number, height and location of signs pursuant to the specific zoning district wherein the sign is located. **Ex. K** at 45:10-16, 71:12-16, 72:19-21; **Ex. D** at 127:1-2; **Ex. R** (Mark White Aff’d) at ¶ 6.

46. Regulating the size, number, height, and location of signs helps to reduce clutter,

thereby reducing distractions, keeping visual sight lines for vehicles and pedestrians clear, and ensuring signs remain effective while not holding the eye of viewer for too long. **Ex. K** at 71:12-23.

47. The Sign Code seeks to protect the aesthetics of the community and quality of life, while reducing safety hazards that can result from sign clutter. **Ex. E** at 64:10-18.

48. Eliminating the risk of sign wars--where in order to have more prominent signage businesses compete by erecting additional signs and signs that are larger than the surrounding signs cluttering the area--also protects the aesthetics and safety of the community. **Ex. E** at 60:6-24, 61:2-25, 62:1-18.

49. Excessive amounts of “signage, both in terms of number of signs and size of signs” can become distracting and cause safety problems. **Ex. E** at 121:10-25.

50. The Sign Code seeks a balance by allowing “ample amount of signage for each property” allowing “effective and attractive” signs “without becoming a safety concern.” **Ex. E** at 121:23-25, 122:1-2.

51. The Cozy Inn is located in the C-4 district. **Ex. G** at 3, Stipulated Fact viii.

52. In the C-4 District, the number of signs is limited to “four (4) signs per business.” **Ex. C** (§ 42-521(4)(b)); **Ex. D** at 131:20-24.

53. In the C-4 District, the size and number limitations are designed to prevent safety problems. **Ex. E** at 62:16-19.

54. The C-4 district is a more pedestrian-oriented area where the buildings are shoulder to shoulder and share common walls. **Ex. E** at 17:7-21.

55. The Sign Code serves compelling and substantial urban planning purposes including

traffic safety and aesthetics. The Sign Code directly and materially furthers its recited purposes, set forth in Salina Code § 42-500. The Sign Code is consistent in practice with the state of the art nationally for how sign regulations interact with decorative building features such as murals. To that end, it is consistent with twenty-one sign and mural regulations in Kansas and Oklahoma, which demonstrate a range of approaches to regulating signs while accommodating the benefits of murals. This is because murals are integral to buildings, are not designed to direct attention to a place, and as such do not function as signs. **Ex. R** at ¶ 6.

56. The restrictions in the Sign Code are reasonable, generally accepted regulations of the size, number, placement and design of signs. The Sign Code varies sign height, size and design by zoning district. This is a state of the art, and generally accepted technique for controlling sign clutter. The Sign Code keeps signs in scale with the building's context which furthers the City's aesthetic interests. This is especially important in the historic downtown C-4 district, where the 67% limitation on the total sign area on any building wall or street frontage protects aesthetics and architectural integrity. **Ex. R** at ¶ 6.

57. The terms and phrases used in the definition of sign in the Sign Code, such as advertise and announce, are well understood and in common use in sign regulations throughout the nation and in Kansas. **Ex. R** at ¶ 6(g).

58. The Cozy Inn communicates via Facebook, branded merchandise worn or used by their customers, community events, radio advertising, banner advertising at indoor football events, billboards, bumper stickers, and a sign similar to the Cozy Sign on the wall of Jenni's Liquors in a nearby town. **Ex. I** at 19:5-25, 20:1-25, 21:1-25, 22:1-2, 23:8-25, 24:1-25, 26:7-25, 27:1-2, 29:12-25, 30:1-25, 59:2-25, 60:1-19; **Ex. H** at 89:11-24, 150:8-24; 213:3-13, 221:25, 222:1-12; **Ex. S**

(Photo from Stephen Howard Deposition Ex. Y).

59. Charles Taylor admitted that prior to construction of the Cozy Sign, the Cozy Inn signs that were already in place were “conspicuous enough,” and did in fact “brand the site.” **Ex. T** at 177:20-23; 180:1-2 (Charles Taylor Depo.).

60. Mr. Howard was upset about the City’s determination that his display was a sign and that it was too large to qualify for a permit. **Ex. I** at 48:4-17.

61. Plaintiffs allege that they do not want to “remove or otherwise restrict” other murals in Salina. *See* (ECF 16 at ¶¶ 50, 72).

62. Plaintiffs contend that “The mural is not an advertisement. Instead, it is an artistic expression intended to tell a story about travel. ‘It’s not a billboard; it’s artwork,’ Howard said. ‘It’s my expression. It’s my character going on my wall. I want to paint my wall.’” **Ex. G** at 5.

63. Plaintiffs contend that “The written sign code treats all outdoor murals as wall signs and purports to subject every wall sign to the same size restrictions because all murals are ‘displays calculated to attract the attention of the public.’” **Ex. G** at 6

64. Plaintiffs contend that the Cozy Sign depicts, among other things, “burger-esque flying saucers attacking The Cozy Inn with blasts of ketchup and mustard.” **Ex. G** at 4.

65. Plaintiffs contend that there is no “factual basis” to support the City’s argument that the Sign Code advances its stated interests **Ex. G** at 9.

### **III. STANDARD OF REVIEW**

“Summary judgment is appropriate only if ‘there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.’” *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1145 (10th Cir. 2008) (quoting Fed. R. Civ. P. 56(c)). “A

fact is material if, under the governing law, it could have an effect on the outcome of the lawsuit. *Id.* (quotations omitted). The moving party bears the burden of proof. *Id.*

#### IV. ARGUMENT

##### A. The Complaint Must be Dismissed Because Plaintiffs Lack Standing.

“Article III of the Constitution confines the federal judicial power to ‘Cases’ and ‘Controversies.’ Under Article III, a case or controversy can exist only if a plaintiff has standing to sue . . . .” *United States v. Texas*, 599 U.S. 670, 675 (2023). Standing is “a bedrock constitutional requirement . . . .” *Id.* “To establish standing, a plaintiff must show an injury in fact caused by the defendant and redressable by a court order.” *Id.* at 676. The element of redressability requires more than a “‘merely speculative’ showing that the court can grant relief to redress the plaintiff’s injury.” *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006); *Friends of the Earth, Inc. v. Laidlaw Env. Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). “[S]tanding concerns the court’s subject-matter jurisdiction and may be raised at any time.” *Bertels v. Farm Bureau Property & Casualty Ins. Co.*, 123 F.4th 1068, 1074 (10th Cir. 2024).

Plaintiffs insist that the City’s definition of “sign” includes all “murals” in the City.<sup>1</sup> Statement of Undisputed Material Fact (“SUMF”) No. 63. Yet Plaintiffs specifically (and repeatedly) allege that (although they are challenging the City’s regulations on their face), they do not want to “remove or otherwise restrict” those murals. SUMF No. 61.

This Court has held that “Severability will be assumed ‘if the unconstitutional part can be severed without doing violence to legislative intent.’” *Clark v. City of Williamsburg, Kansas*, 388

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<sup>1</sup> The term “murals” here refers to artistic displays that are located on exterior building walls, but that do not “announce,” “direct attention to,” or “advertise.”

F. Supp. 3d 1346, 1362 (D. Kan. 2019). Salina Code § 1-11 articulates that intent: “If for any reason any chapter, article, section, subsection, sentence, clause or phrase of this Code or the application thereof to any person or circumstances, is declared to be unconstitutional or invalid or unenforceable, such decision shall not affect the validity of the remaining portions of this Code.” SUMF No. 10. In Kansas, a severability clause “creates a presumption of severability.” *City of Wichita v. Griffie*, 544 P.3d 776, 791 (Kan. 2024). However, even if the intentions stated in Salina Code § 1-11 are disregarded, severing any part of the definition of “sign” would simply mean that the sign code would not only continue to apply to Plaintiffs’ sign, but also to additional displays that are not currently subject to its provisions. Such a situation would not be ideal, but it certainly would not do “violence to legislative intent.” Severability therefore applies as a matter of law.

Consequently, even if Plaintiffs’ argument is successful, they are without a remedy. If this Court finds any part of the challenged definition of sign unconstitutional, it is severable, and the resulting scope of what is regulated under the Sign Code would expand due to the severance of limiting language. What remains will be unchallenged, objective numerical size limits that are clearly constitutional. SUMF Nos. 2, 9, 61, 63. Those limitations will continue to preclude the Cozy Sign. *See Advantage Media*, 456 F.3d at 801 (Finding lack of standing to challenge sign regulations because in light of severability principles, “a favorable decision . . . even with respect to those sign code provisions which were factors in the denial of its permit applications would not allow it to build its proposed signs, for these would still violate other unchallenged provisions of the sign code like the restrictions on size, height, location, and setback.”); *see also Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 893 (9th Cir. 2007); *Harp Adv. Ill., Inc. v. Village of Chicago Ridge*, 9 F.3d 1290, 1292 (7th Cir. 1993). In sum, if Plaintiffs are to be taken at their word

as expressed in the Amended Complaint and Pretrial Order, they will actually be worse off if they prevail than they were when they filed suit. SUMF Nos. 2, 9, 61, 63

Plaintiffs also lack standing to challenge the timing provisions of the Sign Code as an impermissible prior restraint. The Sign Code articulates a brief, specified time for decision-making. SUMF No. 7. Plaintiffs started painting the Cozy Sign without a permit. SUMF No. 15. By the time the permit application was submitted, Plaintiffs were well-aware that the Cozy Sign could not qualify for a sign permit. SUMF Nos. 20, 22, 23. Indeed, their permit application was submitted hours after discussing this issue with City Staff (a discussion supported by The Cozy Inn Sign Analysis), at which time they agreed to have their permit application held in abeyance. SUMF Nos. 20, 22, 23, 29. Because Plaintiffs knew the permit could not presently be issued, and agreed to delayed processing of their sign permit application, Plaintiffs have no cognizable injury-in-fact.

On this record, Plaintiffs have not made the required showing for standing. Consequently, the Complaint should be dismissed in its entirety for want of subject-matter jurisdiction.

**B. The Sign Code is Content-Neutral**

1. *The Sign Code is Content-Neutral on its Face.*

On its face, the Sign Code and definition of “sign” upon which the application of the Sign Code turns, are content-neutral. The City applies the Sign Code as written. SUMF No. 2. Courts look to the text of challenged provisions to determine if they are content-neutral on their face. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163-64 (2015) (looking to the text of the challenged code to determine if its content-neutral) *Harmon v. City of Norman, Okla.*, 981 F.3d 1141, 1148 (10th Cir. 2020) (looking to the text of the challenged code to determine if its content-neutral). “To find a provision facially unconstitutional, [courts] must conclude that any attempt to enforce such



legislation would create an unacceptable risk of the suppression of ideas.” *Am. Target Advert., Inc. v. Giani*, 199 F.3d 1241, 1246–47 (10th Cir. 2000) (quotations omitted). Under *Reed*, a regulation is content based if: (1) its text draws distinctions among signs based on “the topic discussed or the idea or message expressed”; or (2) if the regulations “cannot be ‘justified without reference to the content of the regulated speech,’ or . . . were adopted by the government ‘because of disagreement with the message [the speech] conveys.’” 576 U.S. 155, 163-64 (2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). If these two factors are not present, the government may “place restrictions on expression so long as it do[es] not regulate *what* is said, but merely [regulates] such matters as *when*, *where*, and *how loud*.” *Ward v. Utah*, 398 F.3d 1239, 1254 (10th Cir. 2005) (quotations omitted).

A regulation is not content based and subject to heightened scrutiny merely because it requires a reading of the sign to determine who is speaking and what they are saying in order to apply the regulation. *Austin*, 596 U.S. at 69. Rather, a regulation remains “agnostic as to content” when a “reading of the sign” is incidental to the application of a content neutral regulation. *Id.* Indeed, the Supreme Court outright rejected the argument that a sign regulation is unconstitutional because a person must read a display to determine whether the regulation applies--characterizing that approach as “too extreme.” *Austin*, 596 U.S. at 69.

Looking to the text of the Sign Code, there is no reference to topics, ideas, messages, or viewpoints regarding what is announced, the objects or locations to which attention may be directed, or the contents of any advertisement. *See Austin*, 596 U.S. at 71; SUMF Nos. 3, 4, 5, 9. The Sign Code is agnostic as to content, and contains only “time, place and manner” restrictions. SUMF No. 3, 4, 5, 9, 44, 45, 53, 56. The definition of sign turns on whether a display is located

outside of a building and is used to “announce, direct attention to, or advertise.” SUMF Nos. 3, 24, 25. That limitation, which constrains the application of the Sign Code by ruling out certain architectural embellishments that do not serve these functions, is in keeping with long-established common understandings regarding what signs are. SUMF No. 55. It does not involve content in a constitutional sense (that is, ideas, messages, topics, or viewpoints). Displays that fall within the definition are a “sign” and subject to the Sign Code’s size, number, and placement limitations (time, place and manner provisions). Displays that fall outside of the definition of sign” are not signs and are therefore not regulated as such.

The United States Supreme Court determined that a substantially similar sign regulation was content-neutral in the case of *Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 66 (2022). Like Salina Code § 42-764, which subjects a display used to “announce, direct attention to, or advertise” to regulation as a “sign,” the City of Austin’s regulation also triggered regulation as a “sign” based on whether the display was used to “advertis[e]” or “direct[] persons to.” *Austin*, 596 U.S. at 66; SUMF No. 3.

Just like the city officials in *Austin*, who had to read the display to determine if the applicable regulation applied (first, to determine whether a display is a “sign,” and second, to determine whether it was an on-premise or off-premise sign), in some circumstances Salina City officials may have to look at a display to determine if it is a Sign. *Austin*, 596 U.S. at 71. But, like in *Austin*, a mere reading of the sign to determine if a regulation applies to it does not make the Sign Code content-based. *Austin*, 596 U.S. at 69. And like the noise regulation upheld as content-neutral by the Tenth Circuit Court of Appeals in *Harmon* (prohibiting “‘loud or unusual sounds,’ *without reference to the content* of the noise,”) the Sign Code merely regulates the time, place, and manner

of the display of signs, but does not concern itself with what a sign *says*. *Harmon*, 981 F.3d at 1148 (quotations omitted) (emphasis added).

The government’s purpose in the regulation is also used to assess its content-neutrality. *Harmon*, 981 F.3d at 1148 (“Whether a legislative enactment is content-neutral or instead content-based turns on ‘the government’s purpose.’”). “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Harmon*, 981 F.3d at 1148 (quotations omitted). Aesthetic and traffic safety purposes are unrelated to the content of the regulated speech. *Stockinger*, 79 F.4th at 1251 (recognizing aesthetic and traffic safety justification as unrelated to content).

Salina Code § 42-500 (purpose statement) enumerates the City’s government interests, which include aesthetics, traffic and pedestrian safety, and property values. SUMF No. 4. The purpose statement does not reference content at all. Instead, it seeks to “promote the public health, safety and welfare of the community through a comprehensive system of reasonable, effective, consistent, *content-neutral* and nondiscriminatory sign standards and requirements . . . .” SUMF No. 4. Since the Sign Code addresses only the “time, place, and manner” of speech, and because the Sign Code does not cross any threshold into content based territory, it is content neutral. *See Ward*, 491 U.S. at 791.

## 2. *The Sign Code is Content-Neutral As-Applied.*

The City applied the facially content neutral Sign Code, as written, to the Cozy Sign. It is “an uncontroversial principle . . . that a plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him.” *McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014). An “as-applied challenge

tests the application” of the regulation “to the facts of a plaintiff’s concrete case.” *Stockinger*, 79 F.4th at 1248-49. Thus, no other display is germane to the Plaintiffs’ as-applied challenge. *Id.*

With regard to the Plaintiffs’ “concrete case,” the City applied the applicable, content-neutral provisions of the Sign Code to their letter when it determined that the Cozy Sign was a “sign” that was too big to qualify for a sign permit. SUMF Nos. 24-27, 29- 33, 35-41. Painting of the Cozy Sign commenced without a sign permit on November 3, 2023. SUMF Nos. 14-15. Three days later, the City reviewed the Cozy Sign that was fully outlined and partially painted on the North wall of the Cozy Inn, determined the Cozy Sign was a sign as defined by Sign Code § 42-764 and, more specifically, as “wall sign” as defined by Salina Code § 42-781 (the characterization of “wall sign” refers to its physical characteristics). SUMF No. 19. It then evaluated the size of the Cozy Sign against objective, numerical size limits of Salina Code § 42-521(4)(b). SUMF Nos. 20, 29-33.

The City determined that the Cozy Sign is a “writing” “pictorial representation” “emblem” “or display calculated to attract the attention of the public” or “any other figure of similar character” that is “a structure or any part therefor, or a portable display, or is attached to, painted on, or in any manner represented on a building or other structure or on the ground,” that “is used to announce, direct attention to, or advertise, and is not located inside a building,” and therefore qualified as a “sign” under the Sign Code. SUMF Nos. 24-27. Specifically, the Cozy Sign announces the Cozy’s infamous smells, directions attention to the building entrance and ordering window, it advertises the hamburgers and toppings available for sale at the Cozy, and it is painted on the outside wall of the building. SUMF Nos. 24-27.

The City was transparent about how it applied the Sign Code to the Cozy Sign, preparing

“The Cozy Inn Sign Analysis” and providing it to Mr. Howard on November 13, 2023. SUMF No. 29. Using the same approach, the City also reviewed the rendering Mr. Howard submitted with Plaintiffs’ *post-hoc* sign permit application (submitted after receipt of “The Cozy Inn Sign Analysis”), which included a rendering that Mr. Howard alleged was the final rendering of the Cozy Sign. SUMF. No. 41. The City confirmed the final rendering of the Cozy Sign also depicted a sign that would be regulated by the Sign Code. *Id.*

The City’s determination that the Cozy Sign is too big to qualify for a permit was based on objective content neutral standards. In the C-4 District where the Cozy Inn is located, the total allowable sign area is limited to three square feet for each linear foot of building frontage. SUMF. Nos. 9, 51, 52. The Cozy Inn has 21 feet of building frontage, so it is limited to 63 square feet of sign area in the aggregate. SUMF No. 30. Of that, three signs totaling 52.88 square feet of sign area were already in place, leaving 10.12 square feet of available sign area for additional signage. SUMF No. 32. The Cozy Sign takes up the entire North wall of the Cozy Inn, so the City estimated the size of the Cozy Sign by taking the height of the building (obtained from software available to the City) and the length of the North wall, concluding that the sign is approximately 528 square feet in area--more than 52 times the area that remained for additional signage. SUMF No. 30-33.

As such, on November 6, 2023, the City contacted Mr. Howard and asked him to pause the Cozy Sign, advising him that the Cozy Sign was a sign under the Sign Code, it needed a sign permit, and it was too big to qualify for a sign permit as proposed. SUMF No. 20. The City met with Mr. Howard again on November 13, 2023. SUMF No. 29. At that meeting, the City provided him with The Cozy Inn Sign Analysis. *Id.* Plaintiffs did not administratively appeal these determinations. SUMF No. 34.

The undisputed material facts show that Sign Code was applied as written to Plaintiffs. Thus, the Sign Code on its face, and as applied to Plaintiffs, is a content-neutral regulation.

### 3. *Plaintiffs Misconstrue the Definition of Sign.*

Plaintiffs allege a different interpretation of the City’s definition of “Sign.” Under Plaintiffs’ interpretation of § 42-764, a sign is *anything* that is “calculated to attract the attention of the public.” SUMF No.63. That interpretation is absurd, ignores the plain language of § 42-764, is not how the City interprets § 42-764, and is not how the City applied § 42-764 to the Cozy Sign. Statutory construction begins with “the plain language of the law.” *United States v. Morgan*, 922 F.2d 1495, 1496 (10th Cir. 1991). Indeed, “absent ambiguity or irrational result, the literal language of a statute controls.” *Edwards v. Valdez*, 789 F.2d 1477, 1481 (10th Cir.1986). Words must be construed in their “ordinary, everyday sense.” *Crane v. Commissioner*, 331 U.S. 1, 6 (1947). “In ascertaining the plain meaning,” the court “must look to the particular . . . language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The Court must “choose the reasonable result over the ‘absurd’ one.” *Robbins v. Chronister*, 435 F.3d 1238, 1241 (10th Cir. 2006).

Here, the plain language of the definition of sign is limited in application to only those displays (and “any other figure[s] of similar character”) that are “a structure or any part thereof, or a portable display, or [are] attached to, painted on, or in any other manner represented on a building or other structure or on the ground,” are “used to announce, direct attention to, or advertise,” and are “not located inside a building.” SUMF No. 3. The City interprets and applies Salina Code § 42-764 to displays and requires that subparagraphs (1), (2), and (3) be met to be a sign pursuant to the Sign Code. SUMF No. 25. The City’s consistent and reasonable construction of the definition of

the term “sign,” which was applied to Plaintiffs’ sign in a content neutral way, is both constitutionally sound and supported by common understandings and long experience.<sup>2</sup> *Id.*

Plaintiffs’ argument that the three subparagraphs of § 42-764(1)-(3) apply only to “any other figure of similar character” is a fundamentally incorrect take on the plain text, and one that robs it of common sense. For example, Plaintiffs’ construction of the definition of sign would result in sign permit requirements for displays *inside of buildings*. Yet Plaintiffs’ interpretation does not alter the content-neutrality analysis. The text of the Sign Code remains content neutral. Even if Plaintiffs have the correct interpretation, they are without relief that would address their alleged injury. See IV.A. and IV.B., *supra*. If all displays are “signs,” the legal status of Plaintiffs’ display would not change--it would still be a sign that is too large to qualify for a permit.

### **C. The Sign Code Passes Intermediate Scrutiny**

Because the Sign Code is content neutral, the applicable test is “intermediate scrutiny.” *Ward*, 491 U.S. at 797. The Court decides as a matter of law whether the content-neutral Sign Code passes intermediate scrutiny. *Harmon*, 981 F.3d at 1148-49. The intermediate scrutiny test consists of three prongs: (1) the governmental interests must be substantial (2) the regulation must advance those interests in a manner that “would be achieved less effectively absent the regulation”; and (3) the regulation must leave open “ample alternative channels for communication of the information.” *Ward*, 491 U.S. at 791, 799 (quotation omitted).

As to the first prong, like thousands of other local governments, Salina’s City Commission has determined that its Sign Code advances its substantial content-neutral interests of aesthetics, traffic and pedestrian safety, and property values. SUMF Nos. 3, 4, 42. Salina Code § 42-500

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<sup>2</sup> *Sign*, MERRIAM-WEBSTER DICTIONARY (<https://www.merriam-webster.com/dictionary/signs>)

enumerates the City’s governmental interests. SUMF No. 4. The City’s interests in aesthetics and traffic safety are substantial government interests that are content neutral as a matter of law. *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243, 1251 The City’s interests in property values (and, again, aesthetics) are “substantial” and “legitimate.” *Taxpayers for Vincent*, 466 U.S. at 795. Sign clutter is akin to a “visual assault,” and is therefore a “significant substantive evil within the City’s power to prohibit.” *Taxpayers for Vincent*, 466 U.S. at 807-08.

As to the second prong, the narrowly tailored requirement is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Ward*, 491 U.S. at 799. Put another way, although the City submits that the Sign Code advances all its stated interests, the City need only show that the Sign Code advances one of its substantial government interests in order to pass intermediate scrutiny review. Additionally, the narrowly tailored requirement does not require the regulation be “the least restrictive or least intrusive means” of regulation. *Id.* at 798.

“Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.” *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). In addressing these concerns, the City regulates the time, place and manner of the display of signs by limiting their size, number, height, and location based on the specific zoning district wherein individual signs are located. SUMF Nos. 44-46, 52-56. Time, place, and manner restrictions like these *per force* address the “distinct safety and esthetic challenges” posed by signs. *Austin*, 596 U.S. at 64, 71, 75. The United States Supreme Court defers to “common-sense judgments of local lawmakers” in determining such things as the traffic safety “hazards” presented by signs. *Metromedia*, 453 U.S. 508-509. It is axiomatic that regulating the



time, place and manner of the display of signs is more effective at advancing traffic safety, aesthetics, and property values than not regulating them.

As to the third prong, “ample alternatives,” “[t]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). An alternative mode of communication is constitutionally adequate if the speaker’s ability to “communicate effectively” is not “threatened.” *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984).

Plaintiffs have ample alternative channels to communicate the information. First, the Sign Code regulates signs, but it does not prohibit them. Indeed, The Cozy Inn currently has three other signs installed on the building that are not at issue in this case. SUMF No. 32. These signs announce the Cozy Inn and advertise the hamburgers it sells. SUMF Nos. 32, 58. Plaintiffs’ proffered expert admitted that they were “conspicuous enough” and served to “brand the site.” SUMF No. 59. Since there is room for just over 10 square feet of additional signage under the Sign Code, Plaintiffs could simply reduce the size of the Cozy Sign to an allowable size so that the City could legally issue a sign permit for it. SUMF No. 30. Second, in addition to signage on its building, the Cozy Inn also uses a number of other alternative channels to communicate information, including Facebook, branded merchandise worn or used by their customers, community events, radio advertising, banner advertising at indoor football events, billboards, bumper stickers, and a sign similar to the Cozy Sign located at Jenni’s Liquors in a nearby town. SUMF No. 58. The Sign Code, therefore, satisfies the third prong of intermediate scrutiny.

In sign cases it is common for courts at all levels to not require evidence beyond the text of

the regulation itself to determine if intermediate scrutiny is satisfied. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981) (“If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.”); *StreetMediaGroup, LLC v. Stockinger*, 1:20-CV-03602-RBJ, 2021 WL 5770231, at \*5 (D. Colo. Dec. 6, 2021), *aff’d*, 79 F.4th 1243 (10th Cir. 2023) (“state’s interest in promoting safe driving alone satisfies the narrow-tailoring requirement . . . the state would less effectively prevent these crashes if it took down signs after they caused motor accidents instead of establishing a prophylactic permitting scheme.”); *StreetMediaGroup, LLC v. Bd. Of Cnty. Comm’rs*, No. 21-CV-1232-RMR-KLM, 2023 WL 5613018 (D. Colo. Mar. 30, 2023) (“Plaintiffs argue that the County should be required to produce specific evidence that the Regulations actually relate to and advance the County’s aesthetic and traffic goals. But the question before the Court is whether the Regulations directly advance the County’s interests in traffic safety and aesthetics, not whether each provision of the Regulations is absolutely necessary to do so.”). Despite this legal precedent, Plaintiffs contend the City must present evidence to support the City’s arguments with regard to how the Sign Code advances its stated interests, and that there is no “factual basis” for such support. SUMF No. 65.

Yet even if this Court determines that additional evidence is necessary to support a holding that the Sign Code survives intermediate scrutiny, the summary judgment record demonstrates that the Sign Code advances aesthetics, traffic and pedestrian safety, and property values. To that end, the summary judgment record includes the following evidence: (1) industry specific publications the City considered; (2) testimony of City staff (who have extensive education and experience in

planning and sign regulations) (SUMF Nos. 11-12); and (3) expert testimony of Mark White.

The City, via its Zoning Administrator, reviewed industry specific publications in anticipation of the City of Salina's 2017 amendment of its Sign Code. SUMF No. 42. The 2017 amendment, Ordinance Number 17-108882, was prompted by *Reed v. Town of Gilbert. Id.* In response to *Reed*, the City's Governing Body amended the Sign Code to ensure compliance with First Amendment requirements. *Id.* The industry specific publications reviewed by the City at that time included material about how signs are a significant driver distraction and how sign regulations promote traffic safety and aesthetics. *Id.*

The Sign Code seeks to protect the aesthetics of the community and quality of life, while reducing safety hazards that can result from sign clutter. SUMF No. 47. Eliminating the risk of "sign wars"--where in order to have more prominent signage businesses compete by erecting additional signs and signs that are larger than the surrounding signs, cluttering the area--also protects the aesthetics of the community and the safety of motorists and pedestrians. SUMF No. 48. Excessive amounts of "signage, both in terms of number of signs and size of signs" can become distracting and cause safety problems. SUMF No. 49. The Sign Code seeks a balance by allowing "ample amount of signage for each property" allowing "effective and attractive" signs "without becoming a safety concern." SUMF No. 50. In the C-4 District, where the Cozy Sign is located, the size and number limitations are designed to prevent safety problems. SUMF Nos. 52, 54. Regulating the size, number, height, and location of signs helps to reduce clutter, thereby reducing distractions, keeping visual sight lines for vehicles and pedestrians clear, and ensuring signs remain effective while not holding the eye of viewer for too long. SUMF No. 46.

The Sign Code is consistent in practice with the state of the art nationally for how sign

regulations interact with decorative building features such as murals. SUMF No. 55. To that end, it is consistent with twenty-one sign and mural regulations in Kansas and Oklahoma, which demonstrate a range of approaches to regulating signs while accommodating the benefits of murals. *Id.* This is because murals are integral to buildings, are not designed to direct attention to a place, and as such do not function as signs. *Id.* The Sign Code directly and materially furthers its recited purposes in Salina Code § 42-500. *Id.* The Sign Code keeps signs in scale with the building's context, which furthers the City's aesthetic interests. SUMF No. 56. This is especially important in the historic downtown C-4 district, where the 67 percent limitation on the total sign area on any building wall or street frontage protects aesthetics and architectural integrity. *Id.*

Although the Court need not rely on evidence outside the text of the Sign Code to determine if the Sign Code passes intermediate scrutiny, the summary judgment record is replete with evidence justifying how the Sign Code advances the City's substantial government interests in aesthetics, traffic and pedestrian safety, and property values. Thus, summary judgment in the City's favor on Plaintiffs' content-based claims is appropriate.

**D. The Sign Code Does Not Constitute an Impermissible Prior Restraint**

Prior restraints "are not unconstitutional per se." *Se. Promotions, LTD v. Conrad*, 420 U.S. 546, 558 (1975). They are permissible if the permitting system includes "procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Id.* at 559. Prior restraints consist of two procedural safeguards: (1) timing and (2) limitations upon discretion. The general rule is that a brief, specified time period for decision-making that allows for prompt judicial review is required. *Am. Target Advert., Inc. v. Giani*, 199 F.3d 1241, 1253 (10th Cir. 2000). However, persuasive case law from the Ninth Circuit has found that procedural safeguards regarding timing

“are not required for content-neutral time, place, and manner” regulations. *Epona v. Ventura*, 876 F.3d 1214, 1225 (9th Cir. 2017) (citing *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322-23 (2002)). The prior restraint doctrine also requires “standards limiting the licensor’s discretion.” *Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758 (1988).

Respecting the timing procedural safeguard (if applicable to the City’s content-neutral time, place, and manner regulations), Salina Code § 42-502(b) provides a sign permit must be issued or refused within 10 days after receipt of an application, or within such further period as may be agreed to by the applicant. SUMF No. 7. That is both “brief” and “specified,” so it meets constitutional requirements on its face.

As-applied, the City asked Plaintiffs to pause the painting of the Cozy Sign within three days after Plaintiffs started the work. SUMF No. 14, 15, 19, 20. At that time, Plaintiffs had not even sought a permit. SUMF No. 15. The City promptly told Plaintiffs that the Cozy Sign would not qualify for a permit because: (1) it was a sign; and (2) it was too big. SUMF No. 20. Consequently, before Mr. Howard even submitted a Sign Permit application, he already knew that the Cozy Sign, as proposed in his application, was too big to qualify for a sign permit. SUMF No. 22.

Not only did the City inform Mr. Howard that the Cozy Sign would not qualify for a sign permit within the 10-day period of Salina Code § 42-502(b), but the City also understood and Mr. Howard agreed that his sign permit application, which he submitted on November 13, 2023, would be held in abeyance. SUMF No. 23. That is an “agreement by the applicant” under Salnia Code § 42-502(b). SUMF No. 7.

But even if Mr. Howard had not agreed to hold the application in abeyance, the sign permit application was submitted seven days after he was asked to pause the Cozy Sign, and just hours

after he received The Cozy Inn Sign Analysis. SUMF Nos. 19-20, 22-23. The City did not need to again inform Mr. Howard about what he already knew--the sign he had painted (and subsequently applied for a permit) was too big, and the City could not legally issue a sign permit for it. SUMF No. 20. Holding the application was a courtesy, not a violation of his First Amendment rights. Moreover, approximately three months later, Mr. Howard filed this lawsuit. SUMF No. 21. On its face and as-applied, the Sign Code includes the proper procedural safeguard with regard to timing of decision-making.

Respecting the safeguard of limiting the “licensor’s discretion,” one standard in the Sign Code is whether the display (among other possible things) “advertises.” SUMF No. 3. That standard is ubiquitous in sign regulations. *See Austin*, 596 U.S. at 64-65. It is also constitutionally sufficient. It is particularly clear when the advertisements pertain to “goods or services for sale.” Consider the strikingly similar case of *Wag More Dogs, Ltd. Liab. Corp. v. Cozart*, 680 F.3d 359 (4th Cir. 2012). In *Wag More Dogs*, a doggy day care facility painted a “mural” on an exterior wall that faced a municipally owned dog park. *Id.* at 363. The “mural” depicted “happy cartoon dogs, bones, and paw prints,” and incorporated some of the cartoon dogs from the logo. *Id.* *Wag More Dogs* argued, *inter alia*, that the display was not an “advertisement,” but instead “noncommercial speech.” *Id.* at 369. The Fourth Circuit was not persuaded. It held that the display was commercial speech because it “was meant to attract customers,” it included dogs from the company’s logo (which, it held, was “analogous to referencing a specific product”), and it sought to create goodwill with potential customers. *Id.* at 370 (emphasis added).

With respect to Plaintiffs’ prior-restraint claim, the Sign Code, on its face, does not promote arbitrary enforcement because it provides sufficient standards to limit the City and its officials’

discretion. The Sign Code has numerous procedural safeguards including avenues for variances and appeals to resolve issues with the City. SUMF No. 34. Further, the standard in the Sign Code is whether the display:

- (1) Is a structure or any part thereof, or a portable display, or is attached to, painted on, or in any other manner represented on a building or other structure or on the ground; (2) Is used to announce, direct attention to, or advertise; and
- (3) Is not located inside a building.

SUMF No. 3. City staff under the supervision of the Zoning Administrator are capable of determining whether the structure or display is attached to, painted on, or represented on a building or other structure or on the ground. SUMF No. 28. City staff under the supervision of the Zoning Administrator are capable of determining whether a display announces, directs attention to, or advertises. *Id.* The City has been interpreting the definition of sign consistently for decades. SUMF No. 25.

As applied, on this record it is clear that the City applied the plain language and ordinary use of the words and phrases “announce, direct attention to, or advertise.” The word “advertise” is widely used in defining “sign” for regulatory purposes. The Cozy Sign plainly “advertises.” SUMF Nos. 31, 35-41. That is particularly clear since the advertisement pertains to or references goods or services for sale. *Id.* “Building” is also a defined term in the Salina Code, and City staff under the supervision of the zoning administrator are capable of determining when a display is “not located inside of a building.” SUMF Nos. 8, 28. On their face and as-applied, the criteria of the Sign Code constrain the discretion of the decision-maker and therefore do not constitute an impermissible prior restraint. Summary judgment in favor of the City is proper.

**E. The Sign Code Also Passes the Commercial Speech Test.**

Assuming *arguendo* this Court finds the Sign Code distinguishes between “signs” and

displays that are not signs based on whether the display is commercial speech or noncommercial speech, the commercial-noncommercial distinction is not a content-based distinction. If the regulation is of commercial speech, then the commercial speech test set out in *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of NY*, 447 U.S. 557, 564-67 (1980) applies.<sup>3</sup>

Commercial speech is an advertisement that refers to a particular product, whose speaker has an economic motivation. *See Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66-67 (1983); *Wag More Dogs*, 680 F.3d at 363, 370. Commercial speech enjoys “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.” *Bd. of Tr. of State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989). Regulations that differentiate between commercial and noncommercial speech, without more, are not content based. *See Metromedia v. San Diego*, 453 U.S. 490, 504-06 (1981). Under the commercial speech test, regulations “need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.” *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980)). The test is strikingly similar to the intermediate scrutiny applied to content neutral regulations. *See Brewer v. Albuquerque*, 18 F.4th 1205, 1252 (10th Cir. 2021). However, unlike the intermediate scrutiny test examined in Section IV.C., *supra*, as-applied commercial speech challenges are not justiciable. *See U.S. v. Edge Broad. Co.*, 509 U.S. 418, 431 (1993).

Nothing in *Reed* (which dealt only with content based classifications of noncommercial speech) or *Austin* prohibits the City from regulating commercial speech differently from

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<sup>3</sup> This test is also referred to as “intermediate scrutiny,” but for clarity, this brief will refer to it as the “commercial speech test.”



noncommercial speech. The constitutional command is simply that commercial speech cannot be favored over noncommercial speech. *See Metromedia*, 453 U.S. at 504-06.

The Cozy Sign displays commercial speech. SUMF Nos. 31, 35-40. While Plaintiffs seek to have the commercial speech doctrine overturned, Supreme Court precedent controls that question, and such precedent has outright rejected overturning the commercial speech doctrine. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980); *Brewer v. Albuquerque*, 18 F.4th 1205, 1252 (10th Cir. 2021). Here again, Plaintiffs do not consider the consequences of their demands. The “commercial speech doctrine” what the Supreme Court had previously determined was unprotected speech, and is therefore arguably the only First Amendment protection that commercial speech has. *See generally, Valentine v. Chrestensen*, 316 U.S. 52 (1942).

For lawful, non-misleading speech, the commercial speech test requires substantial governmental interests, direct advancement of those interests, and narrow tailoring. The City’s asserted aesthetic, traffic safety, and property values interests are substantial as a matter of law. *Metromedia*, 453 U.S. at 508; *Taxpayers for Vincent*, 466 U.S. at 807; *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th at 1251. The City’s interests are directly advanced and narrowly tailored. SUMF Nos. 42-56; IV.C., *supra*; *See Metromedia*, 453 U.S. at 508 (“we reject appellants’ claim that the ordinance is broader than necessary and, therefore, fails the fourth part of the *Central Hudson* test. If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all

billboards, but allows onsite advertising and some other specifically exempted signs.”). Consequently, the Sign Code passes the commercial speech test.

Indeed, the Sign Code allows for a generous amount of commercial signage. By way of illustration (since as-applied commercial speech challenges are not justiciable), prior to Plaintiffs’ decision to paint the Cozy Sign, the Cozy had not fully utilized its sign allowance. SUMF No. 32. According to Plaintiffs’ proffered expert, at that time the Cozy Inn already had “enough” signs in place to be conspicuous and “brand the site and enhance the store image.” SUMF No. 59. If this Court determines that the commercial speech test is appropriate and applicable, summary judgment in favor of the City is appropriate.

**F. The Sign Code is Not Unconstitutionally Vague.**

An ordinance is “unconstitutionally vague for one of two reasons: it either ‘fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits’; or it ‘authorizes or even encourages arbitrary and discriminatory enforcement.’” *Dr. John’s, Inc. v. Roy*, 465 F.3d 1150, 1158 (10th Cir. 2006) (quotation omitted). The task of identifying business advertising, is a “very basic test” that is “not unconstitutionally standardless or vague . . . .” *Wag More Dogs, LLC*, 795 F. Supp. 2d at 390. The vagueness doctrine is not based on “the mere fact that close cases can be envisioned.” *United States v. Williams*, 533 U.S. 285, 305-06 (2008). “[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Ward*, 491 U.S. at 794. “What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” *Williams*, 533 U.S. at 306.

Ordinarily, “[a] plaintiff who engages in some conduct that is clearly proscribed cannot

complain of the vagueness of the law as applied to the conduct of others.” *U.S. v. Williams*, 553 U.S. 285, 304 (2008) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–495, n. 6 and 7 (1982)). However, the Supreme Court has “relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.” *Id.* As a matter of law, Plaintiffs cannot avail themselves to that relaxed standard because their display is commercial speech, and “the overbreadth doctrine does not apply to commercial speech.” *Hoffman Estates*, 455 U.S. at 497.

Yet even if this challenge is available to Plaintiffs, the Sign Code provides people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Its text provides clear standards that ordinary people can understand, and therefore does not encourage arbitrary and discriminatory enforcement. SUMF Nos. 28, 57.

During depositions, both Howard and Windholz testified that they had not read the Sign Code and did not attempt to read the Sign Code. SUMF Nos. 16-18. The Sign Code does not regulate “murals.” It regulates signs. As such, the Sign Code is not vague simply because it does not define mural or any number of other terms and phrases enumerated by Plaintiffs that are not used, and are simply not pertinent to the City’s objective, content-neutral approach to identifying and regulating signs. Urban planning and zoning industry standards do not require a definition to be codified for every single word in a Sign Code to ensure understanding of its meaning and methodology. SUMF No. 57.

As Plaintiffs’ commercial speech is clearly within the scope of the City’s regulation, Plaintiffs cannot be heard on their vagueness claim against the Sign Code. But even if they could, the Sign Code provides clear standards that ordinary people can understand and, therefore, does not

encourage arbitrary enforcement. Consequently, the Sign Code is not impermissibly vague, and summary judgment in favor of the City on the Plaintiffs' vagueness claim is proper.

## **V. CONCLUSION**

For the above stated reasons, the Court should enter judgment in the City's favor on all claims, declare the Sign Code constitutional, and enter final judgment against Plaintiffs. Alternatively, this Court should dismiss Plaintiffs' Amended Complaint because Plaintiffs lack standing and the Court is therefore without subject-matter jurisdiction.

Dated this 7th day of February, 2025.

s/ Aaron O. Martin

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## **CERTIFICATE OF SERVICE**

I hereby certify that on February 7, 2025, I caused the foregoing **BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record including: Jeffrey Shaw and Samuel G. MacRoberts

s/ Aaron O. Martin

Aaron O. Martin

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

<b>Cozy Inn, Incorporated,</b>	)	
<b>d/b/a The Cozy Inn; Stephen Howard,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>CIVIL ACTION</b>
	)	<b>CASE NO. 6:24-cv-01027-TC-ADM</b>
	)	
<b>v.</b>	)	
	)	
<b>City of Salina, Kansas,</b>	)	
	)	
<b>Defendant.</b>	)	

**INDEX OF EXHIBITS TO**  
**DEFENDANT’S MOTION FOR SUMMARY JUDGEMENT**

Exhibit A – Dean Andrew Affidavit with Affidavit Exs. 1 and 2

Exhibit B – City’s Responses to Plaintiffs’ First Set of Interrogatories

Exhibit C – Relevant Sections of Salina Municipal Code

Exhibit D – Dean Andrew Deposition Excerpts

Exhibit E – Dustin Herrs Deposition Excerpts

Exhibit F – Dustin Herrs Affidavit

Exhibit G – Amended Pretrial Order (ECF 101)

Exhibit H – Stephen Howard Deposition Excerpts

Exhibit I – Andrea Windholz Deposition Excerpts

Exhibit J – Colin Benson Deposition Excerpts

Exhibit K – Dustin Herrs 30(b)(6) Deposition Excerpts

Exhibit L – Photo of Cozy Sign (Plaintiffs Bates 58)

Exhibit M – Sign Permit Application

Exhibit N – Dean Andrew 30(b)(6) Deposition Excerpts

Exhibit O – Cozy Inn Sign Analysis

Exhibit P – Michael Schrage Deposition Excerpts

Exhibit Q – Photo of Cozy Sign alleged Final Rendering (Plaintiffs Bates 51)

Exhibit R – Mark White Affidavit with Affidavit Ex. 1

Exhibit S – Photo of sign at Jenni’s Liquors (Exhibit Y to S. Howard Depo.)

Exhibit T – Charles Taylor, Ph.D. Deposition Excerpts

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

<b>Cozy Inn, Incorporated,</b>	)	
<b>d/b/a The Cozy Inn; Stephen Howard,</b>	)	
<b>Plaintiffs,</b>	)	
	)	<b>CIVIL ACTION</b>
	)	<b>CASE NO. 6:24-cv-01027-TC-ADM</b>
	)	
<b>v.</b>	)	
	)	
<b>City of Salina, Kansas,</b>	)	
	)	
<b>Defendant.</b>	)	

**AFFIDAVIT OF DEAN ANDREW**

I, Dean Andrew, Zoning Administrator for the City of Salina, Kansas, being first duly sworn, declare under penalty of perjury as follows:

1. I am over 18 years of age and have personal knowledge of the following facts set forth in this Affidavit, and, if called as a witness, I could testify competently to them.
2. I am the City of Salina Zoning Administrator. I have held this position since 2009.
3. The City regulates signs pursuant to Chapter 42 Article X of the Salina Code of Ordinance, along with related definitions in Chapter 42 Article XIV.
4. The documents attached hereto as Affidavit Exhibit 1 are in my file as the Zoning Administrator and were considered by me in anticipation of the City of Salina's 2017 amendment to the sign code, set forth in Ordinance Number 17-10882.
5. Ordinance Number 17-10882 is attached hereto as Affidavit Exhibit 2.
6. Affidavit Exhibit 1 documents include:

- i. The Cardozo Law Review article entitled “Art or Signage?: The Regulation of Outdoor Murals and the First Amendment” [bates stamped CITY000673-702].
- ii. Rocky Mountain Sign Law Blog article entitled “San Diego’s Motion for Summary Judgment Granted in Mural Case” [bates stamped CITY001510-511].
- iii. Relevant pages of the APA National Planning Conference presentation on “Regulating Digital Signs and Billboards” [bates stamped CITY001585, 1600-01, 1615-17]

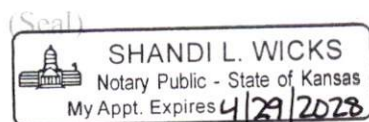
7. As stated in Ordinance Number 17-10882, the *Reed v. Town of Gilbert* decision prompted the Governing Body of the City of Salina to amend Article X, Chapter 42 of the Salina Code (referred to as the “Sign Code”) in order to ensure compliance with the First Amendment and to update and clarify sign regulation and enforcement generally within the City.

Signed: Dean Andrew  
Dean Andrew

STATE OF Kansas )  
 ) ss.  
COUNTY OF Saline )

Subscribed and sworn to before me by Dean Andrew on the 7<sup>th</sup> day of February, 2025.

Witness my hand and official seal. My commission expires: 4/29/2028



Shandi L Wicks  
Notary Public





# Regulating Digital Signs and Billboards (S606)

Sponsored by *Zoning Practice*

APA National Planning Conference  
Tuesday, April 28, 2009



## Driver Distraction #1 Cause of Crashes

<b>Causal Category</b>	<b>Percentage of Drivers Contributing to Causation</b>
Driver Distraction	22.7
Vehicle Speed	18.7
Alcohol Impairment	18.2
Perceptual Errors	15.1
Decision Errors	10.1
Incapacitation	6.4
Other	8.8

Source: National Highway Traffic Safety Administration, 2001; 2006.

## Specific Distraction: % of Drivers

Outside person, object or event	29.4
Adjusting radio, cassette	11.4
Other occupant in vehicle	10.9
Moving object in vehicle	4.4
Other device in vehicle	2.9
Adjusting vehicle/temp	2.8
Eating or drinking	1.7
Dialing/using cell phone	1.5
Smoking	0.9
Other distraction	25.9
Unknown distraction	8.6



# Goals and Purpose

- The statement of purpose includes promoting traffic safety and community aesthetics. We look to the legislative body's statement of intent.

## Narrow Tailoring

- Concord's interests in traffic safety and community aesthetics would be achieved less effectively without the prohibition.

## Need for Studies

- NJI argues that Concord must perform studies to uphold the ban. Concord was under no obligation to do such studies or put them into evidence.

# Rocky Mountain Sign Law Blog

Regulatory, Best Practices and Other First Amendment News from Colorado's Leading Land  
Use Law Firm

## San Diego's Motion for Summary Judgment Granted in Mural Case

By Brian J. Connolly on May 1, 2017

In a **case that we reported on last year**, a federal district court in California granted summary judgment in favor of the City of San Diego in a case involving art murals.

Some of the facts of the case are reported in our prior post. The San Diego sign code exempts from permitting “[p]ainted graphics that are murals, mosaics, or any type of graphic arts that are painted on a wall or fence and do not contain copy, advertising symbols, lettering, trademarks, or other references to the premises, products or services that are provided on the premises where the graphics are located or any other premises.” Otherwise, all signs visible from the right of way are required to obtain a permit, and signs on city-controlled property must obtain a permit as well. Messages on city-controlled property are limited to on-premises speech and “public interest” messages. As we previously noted, the plaintiff, a mural company, was granted approval to place two wall murals in San Diego, but



received a violation for the placement of a third mural. The plaintiff believes that the annual Comic-Con event was given special treatment by the city, because certain signs posted around the city during the event were not issued citations.

On the city's motion for summary judgment, the court treated the signs in question as commercial speech and analyzed the regulations under the *Central Hudson* test, finding that the regulations easily passed constitutional muster. In the court's view, the city had established that its interests in optimizing communication and aesthetics were substantial, and that the restrictions directly advanced these interests without going further than necessary. The court did not provide any analysis to support its conclusion that the speech in question was commercial. In response to the plaintiff's arguments that the mural exception undermined the city's asserted interests, the court disagreed. And consistent with other lower courts' recent holdings, the court rejected the plaintiff's argument that *Reed v. Town of Gilbert* had invalidated the on-premises/off-premises distinction.

Furthermore, responding to the plaintiff's claims that the San Diego sign code was unconstitutionally vague, the court, while noting that "the sign ordinance at issue is far from a paragon of clarity," found that the mural exception, public interest exception, and on-premises/off-premises distinction were sufficiently clear. The court also rejected the plaintiff's prior restraint, selective enforcement, due process, and intentional interference with prospective business advantage claims.

**ArchitectureArt, LLC v. City of San Diego, \_\_\_ F. Supp. 3d \_\_\_, 2017 WL 1226913 (S.D. Cal. Jan. 6, 2017).**

**OTTEN JOHNSON**  
ROBINSON NEFF + RAGONETTI PC



# ART OR SIGNAGE?: THE REGULATION OF OUTDOOR MURALS AND THE FIRST AMENDMENT

*Christina Chloe Orlandot*

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<sup>†</sup> Senior Articles Editor, *Cardozo Law Review*. J.D. Candidate (May 2014), Benjamin N. Cardozo School of Law; A.B., Harvard University, 2011. Many thanks to Professor Stewart Sterk for suggesting this topic and providing invaluable guidance throughout the research and writing process.

## INTRODUCTION

Sally Business Owner runs a successful flower and gift shop in a vibrant suburban town. She sells a wide variety of flowers and related items, including vases and balloons. One day, after deciding that she wants to give her shop a makeover, Sally commissions a local artist to paint a tasteful mural of colorful flowers on the exterior wall of her building. The mural covers the entire wall. Sally believes the mural to be a beautiful piece of art<sup>1</sup> that the community will greatly enjoy. The following week, Sally receives a notice from Wanda Zoning Administrator. According to the notice, Sally's flower mural is in violation of the town sign ordinance that prohibits any outdoor "sign" from exceeding sixty square feet. Because Sally's mural contains flowers and the mural is painted on a commercial shop that sells flowers, the mural qualifies as "advertising" and falls under the ordinance's definition of "sign."<sup>2</sup> Wanda notes that if the mural contained anything other than flowers, such as panda bears or palm trees, it would be deemed art rather than signage. Wanda orders Sally to remove the mural, or else face a hefty fine. Sally is perplexed, and believes that the zoning board has intruded upon her right to free speech.

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<sup>1</sup> The word "art," as used in this Note, indicates concrete works of visual art, such as paintings or sculptures. It does not include other art forms, such as films or productions of the performing arts.

<sup>2</sup> This hypothetical is based on an earlier version of Arlington County's zoning ordinance at issue in *Wag More Dogs, Ltd. Liab. Corp. v. Cozart*, 680 F.3d 359 (4th Cir. 2012), discussed *infra*. That version of the ordinance defined a "business sign" as a sign "identifying the products or services available on the premises or advertising a use conducted thereon." See *id.* at 362 (internal quotation marks omitted) (citing ARLINGTON COUNTY, VA., ZONING ORDINANCE § 34(G)). Arlington County's current zoning ordinance exempts certain works of visual art (including murals) from regulation as signage; to be exempted, artwork cannot include a "picture, symbol or device of any kind that relates to a commercial business, product or service offered on the premises where the wall is located." ARLINGTON COUNTY, VA., ZONING ORDINANCE § 13.2.3(C)(2)(e) (2013). In other words, the artwork cannot contain "commercial speech." Many municipalities throughout the country have substantially similar language in their sign ordinances. See, e.g., TEMECULA, CAL., MUNICIPAL CODE § 17.28.050(U) (2013) (exempting works of art from sign regulations only if they do not convey a commercial message); ST. PETERSBURG, FLA., CITY CODE § 16.40.120.19 (2013) (defining artwork as "drawings, pictures, symbols, paintings . . . or sculpture, which does not in any way identify a product, service or business sold or available on the premises"); MARION COUNTY, IND., REV. CODE § 734-501(b) (2012) (defining a mural as "[a] design or representation painted, drawn or similarly applied on the exterior surface of a structure and which does not advertise a business, product, service, or activity"); MINNEAPOLIS, MINN., ZONING CODE § 520.160 (2013) (defining a mural as "[a] work of graphic art painted on a building wall, which contains no commercial advertising or logos, and which does not serve to advertise or promote any business, product, activity, service, interest or entertainment"); LAS VEGAS, NEV., ZONING CODE § 19.14.030(B)(4) (2010) (exempting works of art "that do not include a commercial message and are not symbolic of . . . commercial activities taking place on the premises on which the graphic is located").

Sally's belief is not unfounded. The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . ."<sup>3</sup> This restriction extends to state and local government through the Due Process Clause of the Fourteenth Amendment<sup>4</sup> and plays a fundamental role in a municipality's regulation of outdoor signage.<sup>5</sup> While a municipality may place general time, place, and manner restrictions<sup>6</sup> on outdoor signage in order to preserve community aesthetics and ensure traffic safety, it may not discriminate against signage that promotes a certain viewpoint or contains certain content.<sup>7</sup>

The regulation of outdoor art murals<sup>8</sup> as signage is a recent phenomenon.<sup>9</sup> To date, only four courts have expressly analyzed the constitutionality of regulating mural art pursuant to the terms of a municipal sign ordinance.<sup>10</sup> Although mural law is still in its infancy, the convoluted status of the limited case law has led to "a war . . . a real

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<sup>3</sup> U.S. CONST. amend. I.

<sup>4</sup> U.S. CONST. amend. XIV, § 1; see *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("[F]reedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."); *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450 (1938) ("It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the [Fourteenth] amendment.").

<sup>5</sup> For a general overview of the relationship between free speech law and outdoor signage, see DANIEL R. MANDELKER, *FREE SPEECH LAW FOR ON PREMISE SIGNS* (2012).

<sup>6</sup> See generally 16B C.J.S. *Constitutional Law* § 828 (2012) (defining this term and providing case examples illustrating its application).

<sup>7</sup> See *infra* Part I.A.

<sup>8</sup> This Note focuses solely on murals that are independently commissioned. Cities throughout the United States have programs that allow for, and encourage, the public display of outdoor murals. See, e.g., CITY PHILA. MURAL ARTS PROGRAM, <http://www.muralarts.org> (last visited Oct. 27, 2013); *Mural Program*, BEAVERTON ARTS COMMISSION, <http://www.beavertonarts.org/index.aspx?NID=122> (last visited Oct. 27, 2013); *Public Art Murals Program*, REGIONAL ARTS & CULTURE COUNCIL, <http://www.racc.org/public-art/mural-program> (last visited Oct. 27, 2013); *Public Art Program*, CITY PASADENA, [http://www.ci.pasadena.ca.us/arts/public\\_art\\_program](http://www.ci.pasadena.ca.us/arts/public_art_program) (last visited Oct. 27, 2013). These public art mural programs are designed, in part, to enhance local aesthetics and foster community appreciation of the arts. Because municipalities implement and control these programs, issuing mural design guidelines to ensure adherence to local zoning requirements, zoning violations are rarely a concern.

<sup>9</sup> See MANDELKER, *supra* note 5, at 69 ("Sign ordinances regulate a wide variety of [outdoor] signs, and some of the unique and/or specialized types of signs include digital signs, portable signs, . . . murals," and sculptures). For a brief overview of a dispute involving regulation of a "unique" type of sign, see Frederick Melo, *St. Paul City Council: Creative Kidstuff Wins Zoning Appeal for Sculptural Signs*, TWINCITIES.COM (Aug. 1, 2012, 12:01 AM), [http://www.twincities.com/stpaul/ci\\_21213086/st-paul-city-council-creative-kidstuff-wins-zoning](http://www.twincities.com/stpaul/ci_21213086/st-paul-city-council-creative-kidstuff-wins-zoning) (discussing a dispute between a toy company and the city of St. Paul, Minnesota over whether two eighteen-foot-tall cat images were "sculptural art" or "signs").

<sup>10</sup> See *infra* Part II. The four cases were decided in 2009, 2010, 2011, and 2012.

fight around the country.”<sup>11</sup> Indeed, disputes between zoning administrators and mural owners over whether a particular mural is “art” or “signage” have become increasingly common.<sup>12</sup> These disputes are complicated, in part, because a legitimate work of art may also serve signage functions, oftentimes unintentionally.<sup>13</sup> In these cases, should the fact that an art mural contains “commercial speech” subject it to a lesser degree of constitutional protection?

This Note attempts to fit outdoor mural regulation into the broader scheme of constitutional law generally, and billboard and signage law specifically. In doing so, this Note argues that a municipality, in enacting a sign ordinance, may not distinguish between murals containing commercial speech and those containing noncommercial speech. The application of this distinction not only constitutes impermissible content-based regulation, but it also stands in stark contrast to the current state of free speech law. As an alternative, this Note proposes that all murals, regardless of their content, be regulated pursuant to the same set of restrictions.

Part I of this Note provides background on the purposes and mechanics of outdoor sign regulation. It then explores the landmark Supreme Court case addressing constitutional issues inherent in such regulation, *Metromedia Inc. v. City of San Diego*,<sup>14</sup> and surveys modern, post-*Metromedia* developments within free speech law. Part II of this Note turns to a narrow area of sign regulation: the regulation of outdoor murals. It discusses sources of inconsistency in current mural case law, and sets forth various legal and policy-based arguments for why the

<sup>11</sup> Tom Jackman, *Arlington's Wag More Dogs Mural Is No More*, WASH. POST (Sept. 25, 2012, 8:18 PM), [http://www.washingtonpost.com/blogs/the-state-of-nova/post/arlington-s-wag-more-dogs-mural-is-no-more/2012/09/25/ed180e82-074c-11e2-a10c-fa5a255a9258\\_blog.html](http://www.washingtonpost.com/blogs/the-state-of-nova/post/arlington-s-wag-more-dogs-mural-is-no-more/2012/09/25/ed180e82-074c-11e2-a10c-fa5a255a9258_blog.html) (“There’s a war going on, . . . a real fight around the country about these sign laws . . . We don’t usually require people to consult government bureaucrats before they express themselves.” (second ellipsis in original) (internal quotation marks omitted)).

<sup>12</sup> See, e.g., *id.*; Karen Boros, *Tough Mural ‘Advertising’ Rules? Minneapolis Council Member Gary Schiff Wants to Loosen Them*, MINNPOST (July 20, 2012), <http://www.minnpost.com/two-cities/2012/07/tough-mural-%E2%80%98advertising%E2%80%99-rules-minneapolis-council-member-gary-schiff-wants-loos>; Melo, *supra* note 9; see also *infra* Part II and the cases discussed therein.

<sup>13</sup> Context is critical in determining whether a particular display is a work of art or signage. See Russ VerSteeg, *Iguanas, Toads and Toothbrushes: Land-Use Regulation of Art as Signage*, 25 GA. L. REV. 437, 469 (1991) (“The physical location of art can cause it to function as signage. A sculpture of Pegasus . . . is almost certainly a work of art when exhibited in an art museum. . . . [T]he same sculpture would function as a sign when placed in close proximity to a Mobil Oil gasoline station or perhaps Mobil’s corporate offices. It functions as a sign because a reasonable person looking at the sculpture would recognize the connection between the image of a winged horse with the products and services of the Mobil Oil Corporation.”); see also Shawn G. Rice, Comment, *Zoning Law: Architectural Appearance Ordinances and the First Amendment*, 76 MARQ. L. REV. 439, 453 (1993) (“The effect of the art on the viewing public is probably more important than the intent of the Presenter.” (internal quotation marks omitted)).

<sup>14</sup> 453 U.S. 490 (1981).

distinction between commercial and noncommercial speech should be eliminated in the context of outdoor mural regulation. Finally, Part III of this Note proposes a model for regulating outdoor murals whereby all murals, regardless of their content, are treated in the same manner. Such a model, Part III argues, best balances government regulatory interests with individual free speech interests, while offering a realistic solution for reducing mural disputes, mending interstate judicial conflict, and preserving judicial and municipal resources.

## I. BACKGROUND

### A. Sign Regulation

Outdoor signs come in different forms, shapes, and sizes.<sup>15</sup> They can be on-premise or off-premise, situated on private property or public property, and attached or detached to a building.<sup>16</sup> As a tangible medium of communication, outdoor signs contain both physical and constitutional dimensions.<sup>17</sup> Physical characteristics of signs include their size, height, shape, spacing, number, distance, and location.<sup>18</sup> The communicative features of signs, namely their content and messages, implicate their constitutional dimension.<sup>19</sup> The speech contained in signs is protected by the First and Fourteenth Amendments from unwarranted government regulation.<sup>20</sup>

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<sup>15</sup> See generally MANDELKER, *supra* note 5, at 69–88 (discussing a broad range of “specialized” on-premise signs, including digital signs, flags, freestanding signs, murals, portable signs, and time and temperature signs); Patricia E. Salkin, *Sign Regulation—Introduction*, 3 AM. LAW. ZONING § 26:1 (5th ed. 2013) (discussing the different types of signs and their functions).

<sup>16</sup> Salkin, *supra* note 15.

<sup>17</sup> See *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (“While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities’ police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. However, because regulation of a medium inevitably affects communication itself, it is not surprising that we have had occasion to review the constitutionality of municipal ordinances prohibiting the display of certain outdoor signs.” (citations omitted)); see also DEP’T OF STATE, N.Y. STATE, MUNICIPAL CONTROL OF SIGNS 2 (2006), available at [http://www.dos.ny.gov/lg/publications/Municipal\\_Control\\_of\\_Signs.pdf](http://www.dos.ny.gov/lg/publications/Municipal_Control_of_Signs.pdf).

<sup>18</sup> DEP’T OF STATE, N.Y. STATE, *supra* note 17; MANDELKER, *supra* note 5, at 89.

<sup>19</sup> DEP’T OF STATE, N.Y. STATE, *supra* note 17.

<sup>20</sup> *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981) (plurality opinion) (noting that “the First and Fourteenth Amendments foreclose [an] interest in controlling the communicative aspects [of signs]”); DEP’T OF STATE, N.Y. STATE, *supra* note 17.



### 1. Community Aesthetics and Traffic Safety

Sign regulation, an exercise of a local government's police power, is warranted on the basis of two public purposes: community aesthetics and traffic safety.<sup>21</sup> In recent years, aesthetics has become the more common justification. In fact, the majority of courts today recognize that aesthetics alone is sufficient to justify constitutionally permissible sign control.<sup>22</sup> This stems, in part, from settled Supreme Court authority dictating that local government has the power to determine that a community is "beautiful."<sup>23</sup> In addition to aesthetics, municipalities enact sign ordinances to eliminate hazards to pedestrians and motorists brought about by distracting sign displays and to ensure clear visibility of traffic signs and signals.<sup>24</sup>

### 2. Content Neutrality

Regulations within a sign ordinance are characterized as either content-neutral or content-based.<sup>25</sup> This characterization is the single most crucial issue in evaluating the constitutionality of a sign ordinance.<sup>26</sup> Content-neutral regulations are those that restrict signage

<sup>21</sup> See generally AM. PLANNING ASS'N, *PLANNING AND URBAN DESIGN STANDARDS* 359 (2006); Alan Weinstein, *Legal Issues in the Regulation of On-Premise Signs*, in *CONTEXT-SENSITIVE SIGNAGE DESIGN* 119, 119–20 (Marya Morris et al. eds., 2001). Together, community aesthetics and traffic safety are often referred to as the "twin goals" of sign regulation. See, e.g., *Metromedia*, 453 U.S. at 507; *Interstate Outdoor Adver., L.P. v. Zoning Bd. of Mount Laurel*, 706 F.3d 527, 529 (3rd Cir. 2013); *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 103 (2d Cir. 2010); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 611 (9th Cir. 1993).

<sup>22</sup> Stephanie L. Bunting, Note, *Unsightly Politics: Aesthetics, Sign Ordinances, and Homeowners' Speech in City of Ladue v. Gilleo*, 20 HARV. ENVTL. L. REV. 473, 480 (1996).

<sup>23</sup> *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (citation omitted)).

<sup>24</sup> See AM. PLANNING ASS'N, *supra* note 21. Although little empirical data exists to confirm that sign control actually increases traffic safety, courts readily accept the justification. See, e.g., *Metromedia*, 453 U.S. at 507–09. This is especially true in cases involving billboards, which "by their very nature . . . are designed to distract drivers." *Major Media of Se., Inc. v. City of Raleigh*, 621 F. Supp. 1446, 1451 (E.D.N.C. 1985).

<sup>25</sup> See MANDELKER, *supra* note 5, at 5, 12–14.

<sup>26</sup> See Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53 (2000) ("Today, virtually every free speech case turns on the application of the distinction between content-based and content-neutral laws."); Mark Tushnet, *The Supreme Court and Its First Amendment Constituency*, 44 HASTINGS L.J. 881, 882 (1993) ("Today the central organizing concept of First Amendment doctrine is the distinction between content-based regulations and content-neutral ones.").

without regard to the content of the speech contained in the signage.<sup>27</sup> The clearest examples of content-neutral regulations are general time, place, and manner restrictions.<sup>28</sup> For example, a sign ordinance may prohibit temporary signs from being posted for more than two months (time restriction); it may prohibit signs from being placed within fifteen feet of a road (place restriction); and it may require that all signs be limited in size to 200 square feet (manner restriction).<sup>29</sup> Content-neutral regulations, if challenged, are almost always upheld as constitutional.<sup>30</sup> These regulations are subject to a lenient, intermediate level of judicial scrutiny.<sup>31</sup> Under this standard, a municipality must demonstrate that the restrictions on speech further a substantial government interest, that the interest is unrelated to the suppression of speech, and that the restrictions are not significantly broader than necessary to further the interest or that ample alternative methods of communicating the message have been left open.<sup>32</sup> Courts routinely qualify community aesthetics and traffic safety as “substantial” government interests.<sup>33</sup>

By contrast, content-based regulations are those that restrict signage based on the message conveyed by the signage or the identity of the speaker displaying the signage.<sup>34</sup> An example of a content-based regulation is a sign ordinance that requires political signs to obtain a permit before being erected, but that exempts time and temperature signs from this permit requirement.<sup>35</sup> Content-based regulations are less favorable than content-neutral regulations, and are presumptively invalid.<sup>36</sup> While some content-based regulations of speech are permissible, the vast majority of these regulations, if challenged, are

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<sup>27</sup> See DEP’T OF STATE, N.Y. STATE, *supra* note 17.

<sup>28</sup> *Id.* at 2–3.

<sup>29</sup> *Id.*

<sup>30</sup> Tushnet, *supra* note 26 (“Content-neutral regulations come to the Court with a strong presumption in their favor[.]”).

<sup>31</sup> See Weinstein, *supra* note 21, at 123.

<sup>32</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989). However, to satisfy intermediate scrutiny, municipal sign regulation “need not be the least restrictive or least intrusive means of doing so.” *Id.* at 798.

<sup>33</sup> See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08 (1981) (plurality opinion); *Ballen v. City of Redmond*, 466 F.3d 736, 742 (9th Cir. 2006).

<sup>34</sup> See DEP’T OF STATE, N.Y. STATE, *supra* note 17, at 3. Restrictions based on the identity of the speaker invoke the principle of “viewpoint neutrality.” See *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004). This principle demands that the municipality not suppress speech “where the real rationale for the restriction is disagreement with the underlying ideology or perspective that the speech expresses.” *Id.*

<sup>35</sup> See DEP’T OF STATE, N.Y. STATE, *supra* note 17, at 3. This regulation is content-based because the municipality is subjecting one type of speech (that contained in political signs) to greater restrictions than another type of speech (that contained in time and temperature signs) based solely on the content of the message within the sign.

<sup>36</sup> Tushnet, *supra* note 26 (“Virtually all content-based regulations will be invalidated [by the Supreme Court.]”).

declared unconstitutional.<sup>37</sup> Content-based regulations are subject to the strictest level of constitutional scrutiny and will be sustained only if a municipality meets its burden of proving that the restrictions on speech advance a compelling state interest and are narrowly tailored to serve that interest.<sup>38</sup> Courts have routinely held that traffic safety and community aesthetics do not qualify as “compelling” state interests.<sup>39</sup>

#### B. *Metromedia, Inc. v. City of San Diego*

Although municipalities have been regulating outdoor signage since the early twentieth century, it was not until 1981 that the Supreme Court first grappled with the free speech issues raised by sign regulations.<sup>40</sup> The sign ordinance at issue in *Metromedia, Inc. v. City of San Diego* imposed substantial limitations on the display of outdoor billboards.<sup>41</sup> Specifically, the ordinance permitted on-premise commercial advertising, but prohibited most other forms of commercial advertising and most noncommercial communications.<sup>42</sup> Noncommercial messages were permitted only if they fell into one of twelve specified exemptions, which included signs with religious symbols and signs depicting time and temperature.<sup>43</sup> *Metromedia*, a leader in the outdoor advertising business, sued the city, arguing that the ordinance violated the First Amendment and that the ordinance’s threatened destruction of the outdoor billboard industry was constitutionally prohibited.<sup>44</sup>

In an opinion delivered by Justice White and joined by Justices Stewart, Marshall, and Powell, a plurality of the Court found that the San Diego ordinance unconstitutionally discriminated among types of speech based on content.<sup>45</sup> First, the plurality held that by allowing on-premise commercial signs but not on-premise noncommercial signs, the ordinance impermissibly privileged commercial speech over

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<sup>37</sup> *Id.* at 882 & n.4 (citing *Burson v. Freeman*, 504 U.S. 191 (1992), as a rare example of a decision upholding a content-based regulation); see also Weinstein, *supra* note 21, at 122.

<sup>38</sup> *Boos v. Barry*, 485 U.S. 312, 321 (1988); see Weinstein, *supra* note 21, at 123.

<sup>39</sup> See, e.g., *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 822–23 (1984); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267–68 (11th Cir. 2005); *Gilleo v. City of Ladue*, 986 F.2d 1180, 1183–84 (8th Cir. 1993), *aff’d*, 512 U.S. 43 (1994).

<sup>40</sup> Sign regulation cases in the early twentieth century did not involve the free speech concerns of modern sign cases. Instead, these earlier cases primarily involved due process and equal protection challenges. See, e.g., *Packer Corp. v. Utah*, 285 U.S. 105 (1932); *St. Louis Poster Adver. Co. v. St. Louis*, 249 U.S. 269 (1919); *Thomas Cusack Co. v. City of Chi.*, 242 U.S. 526 (1917).

<sup>41</sup> *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 493 (1981) (plurality opinion).

<sup>42</sup> *Id.* at 494–96.

<sup>43</sup> *Id.* at 494–95.

<sup>44</sup> *Id.* at 496–98.

<sup>45</sup> See *id.* at 513–16, 521.



noncommercial speech.<sup>46</sup> The plurality noted that this approach was incompatible with then-recent First Amendment case law, which consistently afforded commercial speech less protection than noncommercial speech.<sup>47</sup> Second, the plurality held that by exempting only select categories of noncommercial signage, including religious and historical signs, from regulation, the ordinance impermissibly distinguished between various categories of noncommercial speech.<sup>48</sup> However, the plurality concluded that the ordinance's content-based distinctions within the category of commercial speech were permissible, because they directly advanced San Diego's aesthetic and safety interests.<sup>49</sup> In sum, the *Metromedia* plurality indicated that content-based distinctions within the category of commercial speech were permissible, but similar distinctions favoring commercial speech over noncommercial speech or favoring certain speech within the category of noncommercial speech were impermissible.

In a concurring opinion joined by Justice Blackman, Justice Brennan agreed with the plurality's conclusion that the San Diego ordinance was unconstitutional, but for a different reason.<sup>50</sup> Justice Brennan believed the ordinance to be in violation of the First Amendment because it had the practical effect of eliminating the billboard as a medium of communication within the city, and San Diego lacked a substantial government interest for the ban.<sup>51</sup> Perhaps most notable from Justice Brennan's opinion was his explicit rejection of the first basis for the plurality's holding—that is, that it was impermissible for a sign ordinance to favor commercial over noncommercial speech.<sup>52</sup> Justice Brennan seemed to suggest that content-based distinctions favoring noncommercial speech over commercial speech were the same as content-based distinctions within the category of noncommercial

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<sup>46</sup> *Id.* at 513.

<sup>47</sup> *Id.* ("San Diego effectively inverts this judgment, by affording a greater degree of protection to commercial than to noncommercial speech. . . . [T]he city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.").

<sup>48</sup> *See id.* at 514–15 ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse . . . . Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.").

<sup>49</sup> *Id.* at 507–12. The plurality's decision as to the regulation of commercial speech was expressly joined by Justice Stevens. *See id.* at 541 (Stevens, J., dissenting in part).

<sup>50</sup> *See id.* at 521–40 (Brennan, J., concurring in the judgment).

<sup>51</sup> *Id.* at 525–34 ("[T]he city has failed to show that its asserted interest in aesthetics is sufficiently substantial in the commercial and industrial areas of San Diego.").

<sup>52</sup> *Id.* at 536 ("I cannot agree with the plurality's view that an ordinance totally banning commercial billboards but allowing noncommercial billboards would be constitutional. For me, such an ordinance raises First Amendment problems at least as serious as those raised by a total ban, for it gives city officials the right—before approving a billboard—to determine whether the proposed message is 'commercial' or 'noncommercial.'" (footnote omitted)).

speech or within the category of commercial speech.<sup>53</sup> This was especially true, Justice Brennan noted, because the distinction between the two forms of speech was usually “anything but clear.”<sup>54</sup>

The three dissenting opinions—authored individually by Justice Stevens, Chief Justice Burger, and Justice Rehnquist—all rejected the plurality’s views that the San Diego ordinance was content-based and that it resulted in an unconstitutional ban of an entire medium of communication.<sup>55</sup> Justice Stevens believed the prohibition of billboards to be a constitutionally permissible use of San Diego’s police power.<sup>56</sup> Chief Justice Burger thought that the subject matter at hand, including protecting the safety and enhancing the environment of a city, was best left to local government.<sup>57</sup> Finally, Justice Rehnquist felt that a total prohibition on billboards within a community was justifiable on aesthetic grounds alone.<sup>58</sup>

*Metromedia* was a severely fractured decision, described by Justice Rehnquist as a “virtual Tower of Babel, from which no definitive principles can be clearly drawn.”<sup>59</sup> Nonetheless, the case remains the Supreme Court’s leading authority on First Amendment issues in billboard and sign regulation. By approving a bifurcated approach to sign regulation based on whether the message of a sign is commercial or noncommercial in nature, the *Metromedia* plurality endorsed the distinction between commercial and noncommercial speech.<sup>60</sup> At the opposite end of the spectrum, Justice Brennan’s concurrence strongly critiqued the distinction as content-based.<sup>61</sup> It is the latter view which has gained increasing popularity in Supreme Court case law.

### C. *Post-Metromedia Developments in Free Speech Law*

Modern Supreme Court cases indicate a trend in favor of elevating commercial speech to a similar constitutional status as noncommercial speech. Underlying this trend is the Court’s demand for a stricter content-neutrality standard. In *City of Cincinnati v. Discovery Network*,

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<sup>53</sup> *Id.* at 534–40.

<sup>54</sup> *Id.* at 536.

<sup>55</sup> See *id.* at 540–55 (Stevens, J., dissenting in part); *id.* at 555–69 (Burger, C.J., dissenting); *id.* at 569–70 (Rehnquist, J., dissenting).

<sup>56</sup> *Id.* at 542 (Stevens, J., dissenting in part) (answering affirmatively the plurality’s question of “whether a city may entirely ban one medium of communication”).

<sup>57</sup> *Id.* at 569 (Burger, C.J., dissenting) (“The Court today leaves the modern metropolis with a series of Hobson’s choices and rejects basic concepts of federalism by denying to every community the important powers reserved to the people and the States by the Constitution.”).

<sup>58</sup> *Id.* at 570 (Rehnquist, J., dissenting).

<sup>59</sup> *Id.* at 569.

<sup>60</sup> See *supra* text accompanying notes 45–49.

<sup>61</sup> See *supra* notes 52–54 and accompanying text.

*Inc.*, the Court went as far as to hold that commercial speech must be regulated on par with noncommercial speech.<sup>62</sup> At issue in the case was a city ordinance which banned the dissemination of commercial handbills while allowing the dissemination of noncommercial handbills.<sup>63</sup> After commercial newsrack companies brought suit against the city on First Amendment grounds, the Court concluded that Cincinnati's categorical ban on commercial handbills attached too much importance to the distinction between commercial and noncommercial speech.<sup>64</sup> The Court observed that the city's noncommercial newsracks were just as damaging to community aesthetics as its commercial newsracks, and thus the ban on commercial handbills did not directly advance the city's purported aesthetic and safety interests.<sup>65</sup> For this reason, the Court held, in cases where neither commercial speech nor noncommercial speech is intrinsically more harmful to the public, the distinction between the two speech forms is impermissible.<sup>66</sup>

Three years later, the Court in *44 Liquormart, Inc. v. Rhode Island* invalidated a state law that banned the advertising of retail liquor prices.<sup>67</sup> The Court found that a complete prohibition on such commercial signage would not advance the substantial state interest in temperance.<sup>68</sup> Rather, Rhode Island's goal of promoting temperance would more likely be achieved by alternative forms of regulation that

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<sup>62</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430–31 (1993).

<sup>63</sup> *Id.* at 413 n.3 (“No person shall throw or deposit any commercial or non-commercial handbill in or upon any sidewalk, street or other public place within the city. Nor shall any person hand out or distribute or sell any commercial handbill in any public place.” (quoting CINCINNATI, OHIO MUNICIPAL CODE § 714-23 (1992)) (internal quotation marks omitted)).

<sup>64</sup> *Id.* at 419 (“[T]he city’s argument [regarding its aesthetic and safety interests] attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.”).

<sup>65</sup> *Id.* at 418 (“We accept the validity of the city’s proposition, but consider [safety and community aesthetics] an insufficient justification for the discrimination against respondents’ use of [commercial] newsracks that are no more harmful than the permitted [noncommercial] newsracks, and have only a minimal impact on the overall number of newsracks on the city’s sidewalks.”).

<sup>66</sup> *Id.* at 424 (“Not only does Cincinnati’s categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city’s admittedly legitimate interests [in community aesthetics and safety].”); *see also id.* at 437 (Blackmun, J., concurring) (noting that the valuable handbills at issue highlighted the “absurdity of treating all commercial speech as less valuable than all noncommercial speech,” as it is “highly unlikely that according truthful, noncoercive commercial speech the full protection of the First Amendment will erode the level of that protection”).

<sup>67</sup> *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

<sup>68</sup> *Id.* at 507 (“Thus, the State’s own showing reveals that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous. As is evident, any conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of ‘speculation or conjecture’ that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State’s asserted interest.”).

did not involve any restrictions on speech.<sup>69</sup> Critical to the Court's analysis was its view that commercial speech regulations are not all subject to a similar form of constitutional review simply because they target a similar category of expression.<sup>70</sup> The Court held that if a state regulates commercial speech to protect consumers from misleading or deceptive sales practices, then the traditional intermediate-scrutiny standard of review for regulations on commercial speech should apply.<sup>71</sup> However, if a state prohibits the dissemination of "truthful, nonmisleading commercial messages" for reasons unrelated to the preservation of a fair bargaining process, then a "special care" standard of review should apply.<sup>72</sup> The Court noted that the "typical reason" why commercial speech can be subject to greater government regulation than noncommercial speech is that a state has an interest in protecting its citizen consumers from harms that may result from commercial advertising.<sup>73</sup> Bans on speech that target truthful, nonmisleading commercial messages fail to advance this goal.<sup>74</sup>

44 *Liquormart* was the first case to question the soundness of the supposed "commonsense differences" used to justify affording less First Amendment protection to commercial speech than to noncommercial speech.<sup>75</sup> It announced "a standard reasonably close to strict scrutiny" that "would nearly equate the First Amendment status of commercial speech with that of noncommercial speech in cases involving . . . a content-based prohibition on communication."<sup>76</sup> Justice Thomas was perhaps the most overt when he opined that he did not see any "philosophical or historical basis" for affording less value to commercial speech than to noncommercial speech.<sup>77</sup> Echoing these sentiments, the Court most recently held in *Sorrell v. IMS Health Inc.* that content- and speaker-based restrictions on commercial speech should be subject to heightened scrutiny—a more stringent standard than the typical intermediate-scrutiny level of review for commercial speech.<sup>78</sup>

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<sup>69</sup> See *id.* (discussing alternative forms of regulation including higher prices by means of direct regulation or increased taxation and educational campaigns focused on the problems of drinking).

<sup>70</sup> *Id.* at 501 ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.").

<sup>71</sup> See *id.*

<sup>72</sup> *Id.* at 503–04; see also *id.* at 501 (noting that in these cases, "there is far less reason to depart from the rigorous review that the First Amendment generally demands").

<sup>73</sup> *Id.* at 502 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)).

<sup>74</sup> *Id.* at 502–03.

<sup>75</sup> *Id.* at 498–99; see *supra* text accompanying note 73.

<sup>76</sup> Weinstein, *supra* note 21, at 128.

<sup>77</sup> 44 *Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in the judgment).

<sup>78</sup> 131 S. Ct. 2653, 2664 (2011) (relying on *Discovery Network*, 507 U.S. 410, to support a heightened scrutiny standard).



In light of the continued elevation of commercial speech in modern Supreme Court case law, it is unclear whether the line between commercial and noncommercial speech remains an important or necessary distinction in sign regulation today. Modern commercial speech cases stand in stark contrast to the views espoused by the *Metromedia* plurality over three decades ago.<sup>79</sup> Although the *Metromedia* plurality endorsed the distinction between the two speech forms, it had done so relying on free speech cases from the 1970s, which supported a lower constitutional status for commercial speech.<sup>80</sup> The *Metromedia* Justices did not have *Discovery Network*, *44 Liquormart*, and *Sorrell* at their disposal in 1981. Moreover, in endorsing the different treatment of commercial and noncommercial speech, the *Metromedia* plurality emphasized the “common-sense” nature of the distinction between the two speech forms.<sup>81</sup> But in actuality, as Justice Brennan succinctly noted, the distinction was “anything but clear.”<sup>82</sup> This statement holds even more true today, where modern advertising has further convoluted the status of the two speech forms.<sup>83</sup>

Part II of this Note argues that the distinction between commercial and noncommercial speech should be eliminated in at least one context: the regulation of outdoor murals.

## II. OUTDOOR MURAL REGULATION: REEXAMINING THE COMMERCIAL/NONCOMMERCIAL SPEECH DISTINCTION

Outdoor murals—“painting[s] or other work[s] of art executed directly on a wall”<sup>84</sup>—are unique in that they can be classified as

<sup>79</sup> See *supra* text accompanying notes 45–49.

<sup>80</sup> See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505–06 (1981) (plurality opinion) (citing, for example, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), for the proposition that “commercial and noncommercial speech [are not equated] for First Amendment purposes”). At the time of the *Metromedia* decision, the commercial speech doctrine had been in existence for only six years.

<sup>81</sup> *Id.* at 506 (“[W]e again recognize[] the common-sense and legal distinction between speech proposing a commercial transaction and other varieties of speech.”).

<sup>82</sup> *Id.* at 536 (Brennan, J., concurring in the judgment). In fact, the Supreme Court recognized the difficulty with distinguishing between the two speech forms at the moment the commercial speech doctrine was born. See *Va. State Bd. of Pharmacy*, 425 U.S. at 787 (Rehnquist, J., dissenting) (“There are undoubted difficulties with an effort to draw a bright line between ‘commercial speech’ on the one hand and ‘protected speech’ on the other . . .”).

<sup>83</sup> See, e.g., Darrel Menthe, *Writing on the Wall: The Impending Demise of Modern Sign Regulation Under the First Amendment and State Constitutions*, 18 GEO. MASON U. C.R. L.J. 1, 26 (2007) (noting that “there is, arguably, a complete lack of a standard by which to evaluate [the] distinction” between these two forms of speech).

<sup>84</sup> *Mural Definition*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/mural?q=mural> (last visited Oct. 27, 2013). This Note is limited in scope to outdoor murals located on private property. Murals located on government property face unique issues and are governed by different case law.

artwork, signage, or both, depending on their content and the municipality in which they reside. Most commonly, a municipality's sign ordinance will classify a mural as signage only when the mural contains "commercial speech."<sup>85</sup> For example, Arlington County's sign ordinance mandates that outdoor murals include "no picture, symbol or device of any kind that relates to a commercial business, product or service offered on the premises where the [mural] is located."<sup>86</sup> If a mural does include this prohibited commercial content, the county classifies the mural as signage and subjects it to all of the restrictions and requirements of the sign ordinance.<sup>87</sup> Conversely, if the mural contains solely "noncommercial speech," the county classifies the mural as a "work of visual art" and exempts the mural from the specifications of the sign ordinance.<sup>88</sup>

Disputes between mural owners and local zoning authorities over whether a particular outdoor mural qualifies as artwork or signage have become increasingly common in recent years.<sup>89</sup> Four of these disputes have made their way to court: *Complete Angler, LLC v. City of Clearwater, Florida*;<sup>90</sup> *City of Tipp City v. Dakin*;<sup>91</sup> *Neighborhood Enterprises, Inc. v. City of St. Louis*;<sup>92</sup> and *Wag More Dogs, Ltd. Liability Corp. v. Cozart*.<sup>93</sup> Decided respectively in 2009, 2010, 2011, and 2012, the four cases involve similar fact patterns; yet, the courts embarked on varied analyses and arrived at different holdings. Though the murals at issue in the first three cases were ultimately permitted to remain in place, the mural in the last of the four cases, *Wag More Dogs*, was ordered removed by the county.<sup>94</sup> The various inconsistencies among these four mural cases are predominantly attributable to two factors, neither of which is unique to mural case law, and both of which stem in

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<sup>85</sup> See *supra* note 2.

<sup>86</sup> ARLINGTON, VA., ZONING ORDINANCE art. 13, § 13.2.3.C (2013), available at [http://buildingarlington.s3.amazonaws.com/wp-content/uploads/2013/06/ACZO\\_Adopted-05-18-2013\\_op.pdf](http://buildingarlington.s3.amazonaws.com/wp-content/uploads/2013/06/ACZO_Adopted-05-18-2013_op.pdf).

<sup>87</sup> See *id.*

<sup>88</sup> See *id.* Assuming, of course, that the other requirements for exemption are met. *Id.*

<sup>89</sup> See, e.g., *supra* notes 11–12. These disputes follow a typical pattern, reflected in the Sally/Wanda dispute from this Note's Introduction: The owner of a commercial shop commissions an artist to paint a mural on the exterior wall of her building. The owner believes the mural to be a work of art. "Artwork" is categorically exempted in the local sign ordinance from some or all of the stringent size and other restrictions placed on outdoor signage. A local zoning official believes the shop owner's mural falls outside the definition of "artwork," and is thus signage. Because the mural violates one or more of the restrictions in the sign ordinance, the zoning official orders its removal.

<sup>90</sup> 607 F. Supp. 2d 1326 (M.D. Fla. 2009).

<sup>91</sup> 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484.

<sup>92</sup> 644 F.3d 728 (8th Cir. 2011).

<sup>93</sup> 680 F.3d 359 (4th Cir. 2012).

<sup>94</sup> For a discussion of the facts and holdings of these cases, see discussion *infra* Part II.A–B.

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part from the divisive *Metromedia* decision, as well as post-*Metromedia* developments in free speech law.<sup>95</sup>

#### A. Sources of Inconsistency in Mural Case Law

##### 1. Defining Commercial Speech

The first factor contributing to the inconsistency in mural case law is the manner in which courts define “commercial speech.” Some courts have adopted very narrow definitions of commercial speech, such as “speech that does no more than propose a commercial transaction”<sup>96</sup> and “expression related solely to the economic interests of the speaker and its audience.”<sup>97</sup> Other courts, by contrast, have recognized a broader definition of commercial speech as encompassing speech that “cannot be characterized merely as proposals to engage in commercial transactions.”<sup>98</sup>

The two narrow definitions were used by the court in *Complete Angler* in holding that a marine-themed mural on the wall of a bait and tackle shop qualified as artwork rather than signage because the mural contained noncommercial speech.<sup>99</sup> The court reasoned that although the mural might occasionally inspire commercial activity, namely the purchase of bait and tackle from the mural owner’s shop, the mural’s function was not limited to this pursuit.<sup>100</sup> Rather, the mural also depicted a reflection of a local artist’s impression of the environment

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<sup>95</sup> For a discussion of the five opinions in the *Metromedia* decision, see *supra* Part I.B. For a discussion of post-*Metromedia* developments in free speech law, namely the commercial speech and content neutrality doctrines, see *supra* Part I.C.

<sup>96</sup> See, e.g., *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); see also *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012) (providing same definition).

<sup>97</sup> See, e.g., *El Dia, Inc. v. P.R. Dep’t of Consumer Affairs*, 413 F.3d 110, 115 (1st Cir. 2005) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980)); *Hoover v. Morales*, 164 F.3d 221, 225 (5th Cir. 1998) (same).

<sup>98</sup> See, e.g., *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 412–13 (D.C. Cir. 2012) (quoting another source) (internal quotation marks omitted); *Wag More Dogs*, 680 F.3d at 369–70 (quoting another source) (internal quotation marks omitted); see also *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 274 (2d Cir. 2010), *aff’d*, 131 S. Ct. 2653 (2011); *United States v. Wenger*, 427 F.3d 840, 846–47 (10th Cir. 2005). All of these cases rely on *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983) (adopting a more liberal and comprehensive approach to defining commercial speech that looks to a combination of factors).

<sup>99</sup> *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1332 (M.D. Fla. 2009).

<sup>100</sup> *Id.*

surrounding the bait and tackle shop.<sup>101</sup> In this sense, the speech within the mural did “more than propose a commercial transaction.”<sup>102</sup>

The Fourth Circuit in *Wag More Dogs* rejected this reasoning in favor of a broader definition of commercial speech.<sup>103</sup> The court easily could have found, similar to the court’s finding in *Complete Angler*, that a dog-themed mural on the wall of a canine daycare center situated near a local dog park depicted an artist’s reflection of the community’s appreciation for dogs, and thus did more than simply propose a commercial transaction. Instead, the court stretched the definition of commercial speech to include speech beyond “the core notion of commercial speech.”<sup>104</sup> The court held that the dog-themed imagery on the mural constituted commercial speech because the mural, which included cartoon dogs resembling the business’s logo, was meant to attract potential customers from the nearby dog park, thus potentially economically benefiting the mural owner.<sup>105</sup>

## 2. Analyzing Content Neutrality

The second factor contributing to the inconsistency in mural case law is that courts are divided over the manner in which to analyze the content neutrality of a sign ordinance. While some courts have adopted a strict approach that looks solely at the language of the sign ordinance,<sup>106</sup> other courts have adopted a more liberal approach that looks to a municipality’s asserted purpose for enacting a given regulation.<sup>107</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> Thus, it did not satisfy one of the narrow definitions of commercial speech: “speech that does no more than propose a commercial transaction.” *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001).

<sup>103</sup> See *Wag More Dogs*, 680 F.3d at 369–70 (“*Bolger* recognized a broader definition of commercial speech, encompassing speech that ‘cannot be characterized merely as proposals to engage in commercial transactions.’ . . . The three factors relied on by the Court in *Bolger* similarly counsel classifying *Wag More Dogs*’ painting as commercial speech.”).

<sup>104</sup> *Id.* at 370.

<sup>105</sup> See *id.*

<sup>106</sup> See, e.g., *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736–37 (8th Cir. 2011); *Serv. Emps. Int’l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010); *Ballen v. City of Redmond*, 466 F.3d 736, 742–44 (9th Cir. 2006); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259–62 (11th Cir. 2005); *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1053–54 (3d Cir. 1994); *Nat’l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556–57 (2d Cir. 1990).

<sup>107</sup> See, e.g., *Asgeirsson v. Abbott*, 696 F.3d 454, 460 n.6 (5th Cir. 2012); *Wag More Dogs*, 680 F.3d at 366–69; *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621–23 (6th Cir. 2009); *Globe Newspaper Co. v. Beacon Hill Architectural Comm’n*, 100 F.3d 175, 183 (1st Cir. 1996); *Scadron v. City of Des Plaines*, 734 F. Supp. 1437, 1445–46 (N.D. Ill. 1990), *aff’d*, 989 F.2d 502 (7th Cir. 1993).



The strict approach to content neutrality is the majority approach in existing mural case law. Consider again the case of *Complete Angler*. At issue in the case was a marine-themed mural on the exterior wall of a bait and tackle shop.<sup>108</sup> The mural depicted sailfish, dolphins, and waterways.<sup>109</sup> Clearwater, a resort community, had a sign ordinance that prohibited various types of signs, required a permit and development review process for others, and exempted twenty-six categories of signs from review altogether.<sup>110</sup> One such exemption was made for artwork.<sup>111</sup> Believing the marine-themed mural to be commercial signage, the city issued plaintiffs a notice citing various violations of the sign ordinance and ordering the mural's removal.<sup>112</sup> The *Complete Angler* court held that Clearwater's application of its sign ordinance was content-based because a zoning official had to examine the content of the marine-themed mural in order to determine whether it was a sign or artwork.<sup>113</sup> After determining that the mural was a sign because it contained "commercial speech," the city then declined to extend protections that would have been extended to a mural containing alternative content, such as imagery of kids playing in a park.<sup>114</sup>

Following similar logic, the court in *Neighborhood Enterprises* held that the exemptions in St. Louis's sign ordinance were content-based because they made impermissible distinctions based solely on the content or message conveyed by a given sign.<sup>115</sup> St. Louis's sign ordinance exempted from regulation, among other things, "[w]orks of art which in no way identify a product."<sup>116</sup> Plaintiff, a critic of St. Louis's eminent domain practices, commissioned a mural on the wall of a building containing the words "End Eminent Domain Abuse" inside a red circle with a slash.<sup>117</sup> The city declared the mural an "illegal sign."<sup>118</sup>

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<sup>108</sup> *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1329 (M.D. Fla. 2009).

<sup>109</sup> *Id.* at 1328–29.

<sup>110</sup> *Id.* at 1330–31.

<sup>111</sup> *See id.* at 1331. The exemption defined artwork as "drawings, pictures, symbols, paintings or sculpture which do not identify a product or business and which are not displayed in conjunction with a commercial, for profit or nonprofit enterprise." *Id.* (citation omitted).

<sup>112</sup> The city argued that the marine-themed mural was displayed "in conjunction with" plaintiffs' place of business, and thus was commercial speech, not artwork. *See id.* at 1332.

<sup>113</sup> *Id.* at 1333 ("Yet in concluding that the [mural was] subject to the permit requirement or spatial constraints, [the city] necessarily examined [its] content and determined that [it was not] art work, a holiday decoration, or any other sign exempted under the Code.").

<sup>114</sup> *See id.* at 1332–33.

<sup>115</sup> *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011) ("[T]he zoning code's definition of 'sign' is impermissibly content-based because . . . to determine whether a particular object qualifies as a 'sign' . . . and is therefore subject to the regulations, or is instead a 'non-sign' . . . or [is otherwise] exempt from the sign regulations . . . one must look at the content of the object." (citations omitted)).

<sup>116</sup> *Id.* at 739.

<sup>117</sup> *Id.* at 731 (internal quotation marks omitted).

<sup>118</sup> *Id.* (internal quotation marks omitted). The design of the mural was similar to the design

In holding that the ordinance's exemptions to the definition of "sign" were content-based, the Eighth Circuit noted that a mural in the same location and with the same size and dimensions as plaintiff's mural would not be subject to regulation if it contained alternative content, such as a religious subject.<sup>119</sup> The court reasoned that treating one mural as signage and another as artwork based solely on the content of the murals was a clear example of a content-based regulation on speech.<sup>120</sup>

In contrast to the strict approach to content neutrality seen in *Complete Angler* and *Neighborhood Enterprises* is the more liberal approach reflected in *Wag More Dogs*. This latter approach is the minority approach in existing mural case law. At issue in *Wag More Dogs* was Arlington County's sign ordinance, which, similar to St. Louis's, included various exemptions from the definition of "sign."<sup>121</sup> One such exemption was made for "decorative art," which was left wholly unregulated.<sup>122</sup> After determining that plaintiff's dog-themed mural qualified as signage rather than an exempt work of decorative art because it contained "commercial speech," the county zoning administrator subjected the mural to restrictions placed on signage that the mural would not have been subjected to had it contained alternative content.<sup>123</sup> Nonetheless, the Fourth Circuit held that the sign ordinance was content-neutral, both facially and as applied.<sup>124</sup> The court gave significant weight to the government's purpose in enacting the regulations, observing that Arlington County adopted the sign ordinance to regulate land use, not to prohibit a particular disfavored message.<sup>125</sup>

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that the Missouri Eminent Domain Abuse Coalition, an organization with whom the plaintiff co-missioned the mural, used in its advertising and marketing materials. *See id.*

<sup>119</sup> *See id.* at 736–37.

<sup>120</sup> *Id.* at 737. The court refused to accept St. Louis's justification for enacting these content-based regulations on speech. *See id.* This disregard for government intent is one of the defining features of the "strict" approach to content neutrality. *See cases cited supra* note 106 and accompanying text.

<sup>121</sup> *See* Brief of Appellant at 2, *Wag More Dogs, Ltd. Liab. Corp. v. Cozart*, 680 F.3d 359 (4th Cir. 2012) (No. 11-1226), 2011 WL 2534178, at \*2.

<sup>122</sup> *Id.* (internal quotation marks omitted).

<sup>123</sup> *See Wag More Dogs*, 680 F.3d at 369–70 (noting that plaintiff's mural would have been allowed to remain had it contained "noncommercial messages" but holding that the mural contained commercial speech).

<sup>124</sup> *Id.* ("Deeming the Sign Ordinance content neutral, we now readily conclude that it satisfies intermediate scrutiny. . . . As applied to *Wag More Dogs*, the Sign Ordinance's regulation of commercial speech satisfies intermediate scrutiny.").

<sup>125</sup> *Id.* at 368 ("On this score, then, the Sign Ordinance's content neutrality is incandescent.").

B. *Eliminating the Commercial/Noncommercial Speech Distinction*

The aforementioned inconsistencies in mural case law can be significantly reduced by eliminating the distinction between commercial and noncommercial speech in the context of outdoor mural regulation. Regulating all murals, regardless of their content, in the same manner would render moot the first source of inconsistency (that is, the definition of commercial speech) while appealing to the majority, and better, judicial approach for the second source of inconsistency (that is, how to analyze the content neutrality of a sign ordinance). Moreover, it would reflect a more modern regulatory regime that appeals to recent advances in the commercial speech and content neutrality doctrines. This section elaborates on these points and sets forth additional legal and policy-based arguments for regulating all murals, regardless of the speech they contain, in an equal fashion.

## 1. Constitutional Flaws

The principal reason why the distinction between commercial and noncommercial speech should be eliminated in the context of outdoor mural regulation is that the distinction, when applied, constitutes a content-based regulation of speech. Explained simply, if a zoning official subjects one mural to stringent outdoor signage restrictions because the mural contains commercial speech, but exempts another mural from these restrictions because the latter mural contains noncommercial speech, this difference in treatment is a content-based regulation of speech.

The courts in three of the four mural cases—*Complete Angler*, *Neighborhood Enterprises*, and *Tipp City*—would support this view. Each of these courts embraced the stricter approach to evaluating the content neutrality of a sign ordinance.<sup>126</sup> This approach is the better approach in that it is more in line with modern Supreme Court case law, which indicates a desire for a stricter content-neutrality standard.<sup>127</sup> In *Discovery Network*, for instance, the Court embraced a strict approach to content neutrality in holding that Cincinnati's sign ordinance was content-based because a government official had to look at the content of the papers in a given newsrack in order to determine whether the

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<sup>126</sup> See *supra* Part II.A.2.

<sup>127</sup> Brian J. Connolly, Note, *Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation*, 2 MICH. J. ENVTL. & ADMIN. L. 185, 209 (2012) (“[S]ince *Metromedia*, there has been a gradual increase in the degree of content neutrality required of governmental regulations of speech. This gradual increase suggests that, to comply with the Supreme Court’s recent statements on content neutrality, the content neutrality requirement in sign regulation should be more stringent . . .”).

newsrack was subject to the ordinance's ban.<sup>128</sup> The Court specifically rejected a content-neutrality analysis that looks to a government's justification for a given regulation, especially when that justification is the "naked assertion" that commercial speech has low value.<sup>129</sup> Similarly, the Court in *Sorrell* found that because the statute in question would require a government enforcement authority to examine the content of marketing materials before determining whether the protected information was being used for marketing or for some other purpose, the regulation of commercial speech was content-based.<sup>130</sup>

Not only does the strict approach to content neutrality embrace modern, post-*Metromedia* Supreme Court precedent, but this approach also avoids the reliance on community aesthetics and traffic safety as justifications for distinguishing between commercial and noncommercial speech. These justifications are successfully utilized only in those cases where a more liberal content-neutrality standard is applied (and thus, where sign ordinances are more likely to be upheld as content-neutral), because content-neutral ordinances need only satisfy a test of intermediate scrutiny where community aesthetics and traffic safety qualify as substantial government interests.<sup>131</sup> The problem with relying on community aesthetics and traffic safety, the so-called "twin goals" of sign regulation,<sup>132</sup> to justify the commercial/noncommercial speech distinction as applied to outdoor murals is that maintaining the distinction fails to advance either goal. At best, the distinction has a neutral effect on these goals. At worst, the distinction may be detrimental to these goals.

Consider *Wag More Dogs*, the sole mural case to embrace the more liberal content-neutrality standard.<sup>133</sup> After Arlington County's zoning administrator ordered plaintiff business owner to remove the dog-themed mural on the wall of her canine daycare shop because its

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<sup>128</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) ("Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content based.'"). For a more detailed discussion of *Discovery Network*, see *supra* Part I.C.

<sup>129</sup> See *Discovery Network*, 507 U.S. at 429–30.

<sup>130</sup> *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663–64 (2011) ("Given the legislature's expressed statement of purpose, it is apparent that [the statute] imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint."). In embracing a strict approach to content neutrality, the *Sorrell* Court relied on *Discovery Network*. See *id.* at 2664 (citing *Discovery Network*, 507 U.S. at 418, to support the proposition that heightened judicial scrutiny is warranted when content-based restrictions are placed on commercial speech).

<sup>131</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989); see also *supra* Part I.A.2 (explaining the differences between content-based and content-neutral regulations within sign ordinances).

<sup>132</sup> *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (plurality opinion); see also *supra* Part I.A.1 (discussing these two justifications for sign regulation).

<sup>133</sup> See *supra* notes 121–25 and accompanying text.



imagery allegedly constituted commercial speech,<sup>134</sup> plaintiff commissioned two artists to paint a new mural in its place.<sup>135</sup> The replacement mural depicted large bird-like creatures nesting in tires hanging from a tree.<sup>136</sup> While the community adored the “attractive,” original mural, deeming it a welcome and fitting addition to the nearby dog park,<sup>137</sup> many local residents expressed their dislike of the replacement mural.<sup>138</sup>

Perhaps most concerning with this case is that the Fourth Circuit relied entirely on the twin goals of sign regulation in holding that Arlington County’s sign ordinance satisfied intermediate scrutiny.<sup>139</sup> Focusing heavily on the intent of Arlington County in enacting the ordinance, the court held that the ordinance was content-neutral because it “serve[d] purposes unrelated to the content of expression,” “even if it ha[d] an incidental effect on some speakers or messages but not others.”<sup>140</sup> Because the content-neutral ordinance advanced substantial government interests—the furtherance of traffic safety and the enhancement of aesthetics within the county—the court found that it satisfied intermediate scrutiny.<sup>141</sup> The failure of the ordinance to actually further either of these interests highlights a flaw in this minority approach to evaluating the content neutrality of a sign ordinance. Under the stricter, majority approach, Arlington County’s ordinance would have been deemed content-based and subject to a strict scrutiny

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<sup>134</sup> See *supra* notes 103–05 and accompanying text. Arlington County’s zoning administrator provided plaintiff with the following instructions:

For the mural to NOT be considered a sign, it may depict anything you like EXCEPT something to do with dogs, bones, paw prints, pets, people walking their dogs, etc. In other [words], the mural [cannot] show anything that has any relationship with your business. If it does, then it becomes a sign.

Wag More Dogs, Ltd. Liab. Corp. v. Cozart, 680 F.3d 359, 363 (4th Cir. 2012).

<sup>135</sup> See Arin Greenwood, *Wag More Dogs Gets New Mural From Itinerant Artists Rob Fogle And Zack Weaver (PHOTOS)*, HUFFINGTON POST (Oct. 16 2012, 1:55 PM), [http://www.huffingtonpost.com/2012/10/16/wag-more-dogs-mural-rob-fogle-zack-weaver\\_n\\_1962184.html](http://www.huffingtonpost.com/2012/10/16/wag-more-dogs-mural-rob-fogle-zack-weaver_n_1962184.html).

<sup>136</sup> For photos of the replacement mural, see *id.*

<sup>137</sup> *Wag More Dogs, LLC v. Artman*, 795 F. Supp. 2d 377, 392 (E.D. Va. 2011) (“As murals go, Wag More Dogs’ is a relatively attractive one, and . . . many patrons of the nearby local dog park quite enjoy it.”), *aff’d*, 680 F.3d 359 (4th Cir. 2012).

<sup>138</sup> See, e.g., *New Dog Park Mural . . . Improved??*, TWO DOG TALES (Oct. 15, 2012), <http://twodogtales.wordpress.com/2012/10/15/new-dog-park-mural-improved/> (“[I]t’s a shame the cute dogs had to go. They were much more appropriate for the space, and didn’t elicit the comments overheard the past few days at the park, which generally [began] with, ‘What the heck ARE those things?’”).

<sup>139</sup> See *Wag More Dogs*, 680 F.3d at 368–69.

<sup>140</sup> *Id.* at 368 (acknowledging that Arlington had differentiated between different types of speech).

<sup>141</sup> *Id.* at 369 (“[W]e now readily conclude that [the sign ordinance] satisfies intermediate scrutiny. . . . Arlington enacted the . . . [o]rdsinance to, in part, promote traffic safety and enhance the County’s aesthetics. Both are substantial government interests.”).

analysis, under which traffic safety and community aesthetics are not compelling justifications.<sup>142</sup>

In a similar case from Arlington County (which did not make its way to court), the owner of a head shop that sold various paraphernalia, including pipes, hookahs, and cigars, commissioned an artist to paint a mural on the side of his building to beautify the block.<sup>143</sup> The finished artwork depicted a man holding a smoke-exuding cigar.<sup>144</sup> Upon investigating the mural, the county zoning administrator noted: “[T]he cigar must go; then the mural can stay. Without the cigar, it is not a sign . . . .”<sup>145</sup> Smokey Shope’s owner decided to paint over the cigar, converting it into a blue whale.<sup>146</sup> The new mural was identical in all respects to the original mural, except that it contained a whale instead of a cigar.<sup>147</sup> Yet, replacing the “commercial speech” with “noncommercial speech” did absolutely nothing to enhance Arlington County’s aesthetics or traffic safety. Rather, it seemed only to enforce the meaninglessness of distinguishing between the two speech forms.<sup>148</sup>

Outside of Arlington County, at least one court has commented on the failure of the distinction between commercial and noncommercial speech to enhance the twin goals of sign regulation. In *North Olmstead Chamber of Commerce v. City of North Olmsted*, the court addressed a sign ordinance which permitted noncommercial art murals, but banned murals with commercial messages, such as corporate products or logos.<sup>149</sup> The court held that these restrictions on commercial speech were content-based and unconstitutional.<sup>150</sup> The sign ordinance lacked “rationality” because the city failed to provide evidence that the restrictions directly and materially contributed to traffic safety and

<sup>142</sup> See, e.g., *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 823 (1984) (“But a governmental interest in aesthetics cannot be regarded as sufficiently compelling to justify a restriction of speech based on an assertion that the content of the speech is, in itself, aesthetically displeasing.”); *Gilleo v. City of Ladue*, 986 F.2d 1180, 1183–84 (8th Cir. 1993) (holding that the city’s interest in eliminating aesthetic, safety, and property value problems associated with signs was not sufficiently compelling), *aff’d*, 512 U.S. 43 (1994).

<sup>143</sup> See *County to Head Shop: Cigar Mural Has Got to Go*, ARLNOW (Aug. 21, 2012, 1:50 PM), <http://www.arlnow.com/2012/08/21/county-to-head-shop-cigar-mural-has-to-go>.

<sup>144</sup> For a photo of the mural, see *id.*

<sup>145</sup> *Id.* According to the logic of the zoning administrator, if a mural painted on a cigar shop contains a cigar, the mural is a sign. If the cigar is converted into a whale, the mural transforms into a work of art. See Taylor Holland, *When a Cigar Becomes a Whale, a Sign Becomes Art*, WASH. EXAMINER (Sept. 26, 2012, 4:30 PM), <http://washingtonexaminer.com/when-a-cigar-becomes-a-whale-a-sign-becomes-art/article/2509136#.UORv1InjkoZ>.

<sup>146</sup> Holland, *supra* note 145.

<sup>147</sup> For photos of the original and replacement murals, see *id.*

<sup>148</sup> As the Smokey Shope store manager observed, “It doesn’t make a lot of sense, but the county made us do it.” *Id.*

<sup>149</sup> 86 F. Supp. 2d 755, 767 & n.7 (N.D. Ohio 2000).

<sup>150</sup> *Id.* at 773 (“The City’s content-based regulations on commercial speech are unconstitutional.”).

community aesthetics.<sup>151</sup> Murals housing commercial content, the court reasoned, were no more distracting or less aesthetically pleasing than noncommercial murals.<sup>152</sup> As such, it was senseless to distinguish between the two speech forms.<sup>153</sup>

## 2. Classifying Mural Speech

Perhaps one of the reasons why maintaining the distinction between commercial and noncommercial speech in the context of outdoor mural regulation seems futile is that classifying mural speech is a transitory determination that has the potential to change overnight.

Consider the following hypothetical: The exterior wall of a local mom-and-pop cupcake shop features a lively mural with large cups of coffee in honor of the shop owner's favorite morning beverage. The mural has been on the building for five years, and is accepted and relished by the community as a lovely work of art. One day, the owner decides to start selling coffee at her cupcake shop. Although this decision converts the mural's coffee imagery from noncommercial to commercial speech, it would hardly seem necessary, fair, or prudent for the town to demand its removal after years of community enjoyment. Moreover, in light of the frequent product turnover within commercial establishments, a municipality would have to constantly reevaluate the products sold inside every building upon which is displayed an outdoor mural. This would be a foolish and wasteful use of government time and resources.

Further complications arise in cases where a given business sells a wide variety of products or services. The process of classifying mural speech is more conducive to businesses that sell only one key product or provide only one key service. Businesses such as gift shops or grocery stores, which may sell thousands of products, are placed at an unfair disadvantage if the distinction between commercial and noncommercial speech remains in place. Does a flower mural on the side of a gift shop, where fresh flowers comprise less than one percent of the store's total

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<sup>151</sup> See *id.* at 772–73 (“In fact, many of the City’s content-based restrictions *completely fail* to contribute to safety and aesthetics and seem to be *unrelated to these goals*.” (emphasis added)).

<sup>152</sup> *Id.* at 768, 772 (“It is also not evident why a mural may contain content that may be very distracting (such as sexually explicit but not obscene art) or aesthetically displeasing, but may not contain words, corporate products, or corporate images. Surely a mural containing the ‘golden arches’ of McDonalds is not more distracting than Botticelli’s ‘Venus’ or more aesthetically displeasing than some modern works of art that may be reproduced on the side of a wall. . . . Signs with content other than identifying a business are not somehow safer. Nor is the content . . . more aesthetically pleasing.”).

<sup>153</sup> See *id.* at 771 (noting that making content-based distinctions among signs, including distinctions based on whether they contained commercial or noncommercial speech, did not further North Olmsted’s goals “in any meaningful way”).

inventory, contain commercial speech? Should a mural featuring fruits and vegetables on the wall of a Whole Foods Market—which also sells dairy, meat, grains, beverages, and even body care products and eating utensils—be considered signage, when the same mural outside of a butcher shop would be considered art? What if that same mural has been intact for fifteen years and has become a neighborhood landmark, as it has in the city of St. Paul, Minneapolis?<sup>154</sup> Eliminating the distinction between commercial and noncommercial speech in the context of outdoor mural regulation avoids these inevitable difficulties that arise when classifying mural speech.

### 3. Classifying Mural Art

Similar to the difficulties with classifying mural speech, it is likewise difficult to classify mural art. Maintaining the distinction between commercial and noncommercial speech only further complicates this matter. The current framework leaves unbridled discretion in government enforcement authorities to arbitrarily decide when, in their subjective opinions, a mural qualifies as a work of art or signage.<sup>155</sup> It is this broad discretion that Justice Brennan feared in his *Metromedia* concurrence when he noted the danger of permitting a government unit to decide whether a given outdoor display contains commercial or noncommercial speech.<sup>156</sup> This concern is especially strong in the context of regulating outdoor murals. The definition of art and the determination of whether something qualifies as art have long been the subject of vigorous debate, even among artists themselves.<sup>157</sup>

Courts too have certainly struggled with the determination of whether a given mural is art or signage. The court in *Tipp City*, for

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<sup>154</sup> For a photo of the Whole Foods mural, see Curtis Gilbert, *Cities Debate Art vs. Advertising*, MPRNEWS (Aug. 1, 2012), <http://minnesota.publicradio.org/display/web/2012/08/01/business/art-versus-advertising-in-twin-cities>.

<sup>155</sup> See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 653 (1990) (“[T]he commercial speech doctrine . . . gives government a powerful weapon to suppress or control speech by classifying it as merely commercial. If you think carefully enough, you can find a commercial aspect to almost any[thing] . . .”).

<sup>156</sup> See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 536–37 (1981) (Brennan, J., concurring in the judgment) (“Because making such determinations would entail a substantial exercise of discretion by a city’s officials, it presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech.”).

<sup>157</sup> David Leichtman & Avani Bhatt, *Federal Courts and the Communicative Value of Visual Art: Is an Intended Message Required for Strong Protection of Rights Under the First Amendment?*, FED. LAW., Sept. 2011, at 25, 25 (“Federal courts addressing the question of the appropriate level of First Amendment protection for art have sometimes agreed that the key to protection is the communicative value of the work at issue. Others—in both law and other disciplines—have argued, however, that to qualify as art, the work must carry some component that is aesthetically pleasing, lest a mere circle painted on a canvas be considered art.”).



example, was vocal in its discomfort with classifying the mad scientist mural at issue as commercial signage.<sup>158</sup> The court emphasized that the “inherent difficulty” with the classification was due, in part, to the lack of a clear distinction between commercial and noncommercial speech.<sup>159</sup> Stressing that the issue was “a close one,” the *Tipp City* court avoided making a determination of its own.<sup>160</sup> Instead, it adopted the reasoning of the trial court, which had concluded that the mural was a sign, not art.<sup>161</sup> The hesitation scattered throughout the *Tipp City* court’s discussion of classifying the mad scientist mural—a classification that hinged entirely on the distinction between commercial and noncommercial speech—is evidence of the arbitrariness of this distinction as it pertains to outdoor mural regulation.<sup>162</sup>

A related issue arises when multiple murals within a given municipality are regulated under the same terms of a local sign ordinance but are subjected to different treatment. The court in *Complete Angler* critiqued this discriminatory practice within the city of Clearwater. Although the city had declared plaintiffs’ marine-themed mural an illegal sign, it had allowed other businesses in the city to display murals that contained similar degrees of relatedness to their business.<sup>163</sup> For instance, it had permitted a mural on a daycare center depicting children running through a field and a mural on a seafood restaurant containing various images of marine life.<sup>164</sup>

Of course, zoning officials are not entirely to blame for this disparate treatment. Murals painted on commercial buildings contain varying degrees of relatedness to the business inside, and thus, when a municipality must determine whether a mural is art or signage, the process of line-drawing becomes unbearably difficult—and consequently, quite haphazard.<sup>165</sup> Treating all outdoor murals the same,

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<sup>158</sup> *City of Tipp City v. Dakin*, 186 Ohio App. 3d 558, 2010-Ohio-1013, 929 N.E.2d 484, at ¶ 31 (“Despite the straightforward nature of the issue, determining whether the appellants’ mural constitutes commercial speech is not without difficulty.”).

<sup>159</sup> *Id.* ¶ 32 (“The distinction between commercial and non-commercial speech was never obvious, and sophisticated advertising techniques can blur the lines even more.” (quoting *Menthe*, *supra* note 83, at 6)).

<sup>160</sup> *Id.* ¶ 33.

<sup>161</sup> *See id.* This was likely a showing of deference to the trial court.

<sup>162</sup> *See, e.g., id.* n.3 (“Assuming, arguendo, that we are wrong and that the appellants’ mural is noncommercial speech, we note that the outcome in this case would remain the same. Our ultimate conclusion . . . is that Tipp City’s sign ordinance cannot be enforced against the appellants’ mural.”); *supra* notes 158–59.

<sup>163</sup> *See Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1334 (M.D. Fla. 2009).

<sup>164</sup> *Id.*

<sup>165</sup> How close does the relationship have to be between the imagery contained in a mural and the business on whose wall the mural resides? Consider another case arising out of the city of Clearwater, Florida: An Egyptian-themed restaurant commissioned an artist to paint a mural depicting a repeating pattern of hieroglyphics over the entire front exterior wall of the building. The finished artwork was “eye-catching and appealing.” But Clearwater, whose sign code

regardless of whether they contain commercial or noncommercial speech, would eliminate this inconsistency within a single municipality.

#### 4. Murals as Art

Lastly, eliminating the distinction between commercial and noncommercial speech in the context of outdoor mural regulation would restore all murals to their traditional status as artwork. Since its origination more than 30,000 years ago, mural art throughout history has been employed as a means of conveying artistic expression.<sup>166</sup> Mural art is a unique form of communication that is distinct from (and serves purposes different than) billboards, the prototype of commercial signage. Municipalities have used outdoor art murals, but not billboards, as a means of revitalizing urban communities.<sup>167</sup> Murals offer strong aesthetic pleasure in place of, or at least amongst, community blight, and they contribute to the cultural identity of a neighborhood.<sup>168</sup> By contrast, billboards generally clutter communities and elicit negative emotions from residents and tourists alike.<sup>169</sup> Treating murals housing commercial speech the same as those containing noncommercial speech would embrace the notion that all murals, no matter what their content,

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forbids murals on commercial buildings if the mural relates to what the business is selling, declared the mural an illegal sign. Although the restaurant owner ultimately won the dispute on appeal, this case illustrates the danger of making broad determinations that jeopardize free speech interests. See Diane Steinle, *Murals Rules Create A Muddled Sign Code*, ST. PETERSBURG TIMES, Jan. 25, 2009, at 2.

<sup>166</sup> For a discussion of the historical and artistic importance of public mural art, see Christian Ehret, *Mural Rights: Establishing Standing for Communities Under American Moral Rights Laws*, 10 U. PITT. J. TECH. L. & POL'Y 3 (2010).

<sup>167</sup> See *id.* (noting that art allows “communities [to] take[] advantage of low cost, unused property and [attract] positive attention from outsiders”); Dana Cole, *Mural Project Gets Council's Green Light*, BENSONNEWS-SUN.COM (July 9, 2013, 6:00 PM), [http://www.bensonnews-sun.com/news/article\\_d579d91c-e8e8-11e2-853d-001a4bcf887a.html](http://www.bensonnews-sun.com/news/article_d579d91c-e8e8-11e2-853d-001a4bcf887a.html) (noting the success of mural projects in revitalizing communities, and indicating the intent of Benson, Arizona to launch a community-wide mural project to “make Benson a destination town for all tourists rather than a pass-through for travelers”).

<sup>168</sup> For example, Lake Placid, a small Florida town with a population of 2,000, is now known as the “Town of Murals.” The community had a business district that was on the verge of collapse until the mid-1990s, when the town decided to paint murals on dilapidated buildings. Mural artists have since painted historical scenes, landscapes, and pictures of Lake Placid people and wildlife. Tourists travel from all over the world to see the beautiful paintings. See Steinle, *supra* note 165 (observing that “[e]ven the trash receptacles have been transformed by murals”).

<sup>169</sup> See, e.g., *Ballen v. City of Redmond*, 466 F.3d 736, 744 (9th Cir. 2006) (defining billboards as “fixed, permanent structures that are . . . intrusive to community aesthetics”); Armin P. Langheinrich, *Letter: Ugly Highway Billboards Damage State's Image, Beauty*, DESERET NEWS (May 9, 2012, 12:00 AM), <http://www.deseretnews.com/article/765574661/Ugly-highway-billboards-damage-states-image-beauty.html> (“Because of [the abundance of ugly billboards all over the state of Utah], some labeled us as a third-world-country state. . . . This is . . . a big, ugly mess that distracts from the beauty of the state . . .”).

can contribute to society in a way that billboards and other commercial signage cannot.<sup>170</sup>

### III. A MODEL FOR REGULATING OUTDOOR MURALS

In light of the legal and policy-based reasons for eliminating the distinction between commercial and noncommercial speech in the context of outdoor mural regulation,<sup>171</sup> this Note proposes a model whereby all murals, regardless of their content, are regulated in the same manner. Under this model, municipalities would be able to regulate murals as they please in a content-neutral manner. Business owners interested in painting a mural on the exterior wall of their building would have sufficient notice of any time, place, and manner restrictions by which they must abide. If implemented correctly, this model would eliminate the number of disputes between mural owners and zoning administrators over whether a particular mural is artwork or signage.

The method of defining what exactly constitutes a “mural” is a process that would need to be undertaken by each individual municipality. For example, a mural could be defined as “[a] hand-produced work of visual art which is tiled or painted by hand directly upon, or affixed directly to an exterior wall of a building.”<sup>172</sup> Notably absent from this definition is any mention of commercial or noncommercial speech. Once a definition is established, a municipality would then need to decide how it would like to regulate all outdoor

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<sup>170</sup> Moreover, it would embrace the Supreme Court’s oft-repeated view that “[e]ach method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method.” *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion) (internal quotation marks omitted); *see also* *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”).

<sup>171</sup> *See infra* Part II.B.

<sup>172</sup> This is the definition currently being used by the city of Portland, Oregon. *See* PORTLAND, OR., CITY CODE & CHARTER tit. 4, ch. 4.12.020(I) (2013), *available at* <http://www.portlandonline.com/auditor/index.cfm?c=50808&a=257808>; *see also id.* at ch. 4.10.010 (“The purpose of this Title and the policy of the City of Portland is to permit and encourage original art murals on a content-neutral basis on certain terms and conditions. Original art murals comprise a unique medium of expression which serves the public interest. Original art murals have purposes distinct from signs and confer different benefits. Such purposes and benefits include: improved aesthetics; avenues for original artistic expression; public access to original works of art; community participation in the creation of original works of art; community building through the presence of and identification with original works of art; and a reduction in the incidence of graffiti and other crime. Murals can increase community identity and foster a sense of place and enclosure if they are located at heights and scales visible to pedestrians, are retained for longer periods of time and include a neighborhood process for discussion.”).

murals within its jurisdiction. Again, this process should be individualized to reflect the unique identity of each municipality.

Some municipalities may choose to exempt all murals from all forms of regulation. More likely, municipalities will choose to impose at least some restrictions on outdoor art. Bearing in mind aesthetic and traffic safety goals, as well as general community demands, each municipality should strive to create content-neutral time, place, and manner restrictions that are equally applicable to all outdoor murals. For instance, a municipality could require that all murals be less than 200 square feet (manner restriction), contain less than three percent text (manner restriction), be located on a commercial building at least fifty feet from a main highway (place restriction), and remain intact for a minimum of two years (time restriction). These restrictions would apply to all murals—those containing noncommercial speech, commercial speech, or a hybrid of both.

One potential concern with implementing such a regulatory model is that muralists would be inhibited in their artistic pursuits, at least in those municipalities which impose more stringent time, place, and manner restrictions on outdoor signage. A muralist who is otherwise accustomed to painting 600-square-foot murals may feel frustrated that he is now limited to painting murals one-third the size. Although one may be sympathetic to a muralist's concern, it is an insufficient basis for maintaining the content-based distinction between commercial and noncommercial murals. If an artist desires to paint large-scale murals, he can do so in a municipality that welcomes such murals. Just like most other facets of government regulation, every municipality will differ in the value it places on art. Fortunately, many, if not most, municipalities appreciate the value of outdoor murals. This appreciation is reflected in sign ordinances which "exempt" murals and similar works of art from the more stringent requirements placed on other forms of signage.<sup>173</sup> Of course, many of these ordinances maintain the distinction between commercial and noncommercial murals that this Note argues should be eliminated.<sup>174</sup> However, at least two cities are on the cusp of eliminating this distinction.

Minneapolis and St. Paul, Minnesota's two largest cities, are considering revisions to their sign ordinances that would relax the definition of "mural" to allow for imagery of products sold within the building on which a mural resides. In Minneapolis, council member Gary Schiff has been vocal in his desire to subject all murals, regardless of their content, to the same regulations.<sup>175</sup> Minneapolis's current sign ordinance bans all murals that "advertise or promote any business,

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<sup>173</sup> See *supra* note 2.

<sup>174</sup> See *id.*

<sup>175</sup> See Boros, *supra* note 12; Gilbert, *supra* note 154.



product, activity, service, interest or entertainment” (that is, murals that contain “commercial speech”).<sup>176</sup> Calling the distinction between commercial and noncommercial speech as contained in murals “silly,” Schiff has called for a more reasonable definition that better responds to community needs and wishes.<sup>177</sup> Similar considerations for change are being voiced in St. Paul, a city that has long encouraged the creation of murals and other forms of artwork to “enliven” the city and “improve visual interest.”<sup>178</sup>

Another possible concern with implementing a model that regulates all outdoor murals in the same manner is that municipalities risk corporate entities transferring their advertising campaigns from billboards to murals, which would now be permitted to house even the most overt commercial speech.<sup>179</sup> This concern is strongest in those jurisdictions that ban billboards, such as Los Angeles.<sup>180</sup> This concern, however, can be eliminated by carefully constructing content-neutral time, place, and manner restrictions that would make traditional forms of corporate advertising impossible.

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<sup>176</sup> Gilbert, *supra* note 154 (internal quotation marks omitted).

<sup>177</sup> See *id.* (“I think ever since Andy Warhol painted a Campbell’s Soup can, there’s been a blurring between American iconography and advertising, and we need a change . . . . If you can’t even paint some grapes on the side of a wine store, then we’ve gone to the land of silly and this needs to be fixed.” (internal quotation marks omitted)); Boros, *supra* note 12 (“You are not allowed to show any products that you sell in your mural, or your mural is deemed advertising . . . . It’s really gotten silly, and the enforcement and destruction of murals has got to stop.” (internal quotation marks omitted)).

<sup>178</sup> See CITY SAINT PAUL, CENTRAL CORRIDOR DEVELOPMENT STRATEGY 66 (2007), available at <http://www.stpaul.gov/DocumentCenter/Home/View/4772> (“Blank walls create harsh pedestrian environments by limiting activity, removing a sense of connection between the building and the street and limiting ‘eyes on the street.’ Where the reconfiguration and reopening of blank walls is not possible, an opportunity exists to enliven the street and improve visual interest through the creation of a mural or other form of artwork.”); see also Melo, *supra* note 9.

<sup>179</sup> Various mural advertising companies are already in existence, so businesses would have no shortage of artists willing to paint their commercial murals. See, e.g., ALT TERRAIN, [http://www.altterrain.com/graffiti\\_advertising.htm](http://www.altterrain.com/graffiti_advertising.htm) (last visited Oct. 27, 2013) (noting that they work with street artists to “assist agencies in creating unique art-advertising outdoor painted billboard murals”); COLOSSAL, <http://colossalmedia.com/about> (last visited Oct. 27, 2013) (touting themselves as “the largest hand paint mural and outdoor advertising company in the world”); see also Kim Bhasin, *17 Awesome Graffiti Ads From Around the World*, BUS. INSIDER (Oct. 20, 2011, 10:54 AM), <http://www.businessinsider.com/graffiti-mural-guerrilla-advertising-2011-10?op=1> (describing how brands are increasingly using graffiti and murals in urban areas to “amp up their marketing”).

<sup>180</sup> An earlier version of Los Angeles’s sign ordinance exempted artwork from sign regulation. Specifically, it made all signs viewed mainly from a freeway illegal, with the exception of artwork. In an attempt to draw the line between art and advertising, murals with less than three percent text were allowed so long as they were first approved by the city. Patrick Media Group (PMG), one of Los Angeles’s largest billboard companies at the time, painted a fifty-foot-tall mural in defiance of the sign ordinance. PMG insisted the mural was art. The city ultimately rejected PMG’s argument, ordering it to remove the mural or face six months in jail or a \$1,000 fine. See Kelly David, *Art or Advertising?: Controversy Over Oversize L.A. Murals Looms Large*, L.A. TIMES, Sept. 2, 1995, at D1.

## CONCLUSION

Sign ordinances throughout the nation continue to jeopardize the artistic expression of property owners who commission murals to be painted on their buildings. The continued reliance of municipalities on the outdated and content-based distinction between commercial and noncommercial speech has led to arbitrary enforcement of sign ordinances. Moreover, the inconsistent approaches taken by courts in their judicial review of these sign ordinances has resulted in art murals being subjected to different treatment based solely on the legal jurisdiction in which they reside. Even more concerning, the free speech rights of mural owners are being exposed to this same disparate treatment.

This Note argued in favor of a regulatory model whereby outdoor murals are divorced from the commercial/noncommercial speech distinction. Eliminating this distinction in the context of mural regulation renders moot the issue of how to define commercial speech. Moreover, it significantly diminishes the splitting effect of the contrasting judicial approaches to content neutrality. Altogether, such a model strikes the best balance between maintaining government regulatory power, preserving judicial resources, and safeguarding individual free speech.

**ORDINANCE NUMBER 17-10882**

AN ORDINANCE ADDING NEW SECTIONS 42-500 AND 42-511 TO THE SALINA CODE PERTAINING TO THE PURPOSE OF THE CITY OF SALINA'S SIGN REGULATIONS AND ALLOWING THE SUBSTITUTION OF NONCOMMERCIAL MESSAGES ON ANY PERMITTED SIGN; AND AMENDING SALINA CODE SECTIONS 42-506, 42-507, AND 42-508 PERTAINING TO THE REGULATION OF SIGNS WITHIN THE CITY OF SALINA, AND REPEALING THE EXISTING SECTIONS.

**WHEREAS**, Article X, Chapter 42 of the Salina Code regulates the placement of signs within the City of Salina ("City");

**WHEREAS**, the Governing Body finds that the number, size, height, lighting, design, location, portability, changing frequency, and other physical characteristics of temporary signs within the City directly affect the public health, safety, and welfare;

**WHEREAS**, the City, pursuant to its police power, has the authority to take appropriate action to address concerns regarding traffic safety and aesthetics, as they relate to temporary signs;

**WHEREAS**, the Governing Body recognizes that signs constitute speech protected by the First Amendment to the United States Constitution and that its regulation of temporary signs must be consistent with those protections; and

**WHEREAS**, on June 18, 2015, the United States Supreme Court issued its decision in the case of *Reed v. Town of Gilbert*, which imposed new standards under the First Amendment to the United States Constitution with respect to determining the content-neutrality of municipal sign regulations;

**WHEREAS**, the *Reed v. Town of Gilbert* decision prompts the Governing Body to amend Article X, Chapter 42 of the Salina Code in order to ensure compliance with the First Amendment and to update and clarify sign regulation and enforcement generally within the City;

**WHEREAS**, the City has a substantial interest in regulating temporary signs in the manner set forth in this ordinance, and the regulations adopted and amended in this ordinance further the City's substantial interests in traffic safety and aesthetics, as well as those additional substantial interests set forth in the purpose statement adopted by this ordinance; and

**WHEREAS**, this ordinance adds a message substitution provision to the Salina Code, allowing any sign permitted under the provisions of Article X, Chapter 42 of the Salina Code to display, or be substituted with, any noncommercial message, so that the City's regulations satisfy the constitutional mandate that it not restrict noncommercial signage to a greater degree than commercial signage;

**WHEREAS**, the Governing Body finds that a proliferation of temporary signs in the public right-of-way detracts from the aesthetic quality of the streets and sidewalks, interferes with traffic safety and pedestrian access to public sidewalks and streets, and obstructs the entrance to businesses and residences; therefore warranting the prohibition of all forms of temporary signage within the public right-of-way;



WHEREAS, the Governing Body finds and determines that following amendments to Article X, Chapter 42 of the Salina Code are necessary and desirable to protect the public health, safety, and welfare and to comply with and satisfy the protections afforded speech by the First Amendment to the United States Constitution, **SO NOW THEREFORE,**  
**BE IT ORDAINED** by the Governing Body of the City of Salina, Kansas:

**Section 1. New Section.** The Salina Code is amended by adding a section to be numbered 42-500 which section reads as follows:

**Sec. 42-500. Purpose.**

This Article promotes the public health, safety and welfare of the community through a comprehensive system of reasonable, effective, consistent, content-neutral and nondiscriminatory sign standards and requirements, narrowly drawn to:

1. Ensure that all signs installed in the city are compatible with the character and visual environment of the community and promote the goals, objectives and policies of the Comprehensive Plan;
2. Balance public and private objectives by allowing adequate avenues for both commercial and non-commercial messages;
3. Improve pedestrian and traffic safety by promoting the free flow of traffic and the protection of pedestrians and motorists from injury and property damage caused by, or which may be fully or partially attributable to, unsecured, cluttered, distracting, and/or illegible signage;
4. Protect the aesthetic appearance of the city's natural and built environment for its citizens and visitors;
5. Prevent property damage, personal injury, and litter caused by signs that are improperly constructed or poorly maintained;
6. Protect property values, the local economy, and quality of life by preserving and enhancing the appearance of the streetscape; and
7. Provide for the placement of temporary signs in limited circumstances, without regard to the communicative content of the sign.
8. Provide consistent design standards that enable the fair and consistent enforcement of these sign regulations.
9. Enhance the city's ability to maintain its public rights-of-way.

**Section 2. Amendment.** Section 42-506 of the Salina Code is amended to read as follows:

**Sec. 42-506. Classification of signs--Functional types.**

The following signs are classified by function:

- (1) *Advertising sign.* A sign displaying a commercial message that directs attention to a business, commodity, service or entertainment conducted, sold, or offered at a location

other than the premises on which the sign is located, or to which it is affixed (off-premise sign).

- (2) *Bulletin board sign.* A sign that indicates the name of an institution or organization on whose premises it is located and which contains the name of the institution or organization, the name or names of persons connected with it, and announcements of persons, events or activities appearing or occurring at the institution. Such signs may also present a greeting or similar message.
- (3) *Business sign.* A sign displaying a commercial message that directs attention to a business or profession conducted, or to a commodity or service sold, offered or manufactured, or an entertainment offered, on the premises where the sign is located or to which it is affixed.
- (4) *Identification sign.* A sign having the name and address of a building, business, development or establishment. Such signs may be wholly or partly devoted to a readily recognized symbol.
- (5) *Menu board sign.* An on-site sign designed and used for the display of menu items and pictures and/or prices of menu items.
- (6) *Nameplate sign.* A sign giving the name and/or address of the owner or occupant of a building or premises on which it is located, and where applicable, a professional status.

**Section 3. Amendment.** Section 42-507 of the Salina Code is amended to read as follows:

**Sec. 42-507. Same--Structural types.**

The following signs are classified as types:

- (1) *Awning, canopy and marquee sign.* A sign that is mounted or painted on, or attached to, an awning, canopy or marquee that is otherwise permitted by this chapter. No such sign shall project more than twenty-four (24) inches above, below, or twelve (12) inches beyond the physical dimensions of the awning, canopy or marquee, and a minimum of eight (8) feet of clearance shall be provided above grade.
- (2) *Banner sign.* A temporary sign composed of cloth, canvas, plastic, fabric, or similar light-weight, non-rigid material that is mounted to a wall, canopy, or solid fence with cord, rope, cable, or a similar method.
- (3) *Changeable copy sign.* Any sign on which message copy can be changed through the use of attachable letters and numerals or by electronic switching of lamps, light emitting devices, or illuminated tubes. This includes public message displays or any sign which features automatic switching such as time and temperature signs.
- (4) *Electronic changeable copy sign/Computer-operated electronic message signs.* A sign containing a computer or digital software generated message or other automated or remote method of changing copy.
- (5) *Feather flag.* A temporary, freestanding, vertical sign, also referred to as a teardrop flag, swooper flag or wind flag, consisting of a loose polyknit or other semi-rigid membrane sign face that flutters in the wind from a pole or staff attached to, anchored or placed into the ground.
- (6) *Flashing sign.* A sign which contains an intermittent or flashing, pulsating, blinking or traveling light source which includes signs that give the illusion of intermittent or flashing light by means of animation, or an externally mounted intermittent light source.

- (7) *Ground sign.* Any sign placed upon or supported by, and permanently affixed to, the ground independently of the principal building or any accessory structure on the property.
- (8) *Illuminated sign.* Any sign which is directly lighted by any electrical light source, internal or external, regardless of technology.
- (9) *Inflatable sign.* Any sign made of flexible material enlarged, activated or inflated by inserted air or gas, which floats, is tethered in the air, or is located on the ground or on a building.
- (10) *Mobile sign.* A sign that is not permanently affixed to the ground or a building and is designed or constructed to be easily moved from one (1) location to another, including signs mounted upon or designed to be mounted on a trailer, even if the sign has had its wheels removed.
- (11) *Pole sign.* A sign that is mounted on a freestanding pole, the bottom edge of which sign is six (6) feet or more above ground level.
- (12) *Projecting sign.* A sign that is wholly or partly dependent upon a building for support and which projects more than twelve (12) inches from such building.
- (13) *Pylon sign.* A freestanding sign, other than a pole sign, permanently fixed to the ground by shafts, posts or other supports wrapped with an aesthetic veneer, but not having the appearance of a solid base.
- (14) *Roof sign.* A sign erected, constructed and maintained wholly upon or projecting above any portion of the roof of a building or having the roof as the principal means of support. A mansard shall be considered part of the wall of the building.
- (15) *Rotating sign.* Any sign or portion of a sign which moves in a revolving or similar manner.
- (16) *Temporary sign.* A sign that is to be displayed for a short period of time and not designed or constructed for permanent display, including but not limited to yard signs, banners, flags, balloons, feather flags, and inflatable signs. Temporary signs shall not include mobile signs.
- (17) *Wall sign.* A sign fastened to or painted on a wall of a building or structure in such a manner that the wall becomes merely the supporting structure or forms the background surface, and which does not project more than twelve (12) inches from such building.
- (18) *Yard sign.* A temporary, freestanding sign made of lightweight or nondurable materials such as paper, cardboard, canvas, fabric, wood, metal, or vinyl that is supported by a frame, pole, or other support structure placed directly in the ground without foundation or other anchor. Yard signs shall not include banner signs.

**Section 4. Amendment.** Section 42-508 of the Salina Code is amended to read as follows:

**Sec. 42-508. Temporary signs, banner signs, and mobile signs.**

- (a) The following temporary signs shall be exempt from the zoning certificate (sign permit) requirements of section 42-502, and shall be allowed to display any commercial or noncommercial message on a property with the owner's consent in addition to any other signs allowed under this article and the applicable district regulations:
  - (1) Two (2) yard signs may be placed and displayed on an individual residential lot in any RS, R, R-1, R-2, R-2.5, R-3 or MH residential zoning district.
  - (2) Two (2) freestanding temporary signs of any type except feather flags, inflatable signs or banners may be placed and displayed on property located in any A-1, U, H-M, P, C-1, C-2, C-3, C-4, C-5, C-6, C-7, I-1, I-2 or I-3 zoning district and on property occupied by multi-family apartments, assisted living facilities and nursing homes.

- (3) In addition to the temporary signs allowed under subsections (a)(1) and (a)(2), four (4) additional yard signs may be placed and displayed on a property in any zoning district for a period up to forty-five (45) days prior to an election involving candidates for a federal, state or local election that represent the district in which the property is located or involving an issue on the ballot of an election within the district where the property is located. These additional temporary yard signs must be removed within seven (7) days following the election.
- (b) On property located in any A-1, U, H-M, P, C-1, C-2, C-3, C-4, C-5, C-6, C-7, I-1, I-2 or I-3 zoning district, or on property occupied by multi-family apartments, assisted living facilities and nursing homes, temporary signs allowed under subsection (a) shall not exceed six (6) feet in height or thirty-two (32) square feet of sign area.
- (c) On property located in any RS, R, R-1, R-2, R-2.5, R-3 or MH residential zoning district, other than property occupied by multi-family apartments, assisted living facilities and nursing homes, temporary signs allowed under subsection (a) shall not exceed six (6) feet in height or eight (8) square feet of sign area.
- (d) In addition to the temporary signs allowed under subsection (a):
  - (1) Feather flags may be placed and displayed on property located in any A-1, U, H-M, P, C-1, C-2, C-3, C-4, C-5, C-6, C-7, I-1, I-2 or I-3 zoning district and on property occupied by multi-family apartments, assisted living facilities or nursing homes. Two (2) feather flags for every fifty (50) feet of street frontage, not exceeding a total of six (6) flags per street frontage, may be displayed on a property for a period not exceeding thirty (30) consecutive days for up to six (6) events in a calendar year. Feather flags shall not exceed thirteen (13) feet in height, shall be set back from any adjoining street a distance equal to its height, shall be securely anchored to the ground, and must be removed by the owner if the flag becomes tattered, torn or damaged.
  - (2) One (1) inflatable sign may be placed and displayed on property located in any A-1, U, H-M, P, C-1, C-2, C-3, C-4, C-5, C-6, C-7, I-1, I-2 or I-3 zoning district and on property occupied by multi-family apartments, assisted living facilities or nursing homes. An inflatable sign may be displayed for a period not exceeding fourteen (14) consecutive days for up to four (4) events in a calendar year. An inflatable sign shall not exceed twenty (20) feet in height, shall be securely anchored to the ground, shall be set back from any adjoining street a distance equal to its height, and must be removed by the owner if the inflatable device becomes tattered, torn or damaged.
- (e) Banners placed over an existing sign face, placed at least eight (8) feet above ground level on existing poles or other supports which serve another primary purpose or placed on an existing building, canopy, solid fence, or other structure located behind the front yard setback line shall be exempt from the zoning certificate (sign permit) requirements of section 42-502, but shall comply with all of the requirements of this article and the applicable district regulations.
- (f) Mobile signs may be permitted upon issuance of a zoning certificate (sign permit) and when in compliance with all of the other requirements of this article, the applicable district regulations, and the following provisions:
  - (1) Only one (1) mobile sign shall be allowed on a zoning lot.
  - (2) Mobile signs shall not exceed thirty-two (32) square feet in area.
  - (3) Mobile signs shall not be placed within twenty-five (25) feet of an existing pole sign or ground sign, within fifty (50) feet of another mobile sign or within the clear vision triangle of any street or driveway.
  - (4) Mobile signs shall not be placed on the premises of an establishment which has an existing pole sign or ground sign located in the front yard.

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- (5) Mobile sign permits shall be valid for not more than thirty (30) days. Each establishment may be issued not more than four (4) permits during a calendar year for a combined total of sixty (60) days.
- (6) Mobile signs shall be of rigid construction and anchored or weighted to prevent movement or overturning by wind.
- (7) Electrical lines shall not lie on the ground where vehicular or pedestrian traffic is permitted. Use of aboveground extension cords is prohibited. All wiring shall comply with the electrical code of the city.
- (8) Use of red, yellow, or green external lighting shall be prohibited. Any light shall be constant in intensity or color at all times.
- (g) No sign authorized under this section 42-508 shall be placed or displayed within the public right-of-way.

**Section 5. New Section.** The Salina Code is amended by adding a section to be numbered 42-511 which section reads as follows:

**Section 42-511. Sign substitution.**

The owner of any sign which is otherwise allowed by this article may substitute noncommercial copy in lieu of any other commercial or noncommercial copy. This substitution of copy may be made without any additional approval or permitting. The purpose of this provision is to prevent any inadvertent favoring of any particular commercial or noncommercial message over any other noncommercial message. This provision prevails over any more specific provision to the contrary.

**Section 6. Repealer.** Existing Salina Code Sections 42-506, 42-507, and 42-508 are repealed.

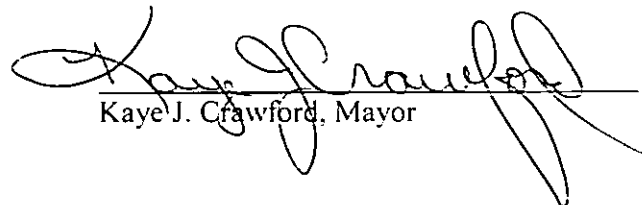
**Section 7. Effective.** This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

**Ordinance No. 17-10882 Summary**

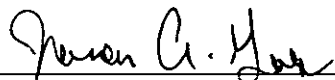
On July 10, 2017, the City Commission passed Ordinance No. 17-10882. The Ordinance adds new Sections 42-500 and 42-511 to the Salina Code pertaining to the purpose of the sign regulations and allowing the substitution of noncommercial copy on any permitted sign and amends Salina Code Sections 42-506, 42-507, and 42-508 pertaining to the regulation of signs and repeals the existing sections. A complete copy of the Ordinance can be found at [www.salina-ks.gov](http://www.salina-ks.gov) or in the office of the City Clerk, 300 W. Ash, free of charge. This summary is certified by the City's legal counsel.

Introduced: June 26, 2017

Passed: July 10, 2017

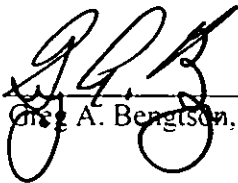
  
Kaye J. Crawford, Mayor

[SEAL]  
ATTEST:



Jason A. Gage, City Manager

Certification of Publication Summary:



Greg A. Bengtson, Legal Counsel

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

<b>Cozy Inn, Incorporated,</b>	)	
<b>d/b/a The Cozy Inn; Stephen Howard,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>CIVIL ACTION</b>
	)	<b>CASE NO. 6:24-cv-01027-TC-ADM</b>
	)	
<b>v.</b>	)	
	)	
<b>City of Salina, Kansas,</b>	)	
	)	
<b>Defendant.</b>	)	

**DEFENDANT’S RESPONSES TO PLAINTIFF’S FIRST SET OF INTERROGATORIES**

Defendant City of Salina, Kansas (“the City”), by and through its attorneys Fairfield and Woods, P. C., hereby submits the following Responses to Plaintiff’s First Set of Interrogatories:

**GENERAL OBJECTIONS**

1. Defendant objects to Plaintiffs’ terms and definitions to the extent they attempt to impose obligations beyond the scope of the Federal Rules of Civil Procedure.

2. Pursuant to the stipulation set forth in the Scheduling Order (Dkt. 29) at p. 6, Defendant objects to the production of any privilege log requiring Defendant to log documents or communications created on or after February 19, 2024 that are subject to the attorney-client, work product, and anticipation of litigation privileges.

3. Defendant objects to each discovery request to the extent it seeks the disclosure of documents or information protected from discovery by the attorney-client privilege, attorney work product doctrine, or any other applicable privilege or immunity. Any inadvertent disclosure

of any privileged communication or documents shall not constitute a waiver of the applicable privilege, and Defendant reserves the right to seek return of all copies of any privileged communication.

4. Defendant objects to each discovery request to the extent that it seeks to require Defendant to disclose public documents that are equally available to all parties.

5. Defendant objects to each discovery request to the extent it is vague, ambiguous, overly broad, unduly burdensome and oppressive, irrelevant to the claim or defense of any party, or otherwise not proportional to the needs of the case. F.R.C.P. 26(b)(1).

6. Defendant objects to each discovery request to the extent it contains multiple, discrete subparts. *See* F.R.C.P. 33(a)(1).

7. Defendant's responses are based on a reasonable and diligent search for information and are made to the best of its present knowledge, information, and belief. Because discovery in this matter is ongoing, Defendant reserves its right, consistent with Federal Rule of Civil Procedure 26(e), to supplement its Responses with additional or different information that further investigation or discovery may reveal.

8. Defendant objects to each request to the extent it requires Defendant to provide a narrative account of its case or inquire beyond material facts supporting specific factual matters raised in the pleadings. *See, e.g., Hilt v. SFC, Inc.*, 170 F.R.D. 182, 186–87 (D. Kan. 1997) and *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 404 (D. Kan. 1998).

9. Defendant objects to the extent the burden of deriving the answer from business records is substantially the same for Plaintiffs as it is for Defendant. *See* F.R.C.P. 33(d); *see also*

*Linnebur v. United Telephone Ass'n, Inc.*, 2011 WL 3490022, \*5 n.46 (D. Kan. Aug. 10, 2011).

10. The foregoing General Objections apply to and are incorporated into each and every specific Response below, whether or not expressly incorporated by reference. The repetition or omission of any General Objection in the Responses below should not be construed to mean that other applicable General Objections are not being asserted.

### **FIRST SET OF INTERROGATORIES**

1. Please explain how the City first learned about the Plaintiffs' mural's existence.

**OBJECTION AND RESPONSE:** The City objects to this discovery request to the extent it refers to the Cozy sign that is the subject of this dispute ("Cozy Sign") as a mural or otherwise implies the Cozy sign is not a sign under the Salina Code of Ordinances ("Salina Code"), Chapter 42, Articles X ("Sign Code"). Subject to and without waiving this objection, the Cozy is located on a main street approximately one block from the City's offices. Due to the size and location of the sign, it is visible to passersby from the street. Brad Anderson noticed the Cozy Sign as he drove by the Cozy, and was the first City staff member to bring the sign to the City's attention.

2. Please identify the city officials who discussed with Dustin Herrs the enforcement of the mural-sign code regime against the Plaintiffs' mural and describe the extent of each official's involvement (i.e. whether the official directed Mr. Herrs to issue a citation against Plaintiffs).

**OBJECTION AND RESPONSE:** The City objects to this discovery request to the extent it refers to the Cozy Sign as a mural or otherwise implies the Cozy Sign is not a sign under the Sign Code. The City further objects to the use of the phrase "mural-sign code regime" to refer to the Sign Code or to Salina Code, Chapter 2, Article X ("BID Code"). The City objects to this request as compound and seeks information regarding the "extent of each officials' involvement" that is not a discrete subpart of the initial interrogatory asking the City to identify the city officials who discussed the "enforcement of the" Sign Code against Plaintiffs' sign.

Subject to and without waiving these objections, the City responds to the first interrogatory contained in this request, that is "Please identify the city officials who discussed with Dustin Herrs the enforcement of the mural-sign code regime against the Plaintiffs' mural" as follows: The City did not issue a notice of violation or citation to Plaintiffs regarding the Cozy Sign. The City determined the Cozy Sign was a sign under the Sign Code and therefore subject to the Sign Code and BID Code, evaluated the Cozy Sign under the Sign

Code and determined that the Cozy Sign was too big to qualify for a sign permit, and informed Mr. Howard of the same. The City staff members who discussed the evaluation of the Cozy Sign under the Sign Code with Dustin Herrs were Lauren Driscoll, Dean Andrew, and Mike Schrage.

Regarding the second interrogatory in this request, as to Ms. Driscoll's involvement with Mr. Herrs, while it is impossible to remember every detail of Ms. Driscoll's involvement with Mr. Herrs and more details may come to light as discovery in this matter is ongoing, in general Ms. Driscoll discussed the application of the Sign Code, the size limits of the Sign Code in relation to the size of the Cozy Sign and Cozy property, follow-up and meeting with Mr. Howard and Mr. Benson, providing information to Mr. Howard regarding the applicability of the Sign Code to the Cozy sign, next steps regarding the Cozy Sign and sign permit application, and the agreement with Mr. Howard to pause the work on the Cozy Sign.

Regarding the third interrogatory in this request, as to Mr. Andrew's involvement with Mr. Herrs, while it is impossible to remember every detail of Mr. Andrew's involvement with Mr. Herrs and more details may come to light as discovery in this matter is ongoing, in general Mr. Andrew discussed the application of the Sign Code, the size limits of the Sign Code in relation to the size of the Cozy Sign and Cozy property, Mr. Howard's knowledge of the Sign Code and BID Code process, and next steps regarding the Cozy Sign.

Regarding the fourth interrogatory in this request, as to Mr. Schrage's involvement with Mr. Herrs, while it is impossible to remember every detail of Mr. Schrage's involvement with Mr. Herrs and more details may come to light as discovery in this matter is ongoing, in general Mr. Schrage participated in discussions with Mr. Herrs, Mr. Andrew and Ms. Driscoll regarding the application of the Sign Code to the Cozy Sign, meeting with Mr. Howard and Mr. Benson, and next steps regarding the Cozy Sign.

3. Please explain the changes the City believes Plaintiffs need to make to their mural in order to "turn this into a mural rather than a sign," as suggested by Vice Mayor Longbine at the November 13, 2023, Commission meeting, (Doc. 16 at ¶ 136.) and in the Brief in Support of Defendant's Motion to Dismiss (Doc. 27 at 8).

**OBJECTION AND RESPONSE:** The City objects to this request to the extent it refers to the Cozy Sign as a mural or otherwise implies the Cozy Sign is not a sign under the Sign Code. The City objects to this request to the extent it seeks information protected by the attorney-client or work product privileges as it relates to the Brief in Support of Defendant's Motion to Dismiss. The City further objects to this request as it seeks the City to explain or interpret the arguments made by the City's counsel in Doc. 27 to Plaintiffs. The City also objects to this request to the extent it misinterprets the argument in Doc. 27 at 8 as a suggestion. The City also objects as the request uses only an excerpt of Vice Mayor Longbine's statement and misinterprets the statement made by Vice Mayor

Longbine on November 13, 2023 as a suggestion. Mr. Longbine's full statement at the meeting was "So I guess my thoughts all along as I've studied this issue is what would it take for him to turn this into a mural rather than a sign." The statement was phrased as a question, not a suggestion. That is because Mayor Longbine does not interpret or apply the Sign Code or BID Code on behalf of the City. The City will not respond to the request to the extent it seeks information "as suggested" by Vice Mayor Longbine or in the Brief in Support of Defendant's Motion to Dismiss.

Subject to and without waiving these objections, the City responds only to the non-objectionable portion of the request that asks "Please explain the changes the City believes Plaintiffs need to make to their mural in order to 'turn this into a mural rather than a sign.'" The City regulates signs as defined by Salina Code § 42-764. In order to remove the Cozy Sign from the applicability of the Sign Code regulations, Plaintiffs would have to change the Cozy Sign into a display that falls outside the definition of "sign" found at Salina Code § 42-764.

As the City does not know what changes Plaintiffs would be willing to consider (particularly considering Paragraph 29 of the Amended Complaint, which states, "Mr. Howard does not want to change, alter, or deviate from" the rendering shown in Paragraph 28 of the Amended Complaint), the City cannot (and does not) know all of the potential changes that could be made to the Cozy Sign that would take it outside of the scope of the definition of sign. It would be nearly impossible for the City to guess all of the changes that could be made to the Cozy Sign to turn it into a display outside the definition of sign. However, in general, Plaintiffs can change the Cozy Sign into a display that does not "announce, direct attention to, or advertise," which would remove the display from the scope of the definition of "sign" because the criterion in Salina Code § 42-764(2) would no longer be met, or Plaintiffs could relocate the display to the inside of the Cozy building, which would remove the display from the scope of the definition of "sign" because the criterion in Salina Code § 42-764(3) would no longer be met.

4. Please identify every government interest served by regulating Plaintiffs' mural.

**OBJECTION AND RESPONSE:** The City objects to this request to the extent it refers to the Cozy Sign as a mural or otherwise implies the Cozy Sign is not a sign under the Sign Code. Subject to and without waiving this objection, the purpose statement of the Sign Code, found at Salina Code § 42-500 ([https://library.municode.com/ks/salina/codes/code\\_of\\_ordinances?nodeId=CH42ZORE\\_ARTXSI\\_DIV1GE\\_S42-500PU](https://library.municode.com/ks/salina/codes/code_of_ordinances?nodeId=CH42ZORE_ARTXSI_DIV1GE_S42-500PU)), sets forth the government interests served by regulating signs under the Sign Code. The City refers Plaintiffs to § 42-500 for a complete list of those interests. The Sign Code regulates all signs, not just the Cozy Sign and the government interests are served by the regulation of all signs (by addressing both their individual and cumulative impacts), not just the Cozy Sign. The government interests served by regulating signs like the Cozy Sign include aesthetics, pedestrian and traffic safety, and property values.

5. Please explain how the City determines if a mural is used to “announce, direct attention to, or advertise.”

**OBJECTION AND RESPONSE:** The City objects to this request to the extent it refers to a mural as defined by Plaintiffs in their Terms and Definitions, a definition that cannot be found in the Salina Code. Subject to and without waiving this objection, the City applies the Sign Code as written. The City does not use or apply the term “mural” as defined by Plaintiffs in their Terms and Definitions. The Sign Code definition found in Salina Code § 42-764 refers to, in pertinent part, whether a “writing,” “pictorial representation,” “emblem,” “flag, banner, streamer pennant, string of lights, or display,” or “any other figure of similar character” is used to “announce, direct attention to, or advertise.”

The City applies the plain language and ordinary use of the words and phrases “announce,” “direct attention to,” and “advertise.” The City determines whether a “writing,” “pictorial representation,” “emblem,” “flag, banner, streamer pennant, string of lights, or display,” or “any other figure of similar character” is used to “announce” by evaluating whether the display makes a declaration about a fact, occurrence, or intention or proclaims or gives notice of, or identifies, a business, product, or event.

The City determines whether a “writing,” “pictorial representation,” “emblem,” “flag, banner, streamer pennant, string of lights, or display,” or “any other figure of similar character” is used to “direct attention to” by evaluating whether the display indicates, points to, points out, or specifies a location (in general, like a particular property, or specifically, like a building entrance or pickup window).

The City determines whether a “writing,” “pictorial representation,” “emblem,” “flag, banner, streamer pennant, string of lights, or display,” or “any other figure of similar character” is used to “advertise” by evaluating whether the display is meant to attract customers, encourage a commercial transaction, offer products or services in exchange for consideration (e.g., a display that says, “sliders, 5 for \$5.00”); call attention to a brand, products, or services in order to encourage the purchase of products or services, in that it pertains to or references the goods or services for sale (e.g., the depiction of hamburger on the Cozy building wall).

6. Please explain how the City identifies “art” which is exempt from the mural- sign code regime. See (Doc. 16 at ¶¶ 62-65, 100, 115, 208, 216); (Doc. 16-2 at 4-6, 22-23, 28); (Doc. 16-4 at 6-7); (Doc. 27 at 9, 12).

**OBJECTION AND RESPONSE:** The City objects to this requests to the extent it seeks information protected by the attorney-client, work product and anticipation of litigation



privileges respecting Defendant's Brief in Support of its Motion to Dismiss. The City further objects to this request to the extent it seeks the City to explain the arguments made by the City's counsel as set forth in Doc. 27 at 9 and 12. The City further objects to the extent the request incorporates allegations to the Amended Complaint as Plaintiffs made the allegations and no answer has been filed to determine whether the allegations are admitted or denied. Based on these objections, the City will only respond to the non-objectionable portion of the request "Please explain how the City identifies 'art' which is exempt from the mural-sign code regime."

The City objects to the use of the phrase "mural-sign code regime" to refer to the Sign Code or BID Code. Subject to and without waiving these objections, the Sign Code regulates "signs" as defined by § 42-764. If a display is not a sign it does not fall within the scope of the Sign Code.

As to the term "art," the term "art" may be used from time to time as an imprecise shorthand for "not sign," but the term "art" is not included in the Sign Code and is not relevant to the determination of whether a display (whether it is artistic or not) is a "sign." This is because some artistic displays are also "signs," and some are not. To clarify, the artistic displays that are also signs are subject to regulation. The artistic displays that are not signs are just art, and because they are not also signs, they are not subject to regulation.

A "sign" under the sign code "is any writing (including letters, words or numerals), pictorial representation (including illustrations or decorations), emblem (including devices, symbols, or trademarks), flag, banner, streamer, pennant, string of lights, or display calculated to attract the attention of the public, or any other figure of similar character which: (1) Is a structure or any part thereof, or a portable display, or is attached to, painted on, or in any other manner represented on a building or other structure or on the ground; (2) Is used to announce, direct attention to, or advertise; and (3) Is not located inside a building.

Please see Response to Interrogatory No. 5 above for additional information responsive to this request.

7. Please identify any murals that exceed the mural-sign code regime's size restrictions which the Defendant has determined are unregulated "art" within the last 5 years.

**OBJECTION AND RESPONSE:** The City objects to this request to the extent it refers to the Sign Code or BID Code as the "mural-sign code regime." The City objects to this request to the extent it refers to a definition of "mural" in Plaintiffs' Terms and Definitions as that definition is not in the Sign Code or BID Code. Subject to and without waiving these objections, the City applies the Sign Code as written. The City does not apply the

term mural as defined by Plaintiffs in their Terms and Definitions. The Sign Code definition found in Salina Code § 42-764 refers to whether a “writing,” “pictorial representation,” “emblem,” “flag, banner, streamer pennant, string of lights, or display,” or “any other figure of similar character” is used to “announce, direct attention to, or advertise.” The Sign Code regulates signs as defined by Salina Code § 42-764. If a display is not a sign it does not fall within the scope of the Sign Code. Displays that are not signs are not subject to the size limits of the Sign Code, and the City does not evaluate the size of such displays. Accordingly, the City does not have information about the location or sizes of displays that are not signs under the Sign Code. The City, does not have sufficient information to “identify” as requested. Moreover, “unregulated ‘art’” (which the City interprets as displays that are not signs) cannot exceed the Sign Code’s size restrictions because those restrictions only apply to regulated signs.

8. Please identify any murals that exceed the mural-sign code regime's size restrictions which the Defendant has determined are regulated “signs” within the last 5 years.

**OBJECTION AND RESPONSE:** The City objects to this request to the extent it refers to the Sign Code or BID Code as the “mural-sign code regime.” The City objects to this request to the extent it refers to a definition of “mural” in Plaintiffs’ Terms and Definitions that does not correspond to the Sign Code or BID Code. Subject to and without waiving these objections, the City applies the Sign Code as written, it does not use or apply the term “mural” as defined by Plaintiffs in their Terms and Definitions. The Sign Code definition found in Salina Code § 42-764 refers to whether a “writing,” “pictorial representation,” “emblem,” “flag, banner, streamer pennant, string of lights, or display,” or “any other figure of similar character” is used to “announce, direct attention to, or advertise.” The Sign Code regulates signs as defined by § 42-764, and if a display is a sign within the Sign Code it is subject to the size limits of the Sign Code.

Pursuant to Request for Production No. 5, Defendant is producing citations issued within the last 5 years. Pursuant to F.R.C.P. 33(d), Defendant refers Plaintiffs to those documents produced in Defendant’s forthcoming supplemental disclosure for information responsive to this request.

9. Please explain how the City determines if a mural “pertains to the goods or services for sale.” See Amended Complaint at ¶¶ 32, 44, 52-54, 64-65, 128.

**OBJECTION AND RESPONSE:** The City objects to this request to the extent it refers to a definition of “mural” in Plaintiffs’ Terms and Definitions as that definition is not in the Sign Code or BID Code. Subject to and without waiving this objection, the City applies the Sign Code as written, it does not apply the term “mural” as defined by Plaintiffs in their Terms and Definitions. The Sign Code definition found in Salina Code § 42-764 refers to whether a “writing,” “pictorial representation,” “emblem,” “flag, banner, streamer pennant, string of lights, or display,” or “any other figure of similar character” is used to

**“announce, direct attention to, or advertise.” Salina Code § 42-764 does not use the phrase “pertains to the goods or services for sale.” Rather, Salina Code § 42-764 applies to a display if, among other things, it “announces, directs attention to, or advertises.” One way to evaluate whether a display “advertises” is if it encourages the purchase of products or services, in that it pertains to or references the goods or services for sale.**

10. For any Request for Admission that you denied, please explain the reasons for your denial.

**OBJECTION: The City objects to this request to the extent it seeks to impose obligations outside the scope of, or different than, the Federal Rules of Civil Procedure. F.R.C.P. 36(4) requires a matter be admitted, or specifically deny the request or state in detail why the answering party cannot truthfully admit or deny it. Further, a denial must fairly respond to the substance of the matter.**

11. Please identify the factual basis for the claim made in your Brief in Support of Defendant’s Motion to Dismiss (Doc. 27 at 2) that “Plaintiffs’ display is obviously a sign”.

**RESPONSE: The City refers Plaintiffs to the allegations in their Amended Complaint found at ¶¶ 15-29 for allegations showing Plaintiffs’ display is a sign pursuant to Salina Code § 42-764. The City also refers Plaintiffs to the transcript attached as Exhibit A to Plaintiffs’ Amended Complaint at 15:2-23 for additional facts showing Plaintiffs’ display is a sign pursuant to Salina Code § 42-764. Plaintiffs sign is a “writing” “pictorial representation” “emblem” “flag, banner, streamer pennant, string of lights, or display calculated to attract the attention of the public” or “any other figure of similar character” that is “a structure or any part therefor, or a portable display, or is attached to, painted on, or in any manner represented on a building or other structure or on the ground,” that “is used to announce, direct attention to, or advertise, and is not located inside a building.”**

**The Cozy Sign is a display calculated to attract the attention of the public, that is attached to or painted on a building. It is used to announce, direct attention to and advertise and it is not located inside of a building. Specifically, the Cozy Sign contains a tag line announcing the infamous smells of the Cozy, it has an arrow directing attention to the building entrance and ordering window, and it advertises the hamburgers and toppings available for sale at the Cozy by depicting representations of them.**

Respectfully submitted this 12th day of July , 2024.

s/ Aaron O. Martin

Aaron O. Martin  
Bar Number 24170  
Attorney for Defendant City

s/ Todd G. Messenger

Todd G. Messenger,  
CO Bar Number 38783  
Pro Hac Vice Attorney for

s/ Amanda C. Jokerst

Amanda C. Jokerst  
CO Bar Number 47241  
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**VERIFICATION**

I, Mike Schrage, as City Manager for the City of Salina, Kansas, declare that the foregoing responses to the interrogatories contained in the foregoing **DEFENDANT'S RESPONSES TO PLAINTIFFS' FIRST SET OF DISCOVERY TO PLAINTIFFS** are true and correct as of this date based upon my present knowledge, information, and belief.



Signature

Executed on July 12, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 12<sup>th</sup> day of July, 2024, I caused the foregoing **DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES** to be served on the following parties by electronic mail as follows:

Jeffrey Shaw.  
Samuel G. MacRoberts  
Kansas Justice Institute  
12980 Metcalf Avenue, Suite 130  
Overland Park, KS 66213  
Telephone: 913-213-5121; 913-213-5018  
E-mail: jeff@kansasjusticeinstitute.org; sam.macroberts@kansasjusticeinstitute.org

*Attorneys for Plaintiffs*

/s/ Amanda C. Jokerst

Amanda C. Jokerst



**Sec. 1-11. Severability.**

If for any reason any chapter, article, section, subsection, sentence, clause or phrase of this Code or the application thereof to any person or circumstances, is declared to be unconstitutional or invalid or unenforceable, such decision shall not affect the validity of the remaining portions of this Code.

(Code 1966, § 1-9)

**Sec. 42-500. Purpose.**

This article promotes the public health, safety and welfare of the community through a comprehensive system of reasonable, effective, consistent, content-neutral and nondiscriminatory sign standards and requirements, narrowly drawn to:

- (1) Ensure that all signs installed in the city are compatible with the character and visual environment of the community and promote the goals, objectives and policies of the comprehensive plan;
- (2) Balance public and private objectives by allowing adequate avenues for both commercial and non-commercial messages;
- (3) Improve pedestrian and traffic safety by promoting the free flow of traffic and the protection of pedestrians and motorists from injury and property damage caused by, or which may be fully or partially attributable to, unsecured, cluttered, distracting, and/or illegible signage;
- (4) Protect the aesthetic appearance of the city's natural and built environment for its citizens and visitors;
- (5) Prevent property damage, personal injury, and litter caused by signs that are improperly constructed or poorly maintained;
- (6) Protect property values, the local economy, and quality of life by preserving and enhancing the appearance of the streetscape; and
- (7) Provide for the placement of temporary signs in limited circumstances, without regard to the communicative content of the sign.
- (8) Provide consistent design standards that enable the fair and consistent enforcement of these sign regulations.
- (9) Enhance the city's ability to maintain its public rights-of-way.

(Ord. No. 17-10882, § 1, 7-10-17)

**Sec. 42-501. Permits.**

No sign, except for normal repair and for signs listed in sections 42-504 and 42-505, shall be painted, constructed, erected, remodeled, relocated or expanded until a zoning certificate (sign permit) for such sign has been obtained pursuant to the procedure set forth in this article.

(Code 1966, § 36-900)

**Sec. 42-502. Zoning certificate (sign permit) required.**

- (a) The zoning certificate (sign permit) must be obtained from the office of the zoning administrator.
- (b) A zoning certificate (sign permit) shall be either issued or refused by the zoning administrator within ten (10) days after the receipt of an application therefore or within such further period as may be agreed to by the applicant. No zoning certificate for any sign shall be issued unless the sign complies with the regulations of this article.
- (c) A zoning certificate (sign permit) shall become null and void four (4) months after the date on which it is issued unless within such four-month period, construction, building, moving, remodeling or reconstruction of a structure or sign is commenced or a use is commenced.

(Code 1966, § 36-901)

**Sec. 42-521. C-3 and C-4 commercial districts.**

The following sign regulations shall apply in the C-3 shopping center and C-4 central business districts:

- (1) *Functional types permitted.* Any type listed in section 42-506, except that advertising signs for other than special public events sponsored by governmental, philanthropic and nonprofit organizations shall be prohibited in the C-4 district and district and advertising signs other than computerized electronic message displays shall be prohibited in the C-3 district.
- (2) *Structural types permitted.* Any type listed in section 42-507, except that mobile signs and roof signs shall be prohibited in the C-4 district.
- (3) *Number of signs permitted.* No maximum limitation in the C-3 district. In the C-4 district, four (4) signs per business with a maximum of ten (10) signs per zoning lot; provided, however, the following additional restrictions shall apply:
  - a. No more than one (1) projecting sign or ground/pole sign shall be allowed per street frontage.
  - b. Ground/pole signs shall be allowed only on zoning lots without buildings or those with buildings having a front yard setback of ten (10) feet or more.
  - c. Ground/pole signs and projecting signs shall not be allowed in combination along the same street frontage.
- (4) *Maximum gross surface area:*
  - a. In the C-3 district, four (4) square feet of sign area for each lineal foot of building frontage; where no building frontage exists, one (1) square foot of sign area for each lineal foot of street frontage.
  - b. In the C-4 district, three (3) square feet of sign area for each lineal foot of building frontage for allowable signage other than a ground/pole sign or a projecting sign; where no building frontage exists, one (1) square foot of sign area for each lineal foot of street frontage. Irrespective of building or street frontage, no property or zoning lot shall be restricted to less than thirty-six (36) square feet of sign area. No more than sixty-seven (67) percent of allowable sign area may be displayed on any building wall or street frontage. In regards to projecting signs and ground/ pole signs, the following maximum area limitations shall apply:

Building Frontage	Projecting Signs*	Ground/Pole Signs
25 feet or less	30 sq. ft.	45 sq. ft.
26—50 feet	36 sq. ft.	54 sq. ft.
51 feet or more	48 sq. ft.	72 sq. ft.

\*The maximum area for a projecting sign on a building wall without street frontage shall be four (4) square feet.

- (5) *Maximum height.* In the C-3 and C-4 districts, ground/pole signs may not exceed thirty (30) feet in height above grade. In the C-4 district, projecting or wall signs may not project above the lowest point of the roof of the structure to which it is attached.

(Ord. No. 90-9381, §§ 5, 9, 5-14-90; Ord. No. 07-10425, § 1, 12-03-07)

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**Sec. 42-597. Board of zoning appeals.**

- (a) *Authorization.* The board of zoning appeals for the city is hereby established in accordance with K.S.A. 12-714.
- (b) *Membership.* The board shall consist of seven (7) members who shall be appointed by the mayor with the approval of the board of city commissioners. All members shall be residents of the city. None of the members appointed shall hold any other elected or appointed office or position in the city government, except that one member shall be a member of the planning commission.
- (c) *Power and duties.* The board shall have the power to:
  - (1) Hear and decide appeals where it is alleged there is an error in any order, requirement, decision or determination made by the zoning administrator in the enforcement of the zoning regulations. The board may reverse or may modify the order, requirement, decision or determination and to that end shall have all the powers of the administrative official from whom the appeal is taken.
  - (2) Authorize in specific cases a variance from the specific terms of these zoning regulations which shall not be contrary to the public interest where, due to special conditions, a literal enforcement of the provisions of the regulations will result in unnecessary hardship for the applicant. The board shall be limited to granting variances on matters including, but not limited to, building height, setbacks, lot size and lot coverage, as provided by the zoning regulations. A request for a variance may be granted after a public hearing upon a finding by the board that all of the following conditions have been met:
    - a. The variance requested arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district, and is not created by an action or actions of the property owner or applicant.
    - b. The granting of the permit for variance will not adversely affect the rights of adjacent property owners or residents.
    - c. The strict application of the provisions of the zoning regulations from which the variance is requested will constitute an unnecessary hardship upon the property owner represented in the application.
    - d. The variance requested will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.
    - e. Granting the variance desired will not be opposed to the general spirit and intent of the zoning regulations.
  - (3) In permitting a variance, the board may impose appropriate conditions and safeguards including, but not limited to, planting screens, fencing, construction commencement and completion dates, lighting, road access restrictions, parking requirements or any other requirement which the board deems appropriate under the circumstances, upon a finding that they are necessary to fulfill the purpose and intent of the zoning regulations.
  - (4) The board is not authorized to issue the following types of variances:
    - a. A variance which would allow a use not otherwise permitted in the zoning district.
    - b. A variance to a zoning ordinance definition.
    - c. A variance to expand or enlarge a nonconforming use.
    - d. A variance that would increase residential density above the maximum allowed in a zoning district.



- 
- e. A variance that would create a zero lot line setback.
  - f. A variance to the owner of a substandard lot where such lot was created in violation of the zoning regulations.
  - g. A variance that would increase the number of permitted signs on a zoning lot.
- (d) *Commencement of proceeding before the board.*
- (1) *Appeals.*
- a. By whom: appeals to the board may be taken by any person aggrieved, or by any officer, department, or board of the city, or any governmental agency or body affected by any decision or interpretation of the zoning administrator. Such appeal shall be filed with the secretary of the board within thirty (30) days from the date of the decision by the zoning administrator, and such appeal shall specify, in writing, the grounds for appeal of the administrator's decision. The zoning administrator, when notified by the board of zoning appeals, shall transmit to the board all the papers constituting the record upon which the action appealed from was taken, within the time period established by the rules of the board.
  - b. Effect of appeal: an appeal stays all proceedings in furtherance of the action appealed from, including a permittee's right to proceed with development or other activities under a building permit, the issuance of which is a subject of the appeal.
- (2) *Variances.* Any person may apply to the board for a variance by filing an application with the secretary of the board. The application shall include the following:
- a. The name, address, telephone number and signature of the property owner and applicant.
  - b. The name and address of the architect, professional engineer or contractor, if any.
  - c. A site plan of the property showing the following:
    - 1. Property lines of the subject property.
    - 2. Size and location of existing structures and the distance between all existing and proposed structures on the property.
    - 3. Setbacks for all existing and proposed structures on the property.
    - 4. Any other dimension and/or information that may be relevant to the request.
  - d. A survey or verification that property and structure dimensions on the site plan are correct.
  - e. The names and addresses of the record owners of all property adjoining the property in question.
  - f. A narrative statement of how the statutory requirements in K.S.A. 12-715 are met.
- (3) *Representation.* An applicant must appear in person at the public hearing, or be represented by an agent or attorney, in order for the board to act on the application.
- (e) *Written decisions.* The board shall render its decision and findings in writing within thirty (30) days of the conclusion of the hearing. Decisions shall be filed in a public office designated by the board of commissioners and shall be a public record.
- (f) *Dissatisfaction with the determination of the board.* Any person, official or governmental body dissatisfied with any order or determination of the board of zoning appeals may bring an action in district court to determine the reasonableness of any such order or determination.

(Code 1966, § 36-1201; Ord. No. 88-9244, § 1, 4-11-88)

Cross reference(s)—Administration, ch. 2; boards and commissions generally, § 2-136 et seq.

**Sec. 42-637. Building.**

*Building* is any covered structure built for the support, shelter or enclosure of persons, animals, chattels or moveable property of any kind, and which is permanently affixed to the land.

(Code 1966, § 36-1301(21))

**Sec. 42-764. Sign.**

*Sign* is any writing (including letters, words or numerals), pictorial representation (including illustrations or decorations), emblem (including devices, symbols, or trademarks), flag, banner, streamer, pennant, string of lights, or display calculated to attract the attention of the public, or any other figure of similar character which:

- (1) Is a structure or any part thereof, or a portable display, or is attached to, painted on, or in any other manner represented on a building or other structure or on the ground;
- (2) Is used to announce, direct attention to, or advertise; and
- (3) Is not located inside a building.

(Code 1966, § 36-1301(145))

**Sec. 42-781. Sign, wall.**

*Wall sign* is a sign fastened to or painted on a wall of a building or structure in such a manner that the wall becomes merely the supporting structure or forms the background surface, and which does not project more than twelve (12) inches from such building.

(Code 1966, § 36-1301(162))

9/30/2024

1

DEAN ANDREW

1 .

2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF KANSAS

4 .

5 .

6 COZY INN, INCORPORATED, d/b/a

7 THE COZY INN; STEPHEN HOWARD

8 Plaintiffs,

9 .

10 vs. Civil Action No. 6:24-cv-01027-TC-ADM

11 .

12 CITY OF SALINA, KANSAS,

13 Defendant.

14 .

15 .

16 DEPOSITION OF

17 DEAN ANDREW,

18 taken on behalf of the Plaintiffs, pursuant to

19 Notice to Take Deposition, beginning at 9:02 a.m.

20 on the 30th day of September, 2024, at Clark, Mize

21 & Linville, 129 S. 8th Street, in the City of

22 Salina, County of Saline, and State of Kansas,

23 before Sandra S. Biggs, Kansas CCR No. 0716.

24 .

25 .



5111 SW 21st Street  
Topeka, KS 66604  
785-273-3063  
www.appinobiggs.com

6420 W. 95th Street  
Suite 101  
Overland Park, KS 66212  
913-383-1131

800 E. 1st Street  
Suite 305  
Wichita, KS 67202  
316-201-1612

EXHIBIT D



9/30/2024

9

**DEAN ANDREW**

1 Q. Okay. Is there any reason you can't  
2 testify here today?

3 A. I can't think of any.

4 Q. All right.

5 A. Seasonal allergies have spiked, and I'll  
6 muddle through the best I can. If I lose my  
7 voice, I'll just need to drink some water.

8 Q. All right. And if at any time you need  
9 to take a break, that is fine. Just let me know.  
10 The only condition on that would be that if  
11 there's a question pending that you answer that  
12 question first and go to break.

13 A. Okay.

14 Q. What is your current job title?

15 A. I'm the Planning and Zoning administrator  
16 for the City of Salina.

17 Q. And how long have you had that job?

18 A. That specific job since 2009. I've been  
19 employed as a planner by the city for 37 years.

20 Q. Okay. So, since 2009, you've been the  
21 zoning administrator. Before that, you were just  
22 a planner?

23 A. I've had various titles.

24 Q. Okay.

25 A. But I've always worked in the Planning

9/30/2024

10

**DEAN ANDREW**

1 Department since I was hired.

2 **Q. All right. And what was your educational**  
3 **background before working for the City of Salina?**

4 A. I have a Bachelor's and Master's degree  
5 from Kansas State University in urban geography  
6 and planning. And I have a Juris Doctorate degree  
7 from the University of Iowa, and I've been  
8 admitted to the Iowa and Kansas bars.

9 **Q. All right. And in your role as zoning**  
10 **administrator, who do you report to?**

11 A. Lauren Driscoll is the director of  
12 Community and Development Services.

13 **Q. And does anyone report to you?**

14 A. I have three planners who report to me.

15 **Q. Other than those three planners, does**  
16 **anyone else report to you?**

17 A. No, just those three planners. That's  
18 the Planning Division.

19 **Q. Who are the three planners?**

20 A. Dustin Herrs, Dustin Michelson and Gage  
21 Roberts.

22 **Q. And when you make a determination as a**  
23 **zoning administrator, does anyone in the city have**  
24 **the authority to overrule you?**

25 A. The Board of Zoning Appeals can overrule

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**DEAN ANDREW**

1 correct?

2 A. Yes.

3 MS. JOKERST: Object to form.

4 BY MR. SHAW:

5 Q. And after that, does it say or display  
6 calculated to attract the attention of the public?

7 A. Yes.

8 Q. Is the meaning of this section saying  
9 that any writing, pictorial representation,  
10 emblem, flag, banner, streamer, pendant, string of  
11 lights or display that is calculated to attract  
12 the attention of the public meets the definition  
13 of a sign?

14 MS. JOKERST: Object to form.

15 A. That can't be read without reference to  
16 subsections 1, 2 and 3.

17 BY MR. SHAW:

18 Q. Well, is there also an or after  
19 calculated to attract the attention of the public?

20 A. Are you asking me if there's an or in  
21 front of it or after it.

22 Q. Is there an or after calculated to  
23 attract the attention of the public?

24 A. Yes.

25 Q. So does that second or separate the any

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**DEAN ANDREW**

1 flag?

2 A. Flag, banner, streamer, pennant or string  
3 of lights.

4 BY MR. SHAW:

5 Q. Okay. And such a display if it's  
6 calculated to attract the attention of the public  
7 would be a sign?

8 MS. JOKERST: Object to form.

9 A. No, because, again, I can't make a  
10 determination without using subsections 1, 2 and  
11 3.

12 BY MR. SHAW:

13 Q. Why is the second or there, I guess?

14 MS. JOKERST: Object to form.

15 A. You're speaking again to this or after  
16 the word public?

17 BY MR. SHAW:

18 Q. Yes, that's correct?

19 A. Well, if the code drafter was here, I  
20 would ask them, but my interpretation would be  
21 that it's somewhat redundant because display or  
22 any other figure seems to be somewhat repetitive.

23 Q. Okay. So the display calculated to  
24 attract the attention of the public has to also be  
25 married with the three subsections?

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**DEAN ANDREW**

1 A. Yes.

2 Q. So then a display would have to both  
3 attract the attention of the public and direct the  
4 attention of the public. Is that correct?

5 A. No.

6 Q. So a display that was only calculated to  
7 attract the attention of the public would be a  
8 sign?

9 A. A display calculated to attract the  
10 attention of the public that was used to announce,  
11 direct attention to or advertise would be a sign.

12 Q. Okay. So it would have to both attract  
13 the attention of the public and direct attention?

14 A. That would be my interpretation.

15 Q. Okay. And as I recall from what you said  
16 earlier, attract attention is a shorter duration  
17 than direct attention. Is that correct?

18 MS. JOKERST: Object to form.

19 A. Yes.

20 BY MR. SHAW:

21 Q. Okay. And the term advertise here as  
22 used in subsection 2, can you define an  
23 advertisement as used here?

24 A. I think I answered that question  
25 previously, but it is to promote what is going on

**DEAN ANDREW**

1 would put up a structure, whether it was a banner  
2 or whether it's permanent sign, that would be  
3 something that is announcing, directing attention  
4 or advertising.

5 **Q. What would they be advertising?**

6 MS. JOKERST: Object to form.

7 A. They would be advertising their desire  
8 for the public to turn to Jesus.

9 BY MR. SHAW:

10 **Q. Okay. In subsection 3 where it says is**  
11 **not located inside of a building, what is**  
12 **considered a building under this section?**

13 A. A structure that meets the definition of  
14 building in the zoning ordinance.

15 **Q. Okay. Would you please turn to the**  
16 **section defining building?**

17 A. Appears to be 42-637.

18 **Q. All right. And does that define a**  
19 **building as any covered structure built for the**  
20 **support, shelter or enclosure of persons, animals,**  
21 **chattels or movable property of any kind and which**  
22 **is permanently affixed to the land?**

23 A. That is the definition that's in the  
24 zoning ordinance.

25 **Q. All right. What is the support, shelter**



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**DEAN ANDREW**

1 of sign as a structure.

2 BY MR. SHAW:

3 **Q. Okay.**

4 A. We're in the business of regulating  
5 structures, so a flag would be a structure.

6 **Q. Okay. Would an American flag be used to**  
7 **announce, direct attention to or advertise?**

8 MS. JOKERST: Object to form.

9 A. It is certainly announcing.

10 BY MR. SHAW:

11 **Q. Okay. Would it be announcing the United**  
12 **States?**

13 MS. JOKERST: Object to form.

14 A. Yes.

15 BY MR. SHAW:

16 **Q. Okay. Has the City of Salina's**  
17 **definition of a sign changed any as a result of**  
18 **this lawsuit?**

19 MS. JOKERST: Object to form and  
20 foundation and -- yeah, those are my two  
21 objections.

22 A. To the best of my knowledge, the city's  
23 definition of sign has been this way since 1966  
24 and is unchanged.

25 BY MR. SHAW:

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**DEAN ANDREW**

1 Q. Has the city's definition of a sign  
2 changed any since 2015?

3 MS. JOKERST: Object to form.

4 A. I don't understand the date reference.

5 BY MR. SHAW:

6 Q. The Supreme Court decided a case named  
7 Reed v. Town of Gilbert in 2015. That is the  
8 reference. Has the city's definition of sign --  
9 or, excuse me, has the city's interpretation of  
10 the definition of sign changed any since the Reed  
11 v. Town of Gilbert decision in 2015?

12 MS. JOKERST: Object to form.

13 A. Not the definition of sign, no.

14 BY MR. SHAW:

15 Q. Okay. Have other parts of the code  
16 changed since then?

17 A. Absolutely.

18 Q. Okay. If you can go to Section 42-781.  
19 Does this provide the definition of a wall sign?

20 A. Yes.

21 Q. Under this definition, are murals  
22 considered wall signs?

23 MS. JOKERST: Object to form.

24 A. My answer would be no.

25 BY MR. SHAW:

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**DEAN ANDREW**

1           **Q.     Why is that?**

2           A.     Because the definition says a wall sign  
3 is a sign, and a mural is not a sign.

4           **Q.     What is a mural?**

5           MS. JOKERST: Object to form.

6           A.     City of Salina does not have a definition  
7 for the term mural.

8           BY MR. SHAW:

9           **Q.     Then how do you know it is not a sign?**

10          MS. JOKERST: Object to form.

11          A.     A mural would not announce, direct  
12 attention to or advertise.

13          BY MR. SHAW:

14          **Q.     Is a mural calculated to attract the**  
15 **attention of the public?**

16          MS. JOKERST: Object to form and  
17 foundation.

18          A.     I think the word calculated goes to  
19 intent, and it's not my job to interpret  
20 somebody's intent.

21          BY MR. SHAW:

22          **Q.     Is that not how the code uses the word**  
23 **calculated, though?**

24          MS. JOKERST: Object to form.

25          BY MR. SHAW:

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**DEAN ANDREW**

1 Gilbert is that we are regulating the size, the  
2 time, place and manner of signs. And if the sign  
3 is otherwise compliant with time, place and manner  
4 and somebody wishes to substitute a non-commercial  
5 message for their commercial message, then that is  
6 permitted.

7 BY MR. SHAW:

8 **Q. Why the distinction between commercial**  
9 **and non-commercial messages?**

10 MS. JOKERST: Object to form and  
11 foundation.

12 A. Section 42-511 says the purpose of this  
13 provision is to prevent any inadvertent favoring  
14 of any particular commercial or non-commercial  
15 message over any other non-commercial message.

16 BY MR. SHAW:

17 **Q. Does this provision allow the favoring of**  
18 **non-commercial messages over commercial messages?**

19 MS. JOKERST: Object to form.

20 A. It doesn't allow for any favoring of  
21 messages.

22 BY MR. SHAW:

23 **Q. So if a -- if the sign code allows a non-**  
24 **commercial message on a sign, can a commercial**  
25 **message be substituted in its place?**

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**DEAN ANDREW**

1 Q. Okay.

2 A. So if I'm Wendy's restaurant and I want  
3 to cover up my Wendy's restaurant sign with a sign  
4 that promotes a particular candidate or ballot  
5 initiative, I may do so.

6 Q. How does this provision interact with the  
7 different functional definitions of signs?

8 MS. JOKERST: Object to form.

9 A. I'm not aware that it does.

10 BY MR. SHAW:

11 Q. Okay. Let's move on to Section 42-521.  
12 Is this section the section regulating signage in  
13 the C-3 and C-4 commercial districts?

14 A. These are the sign district regulations  
15 that apply in the C-3 and C-4 commercial  
16 districts.

17 Q. All right. So for all these questions  
18 I'm about to ask, I'm only asking about the C-4  
19 district. I'm not interested in the C-3.

20 What are the maximum number of signs allowed  
21 in the C-4 district?

22 A. An individual building may have a maximum  
23 of ten signs on that zoning lot with a limit of  
24 four signs per business.

25 Q. Okay. And does that include those signs

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**DEAN ANDREW**

1 Q. Had anyone determined on that day that  
2 the painting at The Cozy Inn was a sign?

3 MS. JOKERST: Object to form.

4 A. All the actions that were taken from that  
5 staff meeting on were based on the possibility  
6 that it would be determined to be a sign.

7 BY MR. SHAW:

8 Q. Was it, in fact, determined to be a sign?

9 A. It was.

10 Q. When was that decision made?

11 MS. JOKERST: Object to form.

12 A. Sometime during that week.

13 BY MR. SHAW:

14 Q. Who made that determination?

15 A. Mr. Herrs made the initial determination,  
16 and then I concurred.

17 Q. Why did you concur?

18 A. Because I agreed with his determination.

19 Q. Why did you agree with his determination?

20 A. Because I determined that the graphic  
21 display announced, directed attention to and  
22 advertised the business which was The Cozy Inn.

23 Q. And you determined that within the first  
24 week?

25 A. Yes.



**DEAN ANDREW**

1           **Q.     What specifically did you determine**  
2     **announced, direct attention to or advertised?**

3           A.     I determined that the graphic displays of  
4     the burgers that were available for sale in the  
5     building, the ketchup, mustard packets and  
6     particularly the words associated with Don't Fear  
7     the Smell and The Fun is inside with an arrow  
8     pointing directly to the north pickup window  
9     constituted a display that announced, directed  
10    attention to and advertised The Cozy Inn business.

11          **Q.     Did it -- did you determine it did all**  
12    **three of those, announced, direct attention to and**  
13    **advertised?**

14          A.     I believe it does, yes.

15          **Q.     Okay.   What part of the painting**  
16    **announces The Cozy Inn?**

17          A.     The burgers that are on display.

18          **Q.     How do they announce The Cozy Inn?**

19          A.     Because they depict the product that's  
20    available inside that building.

21          **Q.     How do the painting on the side of The**  
22    **Cozy Inn direct attention?**

23          A.     The words Don't Fear the Smell is  
24    associated with the unique odor that emanates from  
25    that building and from their product the onion

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**DEAN ANDREW**

1 artificial rectangles around it. We treated the  
2 entire north wall as part of the display area.

3 BY MR. SHAW:

4 Q. Okay. After Mr. Howard submitted this  
5 application on November 13th or whenever he  
6 submitted it, what was done with this application  
7 by your department?

8 A. It was placed on file and on hold.

9 Q. What does it mean for it to be on hold?

10 A. It means that we could not approve it,  
11 but we were going to try to continue to work with  
12 Mr. Howard to find a code-compliant code-based  
13 solution that might allow ultimately the sign to  
14 be installed.

15 Q. Does the city code discuss procedures for  
16 placing a sign permit on hold?

17 MS. JOKERST: Object to form.

18 A. It does not.

19 BY MR. SHAW:

20 Q. So is placing a sign permit on hold just  
21 a unwritten practice?

22 MS. JOKERST: Object to form.

23 A. It's not an unwritten practice. It's  
24 usually done in consultation with the applicant.

25 BY MR. SHAW:

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**DEAN ANDREW**

1 Q. Was this done in consultation with Mr.  
2 Howard?

3 A. Absolutely.

4 Q. Did Mr. Howard agree to having his permit  
5 being placed on hold?

6 A. Yes.

7 Q. When did he make that agreement?

8 A. When he talked to Mr. Herrs.

9 Q. Mr. Herrs told you that Steve Howard  
10 agreed to his application being played on hold?

11 MS. JOKERST: Object to form.

12 A. Mr. Howard was informed on Monday the 6th  
13 that we were unable to issue a sign permit, and he  
14 was informed that we were going to continue to  
15 work with him on coming up with a code-compliant  
16 solution that might allow the sign to ultimately  
17 be installed.

18 BY MR. SHAW:

19 Q. But he submitted this application after  
20 that date. Is that correct?

21 A. That is correct.

22 Q. And at any point after that, did Mr.  
23 Howard consent to his application being place on  
24 hold?

25 MS. JOKERST: Object to form.

**DEAN ANDREW**

1           A.     Mr. Howard had knowledge that we were not  
2     able to approve his sign permit application.

3           BY MR. SHAW:

4           **Q.     I asked if he consented to his**  
5     **application being placed on hold?**

6           A.     What's your definition of consent?

7           MS. JOKERST:   Object to form.

8           BY MR. SHAW:

9           **Q.     Agreeing he would let you place his**  
10    **application on hold?**

11          A.     That's not a definition.   What is your  
12    definition of consent?   Mr. Herrs talked to Mr.  
13    Howard face-to-face, handed him information face-  
14    to-face and told him face-to-face that we are  
15    unable to issue a sign permit for the sign as  
16    currently proposed under the current sign code.  
17    How is that not communication.

18          **Q.     I'm asking if Mr. Howard consented to his**  
19    **application being placed on hold?**

20          A.     What form would that consent take?

21          **Q.     Saying I agree that you can take my**  
22    **application and place it on hold.   Did he ever say**  
23    **anything along those lines to you or Mr. Herrs?**

24          MS. JOKERST:   Object to form and  
25    foundation.

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**DEAN ANDREW**

1           A.     I guess I'll refer back to Mr. Herrs'  
2 e-mail of his conversation with him.

3           BY MR. SHAW:

4           **Q.     Are you referring to Exhibit 3?**

5           A.     Exhibit 3.

6           **Q.     So what in this e-mail do you believe**  
7 **expresses Mr. Howard's consent that an application**  
8 **he had not yet submitted be placed on hold?**

9           MS. JOKERST: Object to form.

10          A.     Mr. Herrs said that in his conversation  
11 with Mr. Howard he had asked the artist to stop  
12 work on the sign until staff had had a chance to  
13 talk more about if there are any possible text  
14 amendments that might be appropriate. And we kept  
15 Mr. Howard informed of that, that we couldn't  
16 approve it in its present form but that we would  
17 continue to explore options and work towards  
18 seeing if there was a code-based solution that  
19 would allow the sign to ultimately be installed.

20          BY MR. SHAW:

21          **Q.     And a week passed between when Mr. Herrs**  
22 **spoke with Mr. Howard and when Mr. Howard**  
23 **submitted his application. Is that correct?**

24          A.     Yes.

25          MS. JOKERST: Object to form.

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**DEAN ANDREW**

1 any time even while an application is pending?

2 A. Absolutely. It happens all the time.

3 Q. I see. And does the code not set out  
4 that it is only by a final determination of the  
5 zoning administrator that the Board of Zoning  
6 Appeals gains jurisdiction?

7 MS. JOKERST: Object to form.

8 A. What is your definition of a final  
9 determination?

10 BY MR. SHAW:

11 Q. What is your definition of a final  
12 determination?

13 A. My determination was on Monday November  
14 6th, I had determined this to be a sign that  
15 required a sign permit. That was my  
16 determination. It didn't change. It didn't  
17 change under any of the additional information  
18 that we had. Mr. Howard, if he disagreed with my  
19 determination that it was a sign could have  
20 appealed my determination as being incorrect to  
21 the Board of Zoning Appeals.

22 Q. I believe earlier you had said when a  
23 sign permit was denied, a letter is sent out to  
24 the applicant. Is that correct?

25 A. I did not say that. I said when a sign

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**DEAN ANDREW**

1 may not be issued unless the zoning administrator  
2 determines a permit could also be issued?

3 MS. JOKERST: Object to form.

4 A. It says a permit cannot be issued without  
5 a Certificate of Compatibility.

6 BY MR. SHAW:

7 Q. All right. So the permits are  
8 conditional on the Certificate of Compatibility.  
9 Is that correct?

10 A. You cannot --

11 MS. JOKERST: Object to form.

12 A. You cannot obtain a sign permit.

13 BY MR. SHAW:

14 Q. Is it the other way around, though? Are  
15 Certificate of Compatibilities conditional on the  
16 permit?

17 MS. JOKERST: Object to form.

18 A. The zoning ordinance and the Kansas  
19 Planning and Zoning Enabling Act give the  
20 authority to grant variances to the Salina Board  
21 of Zoning Appeals, not the Downtown Design Review  
22 Board. The Downtown Design Review Board does not  
23 have the legal authority to approve a sign that  
24 exceeds the limits under the C-4 zoning district.

25 BY MR. SHAW:



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**DEAN ANDREW**

1 complete unless we had elevation drawings and  
2 dimensions of the proposed sign. So at least to  
3 that point and the early points, no one had any  
4 knowledge of what the final intended product was.  
5 And so by submitting a sign permit application  
6 with a rendering of the proposed installation,  
7 that would at least inform us of what the full  
8 scope of the installation was. So there was a  
9 benefit from that standpoint.

10 **Q. And after reviewing the rendering of what**  
11 **Mr. Howard was proposing in its alleged final**  
12 **format, did you confirm your determination that**  
13 **that was, in fact, a sign under the sign code?**

14 **A. I was furnished a copy of that rendering,**  
15 **and it did not change my determination that what**  
16 **was being proposed was a painted wall sign.**

17 **Q. And you are aware that other city staff**  
18 **members, specifically Lauren Driscoll and Dustin**  
19 **Herrs, had conversations with Mr. Howard about the**  
20 **sign, correct?**

21 **A. I'm aware that conversations took place,**  
22 **but I wasn't present at any of those meetings. I**  
23 **don't know how many total meetings there were or**  
24 **the whereabouts. I heard secondhand that there**  
25 **was a meeting at the Smoky Hill Museum.**

9/12/2024

1

**DUSTIN HERRS**

1 .

2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF KANSAS

4 .

5 .

6 COZY INN, INCORPORATED, d/b/a

7 THE COZY INN; STEPHEN HOWARD,

8 Plaintiffs,

9 .

10 vs. Civil Action No. 6:24-cv-01027-TC-ADM

11 .

12 CITY OF SALINA, KANSAS,

13 Defendant.

14 .

15 .

16 DEPOSITION OF

17 DUSTIN HERRS,

18 taken on behalf of the Plaintiffs, pursuant to

19 Notice to Take Deposition, beginning at 1:00 p.m.

20 on the 12th day of September, 2024, at Clark, Mize

21 & Linville, 129 S. 8th Street, in the City of

22 Salina, County of Saline, and State of Kansas,

23 before Sandra S. Biggs, Kansas CCR No. 0716.

24 .

25 .



5111 SW 21st Street  
Topeka, KS 66604  
785-273-3063  
www.appinobiggs.com

6420 W. 95th Street  
Suite 101  
Overland Park, KS 66212  
913-383-1131

800 E. 1st Street  
Suite 305  
Wichita, KS 67202  
316-201-1612

**EXHIBIT E**

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**DUSTIN HERRS**

1	No 29	Sign Allowance, The Yard	7
2	No 30	10/3/23 letter to The Yard	
3		from Salina	7
4	No 31	1/2/24 letter to Gleason and	
5		Son Signs from Salina	7
6	No 32	Photos, 095, 123, 91, 301	7
7	No 33	Photo, 120	7
8	No 34	Campbell's Soup photo	7
9	.		
10	.		
11	.		
12	.		
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21	.		
22	.		
23	.		
24	.		
25	.		

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**DUSTIN HERRS**

1 (THEREUPON, Herrs Deposition Exhibit  
2 No 1 through No 34 were premarked for  
3 identification.)

4 DUSTIN HERRS,  
5 called as a witness on behalf of the Plaintiff,  
6 was sworn and testified as follows:

7 DIRECT-EXAMINATION

8 BY MR. SHAW:

9 Q. Good afternoon, Mr. Herrs. My name is  
10 Jeff Shaw. I represent the Cozy Inn and Stephen  
11 Howard in this lawsuit. With me is Sam McRoberts  
12 who also represents the plaintiffs.

13 Have you ever had to sit for a deposition  
14 before?

15 A. I have not.

16 Q. Okay. Some basic ground rules. Because  
17 we have a court reporter here trying to make a  
18 transcript of this, it's very important that we  
19 all try not to talk over each other. It can be  
20 difficult at times. So let's just all try to give  
21 each other a second or two before we start talking  
22 so that there's a clear transcript.

23 Along those lines, things like body language  
24 and, you know, shrugging, say huh-uh, it just  
25 doesn't come through, so try to avoid this. If I

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8

**DUSTIN HERRS**

1 ask you, oh, is that a yes, is that a no, it's  
2 not me trying to kind of be mean about it. It's  
3 trying to get the transcript to clearly reflect  
4 what it is your answer is.

5 If at some point your attorney objects to one  
6 of my questions, you can go ahead and answer that  
7 question unless she specifically tells you do not  
8 answer that question. Otherwise, that's just her  
9 kind of noting her objection for the record. Does  
10 that make sense to you?

11 A. Yes.

12 Q. Okay. And is there any reason why you  
13 are unable to testify today?

14 A. No, I can testify today.

15 Q. Okay. What is your current job at the  
16 City of Salina?

17 A. I am a city planner for the City of  
18 Salina.

19 Q. Okay. And how long have you held that  
20 position?

21 A. Since April of 2006.

22 Q. Okay. And what was your job before that?

23 A. Well, I was a student.

24 Q. Okay. And where were you a student at?

25 A. Before coming here, Kansas State

9/12/2024

9

**DUSTIN HERRS**

1 University.

2 Q. Okay. What did you study there?

3 A. Planning.

4 Q. Okay.

5 A. Regional and Community Planning is the  
6 title.

7 Q. And did you attend any other  
8 universities?

9 A. Fort Hays State.

10 Q. What did you study there?

11 A. Geography.

12 Q. Okay. So as a planner, who do you report  
13 to within the City of Salina?

14 A. Dean Andrew, Zoning administrator.

15 Q. Okay. Do you have anyone that reports to  
16 you?

17 A. No.

18 Q. Okay. Are there other planners?

19 A. We have other planners.

20 Q. Okay. How many approximately, if you  
21 know?

22 A. There are two other planners.

23 Q. Okay. Is one of them Dustin Michelson?

24 A. Michelson.

25 Q. Michelson. Okay.

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**DUSTIN HERRS**

1 Board of Zoning Appeals for a variance to have  
2 exceptional signage.

3 BY MR. SHAW:

4 Q. Okay. All right. Let's kind of do the  
5 same thing with a Certificate of Compatibility  
6 application. That gets submitted. What happens  
7 next for the city?

8 A. Yeah. So the Downtown Design Review  
9 Board is a board of appointed members, and so  
10 there's public hearings involved. We would do a  
11 public notification to the surrounding property  
12 owners of the nature of the Certificate of  
13 Compatibility request. We do a staff report that  
14 would then be sent to the members, and we would  
15 present that staff report at a DRB meeting and  
16 they would review the proposed signage for a  
17 Certificate of Compatibility based on the downtown  
18 design guidelines.

19 Q. It's my understanding the Certificate of  
20 Compatibility is not just for signage. Is that  
21 correct?

22 A. Correct.

23 Q. Is it for kind of any external change to  
24 property?

25 A. Yes.



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**DUSTIN HERRS**

1 A. Are you referring to the Cozy Inn sign  
2 analysis?

3 **Q. Are you on Exhibit 3?**

4 A. I could maybe use some assistance. Okay.  
5 Here we go. Here we go. Thank you. Okay. I do  
6 recognize Exhibit 3.

7 **Q. All right. What is Exhibit 3?**

8 A. It is an e-mail from myself to Lauren  
9 Driscoll regarding a interaction I had with Mr.  
10 Howard.

11 **Q. Okay. Is the e-mail also going to the**  
12 **Plan Group?**

13 A. Oh, it is. Sorry. Yes, it is.

14 **Q. Who all is included in the Plan Group?**

15 MS. JOKERST: Object to form and  
16 foundation.

17 A. At this point in time, it would have been  
18 planning staff, it would have been the development  
19 coordinator and perhaps our administrative staff  
20 supervisor. I'm not a hundred percent certain.

21 BY MR. SHAW:

22 **Q. Okay. Was this written after you had**  
23 **spoken to Steve Howard in your office?**

24 A. Yes.

25 **Q. Okay. So do you see where you say,**

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**DUSTIN HERRS**

1 A. Yes.

2 BY MR. SHAW:

3 Q. On the page 319 there, does the article  
4 attribute quotes to you?

5 A. Yes.

6 Q. All right. Does the article attribute a  
7 quote to you saying that the purpose of the sign  
8 code is to aim to prevent sign wars between  
9 businesses?

10 MS. JOKERST: Object to form.

11 A. Yes.

12 BY MR. SHAW:

13 Q. Is that an accurate quote from you?

14 MS. JOKERST: Object to form.

15 A. It's not the only -- the only  
16 characteristic or purpose of sign regulations.

17 BY MR. SHAW:

18 Q. Okay.

19 A. But it is --

20 Q. It's --

21 A. -- one factor.

22 Q. I'm sorry for talking over you. Did you  
23 say it's a factor?

24 A. Yes.

25 Q. Okay. What is a sign war?

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**DUSTIN HERRS**

1 MS. JOKERST: Object to form.

2 A. A sign war could be a scenario where you  
3 have a number of businesses along a corridor. And  
4 in order to become more prominent, they erect  
5 signs that are larger than the signs around them  
6 and so then -- or larger than the businesses  
7 around them. And the businesses around them in  
8 turn erect signs that are taller or larger than  
9 the original sign. And then more people have  
10 larger, bigger signs and additional signage, and  
11 it goes on to the point where the signage loses  
12 its effectiveness. You lose the trees for the  
13 forest, becomes confusing, becomes cluttered and  
14 there's so much signage that none of it is really  
15 effective any longer.

16 BY MR. SHAW:

17 Q. I see. And is that a term used in the  
18 city code?

19 MS. JOKERST: Object to form.

20 BY MR. SHAW:

21 Q. Is sign wars a term used in the city  
22 code?

23 A. No. It was a term I use in an allegory  
24 form.

25 Q. Okay. So you did use the term sign wars

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**DUSTIN HERRS**

1    **when speaking to the reporter for this article,**  
2    **correct?**

3           A.     Correct.

4           **Q.     That is a correct quotation?**

5           A.     Correct.

6           **Q.     And you said you were using it as -- did**  
7    **you say it was an allegory or...**

8           A.     In the example of the scenario I gave  
9    you, a description of the scenario I gave you.

10          **Q.     All right. And so one of the aims of the**  
11   **sign code is to prevent these sign wars?**

12                   MS. JOKERST: Object to form.

13          A.     One of the aims is to protect both the  
14   aesthetic feel and quality of life of the  
15   community through it's aesthetics as well as  
16   making sure that you don't create any safety  
17   hazards which a lot of sign clutter and large  
18   amounts of signage could potentially result in.

19                   BY MR. SHAW:

20          **Q.     Do you think a mural can potentially**  
21   **result in safety hazards?**

22                   MS. JOKERST: Object to form and  
23   foundation.

24          A.     Which kind of mural?

25                   BY MR. SHAW:

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**DUSTIN HERRS**

1 Q. Okay. All right. There's another quote  
2 attributed to you in that next paragraph. Can you  
3 please review that?

4 A. Yes.

5 Q. Is that an accurate quotation?

6 A. Yes.

7 Q. And the sign wars quotation is also  
8 accurate?

9 A. Yes.

10 Q. Okay. Can you go to Exhibit 14, please.  
11 Are you familiar with what this document is?

12 A. This looks like a sign permit in LAMA.

13 Q. When it says at the top the date of  
14 2/5/2024, do you know is that the date that LAMA  
15 says the permit was submitted or is that the just  
16 the date this was generated?

17 MS. JOKERST: Object to form.

18 A. I have no idea.

19 BY MR. SHAW:

20 Q. Okay. So when you look at this, does it  
21 have any field in there somewhere saying like  
22 assigned to, you know, Dustin Herrs, for instance?

23 A. When I receive a sign permit for review  
24 in our LAMA database, it looks nothing like this  
25 from my seat. The window I see is nothing like

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**DUSTIN HERRS**

1 A. I would characterize this mural as a sign  
2 given that it's with The Yard.

3 Q. Okay.

4 A. So cut to the chase. If that's where  
5 you're going, like this is a sign.

6 Q. I do want to hit each of the --

7 A. Yeah.

8 Q. -- three categories, but yes. So does it  
9 announce The Yard?

10 A. No.

11 Q. Does it direct attention to The Yard?

12 A. Maybe. Probably.

13 Q. Does it advertise The Yard?

14 A. No.

15 Q. This does not advertise The Yard?

16 A. I think it's -- there's a certain Nexus.  
17 I think it would fall under the definition of a  
18 sign. I don't know if it advertises anything. I  
19 mean maybe come play, have fun. Maybe but...

20 Q. Do you believe the mural at the Cozy Inn  
21 advertises the Cozy Inn?

22 A. Yes.

23 Q. Okay. Why does that advertise the Cozy  
24 Inn?

25 A. Because it has burgers and is pointing to

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**DUSTIN HERRS**

1 an arrow inviting you inside.

2 Q. So is the arrow the determining factor  
3 there?

4 A. I think it's --

5 MS. JOKERST: Object to form.

6 A. I think it's the summation of all the  
7 information there.

8 BY MR. SHAW:

9 Q. All right. So a hamburger themed mural  
10 at the Cozy Inn is an advertisement, but a  
11 baseball theme mural at The Yard is not and  
12 advertisement. That is your understanding?

13 A. It could be.

14 MS. JOKERST: Object to form.

15 BY MR. SHAW:

16 Q. Okay. All right. As a whole, you would  
17 classify this as a sign, correct?

18 A. Correct.

19 MS. JOKERST: Object to form.

20 BY MR. SHAW:

21 Q. Do you know if a sign permit was ever  
22 applied for at this mural?

23 A. No.

24 MS. JOKERST: Object to form.

25 BY MR. SHAW:



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1 MR. SHAW: Okay. All right. I have no  
2 further questions for you.

3 MS. JOKERST: I have a couple follow-ups.

4 CROSS-EXAMINATION

5 BY MS. JOKERST:

6 Q. Mr. Herrs, did you provide the Cozy Inn  
7 sign analysis to Mr. Howard?

8 A. Yes, when we met at the Smoky Hill  
9 Museum. I believe I did if I remember correctly.

10 Q. Did Mr. Howard ever propose an  
11 alternative measurement for his sign?

12 A. I don't believe so.

13 Q. And I want to turn your attention to  
14 Exhibit 3 if you can pull that up. Just let me  
15 know when you're there.

16 A. I am there.

17 Q. Okay. If you look about halfway down  
18 where it says I informed Steve that as it is  
19 currently written, do you see that?

20 A. Yes.

21 Q. Okay. And do you see the date there is  
22 November 6 of 2023?

23 A. Yes.

24 Q. So on November 6, 2023, did you tell Mr.  
25 Howard that the sign on the side of the Cozy would

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1     that?

2             A.     I do.

3             Q.     Do you see any other traditional burger  
4     condiments depicted in that area of the sign?

5             A.     Pickles, onions, ketchup, mustard.

6             Q.     And what about the sign as a whole? I  
7     guess look towards the right, just scan the whole  
8     thing. Do you see condiments throughout the sign?

9             A.     Yeah. I see ketchup and mustard and  
10    other pickles floating around.

11            Q.     And those little like white things, that  
12    big burger in the middle, you can kind of -- or,  
13    I'm sorry, towards the left in the middle, Don't  
14    Fear the Smell and The Fun is inside, and then you  
15    can kind of see it like on the one to the top  
16    right, those little white -- I don't know how to  
17    describe them, little white --

18            A.     Looks like team.

19            Q.     -- morsels?

20                    THE REPORTER: What did you say, Amanda?

21                    MS. JOKERST: Morsels.

22                    THE REPORTER: Thank you.

23            BY MR. SHAW:

24            Q.     Do you know what those are?

25            A.     No.

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1 A. Okay. I'm there.

2 Q. Okay. Under that it says current  
3 allowable sign area, 63 square feet. Do you see  
4 that?

5 A. I do.

6 Q. Is that the allowable sign area in total  
7 for the Cozy?

8 A. That is correct.

9 Q. Okay. And then down on the proposed  
10 hamburger sign analysis, do you see there where it  
11 says the Cozy Inn is approximately -- or, I'm  
12 sorry, the proposed hamburger sign on the north  
13 wall of the Cozy Inn is approximately 528 square  
14 feet?

15 A. Yes.

16 Q. And is that the measurement that you took  
17 to determine how large that painted wall sign is?

18 A. Yes.

19 Q. And if you look at the current signage,  
20 it says total sign area, 52.88 square feet. Do  
21 you see that?

22 A. I do.

23 Q. Okay. Is that the total signage that the  
24 Cozy currently had not including this wall sign?

25 A. That is correct.

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1 Q. So if you subtracted that total sign  
2 area, that 52.88, from the approximately 528  
3 square feet --

4 A. Um-hum.

5 Q. -- would that still be small enough to  
6 fit within that 63 square foot allowance?

7 A. No. Say the question again.

8 Q. Yeah. If you --

9 A. I'm trying to --

10 Q. -- subtracted -- so say that that 52.88  
11 square feet wasn't there. There were no other  
12 signs. You didn't calculate any other sign  
13 allowance against their total allowable sign  
14 area --

15 A. I see what you're saying.

16 Q. -- would the Cozy painted wall sign still  
17 be small enough to fit within their allowable sign  
18 area of 63 square feet?

19 A. Okay. So to rephrase your question, if  
20 the Cozy painting sign on the building, if that  
21 was the only sign that was there, would it fit  
22 within the 63 square feet?

23 Q. Correct.

24 A. No.

25 Q. And look at where it says the Cozy Inn

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1 has the ability to install a fourth sign with no  
2 more than 10.12 square feet of area. Do you see  
3 that?

4 A. I do.

5 Q. Okay. If the Cozy was somehow able to  
6 shrink that sign, like the exact sign that they  
7 have down to 10.1 square feet, would they be able  
8 to get a sign permit?

9 A. Yes.

10 Q. Okay. And if you were able to -- okay.  
11 So Mr. Shaw asked you a couple questions, right,  
12 about, well, what if you did this when you were  
13 measuring or if you seem to maybe not include the  
14 projection sign or the window or the awning. So  
15 if you did any of those things, say you, you know,  
16 tried to -- went and parse out like every window  
17 or awning, do you think that you'd be able to  
18 parse that enough to get 528 square feet down to  
19 10.12 square feet?

20 A. No.

21 Q. Does the City of Salina just regulate the  
22 Cozy sign?

23 A. No.

24 Q. Okay. Do they regulate all signs?

25 A. Yes.

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1 same sign allowances as other people in downtown  
2 central business zoning district, which is our C-4  
3 zoning district. People in the C-5 zoning  
4 district are allowed the same sign allowances as  
5 other people in the C-5 district. People in  
6 residential zoning districts are allowed to have  
7 the same sign allowances as other people in  
8 residential zoning districts of that same  
9 district.

10 **Q. And I want to speak specifically to sign**  
11 **clutter. How does regulating signs in the**  
12 **aggregate advance -- prevent sign clutter?**

13 MR. SHAW: Objection.

14 A. If signs are not regulated in the  
15 aggregate, you could have one sign that's larger  
16 than others. Then other people get larger signs.  
17 And if you get a whole bunch of signage, an  
18 excessive amount of signage both in terms of  
19 number of signs and size of signs, it can lose its  
20 effect and become distracting and potentially  
21 cause safety problems. It could also damage the  
22 aesthetic of the community, the quality of life of  
23 the community. And so the goal of the sign  
24 regulations is to permit and allow ample amount of  
25 signage for each property while still establishing

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1 a balance that makes that signage effective and  
2 attractive without becoming a safety concern.

3 BY MS. JOKERST:

4 Q. And I want to direct your attention to  
5 Exhibit 31, and specifically page 2, item 8?

6 A. Okay. I'm on page -- or Exhibit 31.

7 Q. Yep, Exhibit 31, page 2, item 8. It's on  
8 the top of that page.

9 A. Okay. Sure.

10 Q. The wall sign helps make the JRI  
11 Hospitality Field at The Yard more recognizable  
12 from 4th Street. Do you see that?

13 A. Yes.

14 Q. Okay. So earlier Mr. Shaw was asking you  
15 questions about this and the application, and you  
16 said you thought that the application was related  
17 to a JRI sign that was in on the vestibule portion  
18 inside of The Yard. Do you recall that?

19 A. I do.

20 Q. Okay. Now, I want you to read No. 8.

21 A. Um-hum.

22 Q. Okay. So you're going to read that, the  
23 wall sign helps make the JRI Hospitality Field at  
24 The Yard more recognizable from 4th Street. Now,  
25 I want you to turn to Exhibit 32 and go to that



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**Cozy Inn, Incorporated,  
d/b/a The Cozy Inn; Stephen Howard,**

**Plaintiffs,**

**v.**

**City of Salina, Kansas,**

**Defendant.**

)  
)  
)  
) **CIVIL ACTION**  
) **CASE NO. 6:24-cv-01027-TC-ADM**  
)  
)  
)  
)  
)

**AFFIDAVIT OF DUSTIN HERRS**

I, Dustin Herrs, a City Planner II for the City of Salina, Kansas, being first duly sworn, declare under penalty of perjury as follows:

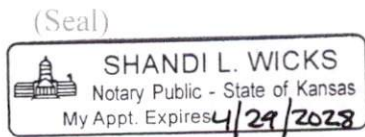
1. I am over 18 years of age and have personal knowledge of the following facts set forth in this Affidavit, and, if called as a witness, I could testify competently to them.
2. I am a City Planner II for the City of Salina. I have been a City Planner for the City of Salina since April 2006.
3. I have an undergraduate degree in Geography from Fort Hays State University.
4. I have a Master's degree in Regional and Community Planning, which I received from Kansas State University.
5. I am certified by the American Institute of Certified Planners ("AICP").
6. My AICP certification requires 32 continuing education credit hours every two years.
7. Some of the continuing education credit hours I have taken as part of my certification are related to planning law classes and include education on sign regulations.

Signed:   
Dustin Herrs

STATE OF Kansas )  
 ) ss.  
COUNTY OF Saline )

Subscribed and sworn to before me by Dustin Herrs on the 7 day of February, 2025.

Witness my hand and official seal. My commission expires: 4/29/2028



  
Notary Public

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

COZY INN, INCORPORATED  
d/b/a The Cozy Inn and  
STEPHEN HOWARD,

Plaintiffs,

v.

Case No. 24-1027-TC-ADM

CITY OF SALINA, KANSAS,

Defendant.

**AMENDED PRETRIAL ORDER**

On November 19 and December 4, 2024, U.S. Magistrate Judge Angel D. Mitchell conducted a pretrial conference in this case, by phone. Plaintiffs Cozy Inn, Inc. d/b/a The Cozy Inn and Stephen Howard appeared through counsel Jeffrey Shaw and Samuel G. MacRoberts. Defendant City of Salina, Kansas, appeared through counsel Amanda C. Jokerst, Todd G. Messenger, and Aaron O. Martin. After the court entered the pretrial order (ECF 92), the parties notified the court that the City of Salina amended its BID Code and Design Guidelines, thereby mooting a portion of plaintiffs' claims. On the parties' request to amend the pretrial order to reflect these developments, the court now enters this amended pretrial order to supersede the previous version.

This pretrial order supersedes all pleadings and controls the subsequent course of this case. It will not be modified except by consent of the parties and the court's approval, or by order of the court to prevent manifest injustice. *See* Fed. R. Civ. P. 16(d) & (e); D. Kan. Rule 16.2(a).

**1. PRELIMINARY MATTERS.**

**a. Subject-Matter Jurisdiction.** Subject-matter jurisdiction is invoked under 28 U.S.C. §§ 1331, 1343, 2201, 2202, and is not disputed.

**b. Personal Jurisdiction.** The court’s personal jurisdiction over the parties is not disputed.

**c. Venue.** Venue in this court is not disputed.

**d. Governing Law.** Subject to the court’s determination of the law that applies to the case, the parties believe and agree that the substantive issues in this case are governed by federal law interpreting the First and Fourteenth Amendments.

## 2. STIPULATIONS.

**a.** The following facts are stipulated:<sup>1</sup>

- i.** Cozy Inn, Incorporated d/b/a The Cozy Inn is a Kansas for-profit corporation registered and in good standing with the Secretary of State of Kansas.
- ii.** Steve Howard is the 90% shareholder of Cozy Inn, Incorporated. His daughter, Andrea Windholz, owns the remaining 10%.
- iii.** Cozy Inn, Incorporated owns and operates The Cozy Inn, a restaurant located in Salina, Kansas.
- iv.** Plaintiffs seek to paint a display on the exterior north wall of The Cozy Inn.
- v.** Plaintiffs started painting the display on November 3, 2023.
- vi.** The photos found at Plaintiffs Bates 50, 52, 53, 54, 57, 58, 59, 60, 61, 62, 63 and 64 represent the unfinished display as currently painted on the north wall at The Cozy Inn.
- vii.** The City of Salina, Kansas (the “City”) determined the display painted on the north wall of The Cozy Inn is a “sign” as defined by Salina Code § 42-764 and, more specifically, a “wall sign” as defined by Salina Code § 42-781. The City determined the sign was too large to qualify for a sign permit and that the display Plaintiffs intend to be the final display painted on the north wall at The Cozy Inn (Plaintiffs Bates 51) is a “sign” as defined

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<sup>1</sup> The parties agree to further confer about factual stipulations and the admissibility of certain exhibits for trial after dispositive motions have been decided, as they believe the court’s decision on summary judgment may eliminate the need for certain evidence and the parties may be able to further narrow the issues for trial. The parties will confer and file any additional stipulations no later than 2 weeks before trial is scheduled to commence.

by Salina Code § 42-764, and more specifically, a “wall sign” as defined by Salina Code § 42-781.

- viii. The Cozy Inn is located within the C-4 zoning district and the Salina Downtown Business Improvement District No. 1.
- ix. On November 6, 2023, the City asked Howard to stop painting the display.
- x. On December 9, 2024, the Board of City Commissioners of the City of Salina (“Board”) adopted Ordinance No. 24-11230, amending Salina Code Sections 2-206 through 2-211, and adding Section 2-212, pertaining to the Design Review Board (collectively, “Amended BID Code”).
- xi. On December 9, 2024, the Board adopted Resolution No. 24-8264, updating the Design Guidelines for Downtown Salina Business Improvement District No. 1 (“Updated Design Guidelines”).
- xii. Salina has determined that the display referred to in paragraphs (iv), (v), (vi), (vii), and (ix), above, “involves only painting or repainting of a building wall” on a side elevation of the Cozy Inn building that is not a “storefront, primary façade, or secondary façade (as defined by the [Updated] Design Guidelines),” and does not “modify the color or finish of any character-defining features (as defined by the [Updated] Design Guidelines).”
- xiii. Pursuant to the Amended BID Code Section 2-207(b)(4), a Certificate of Compatibility is not required for the display referred to in paragraphs (iv), (v), (vi), (vii), and (ix) above, and consequently DRB review is also not required.
- xiv. For the purposes of this litigation, the Sign Code, Salina Code § 42-500, *et seq.*, is not affected by the Amended BID Code and the Updated Design Guidelines.
- xv. In light of the amendments described in paragraphs (x) and (xi) above, the parties agree that the BID Code controversy is moot and therefore the BID Code is no longer at issue.

b. The parties have stipulated to the admissibility of the following exhibits for purposes of summary judgment and trial:

- i. Photos found at Plaintiffs’ Bates 50, 51, 52, 53, 54, 57, 58, 59, 60, 61, 62, 63, 64.

### 3. **FACTUAL CONTENTIONS.**

#### **a. Plaintiffs' Factual Contentions.<sup>2</sup>**

##### Overview

Howard operates The Cozy Inn, a Salina landmark that has served sliders for more than 100 years. It is renowned for its “pungent onion-esque aroma.” After observing the vibrant proliferation of murals throughout Salina, Howard commissioned a mural for the side of The Cozy Inn. The mural would feature burger-esque flying saucers attacking The Cozy Inn with blasts of ketchup and mustard and says “Don’t Fear the Smell!! The Fun is Inside!!” After reviewing the mural’s content, the City came to the conclusion that it pertained to the goods for sale at The Cozy Inn and was considered a regulated sign because it “announced, directed attention to, or advertised” The Cozy Inn. City officials ordered Howard to halt work on the mural and instructed him to file an application for a sign permit. When Howard filed the application, the City refused to either grant or deny the application but instead placed the application “on-hold.” Plaintiffs allege violations of the Free Speech Clause of the First Amendment and the Void-for-Vagueness Doctrine of the Fourteenth Amendment.

##### Summary of the Facts

Around November of 2023, Howard hired a well-known, experienced muralist, Colin Benson, to paint a mural that reflected his and The Cozy Inn’s personality as depicted below:

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<sup>2</sup> The City objected to several sentences in Plaintiffs’ factual contentions on the grounds that they misrepresent the discovery record and/or exceed the scope of the allegations in the Amended Complaint. The court overrules these objections. As the instructions on the court’s Pretrial Order form explain, at this stage of the proceedings Plaintiffs need only set forth “a concise statement of the factual contentions that they believe support their respective theories of the case,” so it is Plaintiffs’ prerogative to frame their own factual contentions. Further, the allegations in the Amended Complaint provided the City with ample notice that Plaintiffs would be relying on these types of factual allegations to support their claims.



On or about November 6, 2023, City officials learned that Plaintiffs were painting a mural at The Cozy Inn. After reviewing the mural’s substance, and without speaking with Howard, City officials concluded that the mural “announced, directed attention to, or advertised” The Cozy Inn, and thus the City believed it fit the definition of a sign under the City code. City officials then told Howard he could not finish the mural and instructed him to submit applications for a sign permit and a Certificate of Compatibility. Howard complied with this request on or about November 13, 2023. City code contains mandatory deadlines for the City to respond to applications, but the City failed to meet these deadlines. Instead, in a letter dated February 8, 2024, the City placed the applications “on-hold.” City code does not authorize placing applications “on-hold.”

The mural is not an advertisement. Instead, it is an artistic expression intended to tell a story about travel. “It’s not a billboard; it’s artwork,” Howard said. “It’s my expression. It’s my character going on my wall. I want to paint my wall.”

The City regulates signs—including their sizes—through its written sign code, its unwritten policies and practices, its Sign Permit requirement, its Downtown Salina Business Improvement District review process, the Certificate of Compatibility requirement, and its



concomitant enforcement penalties.<sup>3</sup> Plaintiffs describe this as the “mural-sign code regime.” In response to this lawsuit, the City amended its BID code and Design Review Guidelines, and determined that a Certificate of Compatibility is not required. As a result, the BID code is no longer at issue in this matter, while the controversy over Salina’s written sign code and its unwritten policies and practices remains in dispute.

The written sign code treats all outdoor murals as wall signs and purports to subject every wall sign to the same size restrictions because all murals are “displays calculated to attract the attention of the public.” But that is not how it works in practice. If artwork “pertains” to a business, or if it’s “part of a commercial transaction,” the City considers it a regulated sign subject to its restrictive size limitations because of the content. But if the content doesn’t pertain to the business, Salina considers the mural to be unregulated art that is exempt from the mural-sign code regime and can take up an entire wall. The difference between an unregulated mural and a regulated sign turns on the artwork’s content. City officials have repeatedly admitted that they must review a display’s contents to determine whether the display is a regulated sign or an unregulated mural.

The City determines whether a display is a regulated sign by reviewing the display for content that announces, directs attention to, or advertises. When asked to identify the factual basis for its assertion that Plaintiffs’ mural “is obviously a sign,” the City stated that “the Cozy Sign *contains* a tag line announcing the infamous smell of the Cozy, it *has* an arrow directing attention to the building entrance and ordering window, and it advertises the hamburgers and toppings available for sale at the Cozy *by depicting representations* of them.” It is clear that the City

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<sup>3</sup> Violations constitute misdemeanors, punishable by a fine with each day being considered a new offense.

reviewed the contents of the mural at The Cozy Inn and considers the mural to be a sign because of its content.

The City Manager explained that The Cozy Inn’s mural “includes a message that pertains to the goods or services for sale, and that makes it a sign and makes it subject to the sign code.” The City’s Director of Community and Development explained the unwritten policy to the City Council, saying that “[i]f a coffee house has a dove with an olive branch and it says the word ‘peace’ on the side of it, that – that’s not a sign”; instead, the government treats it as an unregulated mural. But, the Director continued, “if we had a steaming cup of coffee and a coffee pot on the side,” Salina would consider it a regulated wall sign. If that same “steaming cup of coffee” happened to be painted “on the other side of town unrelated to anything” there, the government confirmed that it would be unregulated. During depositions, City officials admitted The Cozy Inn could paint an airplane mural, or a pizza mural, and could even paint an exact replica of Andy Warhol’s world-famous Campbell soup can—unless The Cozy Inn started offering travel agency services, sold pizzas, or started serving tomato soup. What’s more, if a different business on the other side of town that had no relationship with The Cozy Inn or hamburgers were to paint the exact same mural that Plaintiffs painted, Salina would not consider it to be a regulated sign.

Much of the mural-sign code regime is ill defined and vague. The text of the zoning code (which includes the sign code) grants the zoning administrator the discretion to issue binding interpretations of the code. The City code allows the substitution of the conjunctive “and” with the disjunctive “or” and vice versa as “the sense requires it.” Zoning Administrator Dean Andrew testified that he believes this gives him the unilateral discretion to substitute “and” for “or” at will. The phrases “pertains to the goods or services for sale,” “art,” “commercial speech,” “mural,” and much more is not anywhere in the City code. The City’s use of these terms and its emphasis on

the commercial nature of goods or services for sale to distinguish between murals and signs—based on the artwork’s content—is found only in the City’s unwritten policies and practices.

Andrew uses this authority to implement numerous unwritten policies. For example, the City employs a different methodology of measuring the area of signs than the one written in the code if Andrew decides that it is “practical.” As a result, for murals at The Yard and Sharp Performance, Andrew found it “practical” to measure the area of the mural by measuring individual elements of the mural, while excluding the background paint, while he found it to be “impractical” to measure the individual elements of The Cozy Inn mural and simply calculated the area of the entire wall, including the background paint. Andrew has utilized this discretion to determine that a mural painted on an exterior brick wall at The Yard is not considered a regulated sign because it is “inside” even though it is plainly not inside a building. Andrew testified that he ignores the portion of the sign code defining a “sign” regarding “displays calculated to attract the attention of the public.” Yet the City, in response to an interrogatory, asserted that “The Cozy Sign is a display calculated to attract the attention of the public,” without providing further explanation. Directly across the parking lot from The Cozy Inn’s mural is a mural advertising Bull Durham Tobacco, but Andrew created an exemption to the mural-sign code regime out of whole cloth for the tobacco mural, while strictly applying the regime to The Cozy Inn. The City ignores the deadlines for responding to applications in the code if Andrew places the applications “on-hold,” as happened to Plaintiffs’ applications, which remain on hold.

The City’s content-based discrimination is seen throughout the city. Salina exempts the following murals that are “signs” under the code from the size restrictions, and the permit regulations, because of their content: Fire Station #2; The Yard side mural; KU’s School of Medicine; Salina Art Center; Mural at the Mill; and the water tower mural. The City considers

other murals to be signs but finds them to be compliant with the mural-sign code regime based on the City's unwritten policies and practices: Bull Durham; Sharp Performance; The Yard front mural; and Schlotsky's. Dozens of other murals throughout Salina are exempt. The City is host to the Boom Salina Art & Mural Festival, which has painted murals all around Salina. The City even sponsors murals throughout town through the Salina Arts & Humanities Department. The murals throughout Salina are popular and tourist attractions, and Howard painted the mural at The Cozy Inn to be a part of this thriving cultural scene. No member of the public has complained about the mural at The Cozy Inn. However, numerous members of the public have complained about the City's decision to order The Cozy Inn to halt work on the mural.

Salina has not disclosed any evidence or factual basis to support the alleged purposes of the mural-sign code regime. There is no factual basis for the belief that regulated murals are more aesthetically displeasing than unregulated murals. There is no factual basis for the belief that regulated murals are more dangerous to pedestrians than unregulated murals. There is no factual basis for the belief that regulated murals create a greater danger of traffic accidents than unregulated murals. There is no factual basis for the belief that regulated murals are more likely to harm property values than unregulated murals. There is no factual basis to treat artwork differently based on its content. Plaintiffs' expert rebuttal witness, Charles Taylor, has demonstrated that the report of Defendant's proffered expert, Mark White, is not credible or reliable, and does not provide a factual basis for the mural-sign code regime.

b. **Defendant City of Salina’s Factual Contentions.**<sup>4</sup>

Overview

The *Austin* court recognized sign regulation approvingly as a “tradition” dating back more than 150 years—and observed that during that time, such regulations have addressed “signs . . . that promote ideas, products, or services . . . [or] promote or identify things located onsite.” The City has regulated signs in like fashion for about 58 years. The City’s regulations are currently codified at Salina Code of Ordinances (“Salina Code”), Chapter 42, Article X (“Sign Code”).

The definition of “Sign” in Salina Code § 42-764 is agnostic as to content. It turns on whether a display is used to “announce, direct attention to, or advertise” and is “not located inside a building.” If a display is located outside of a building and is used to “announce, direct attention to, or advertise,” then it is a “Sign” and subject to the Sign Code’s size limitations. Displays that fall outside of the definition of “Sign” are not signs and are therefore not regulated as such.

Plaintiffs allege a different interpretation of the City’s definition of “Sign.” Under Plaintiffs’ interpretation of § 42-764, a sign is *anything* that is “calculated to attract the attention of the public.” Plaintiffs’ interpretation is absurd, ignores the plain language of § 42-764, is not how the City interprets § 42-764, and is not how the City applied § 42-764 to The Cozy Inn sign. Plaintiffs’ suggested interpretation would mean that all displays – including murals – are signs under the Sign Code.

Yet Plaintiffs’ interpretation does not alter the content-neutrality analysis. The text of the Sign Code remains content-neutral. Even if Plaintiffs have the correct interpretation, they are

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<sup>4</sup> Plaintiffs are currently unable to object to the City’s factual contentions on the grounds that they exceed the scope of the pleadings because the City has not yet filed a pleading. If and when the City does so, Plaintiffs will raise any such objection at that time. Further, Plaintiffs object to the City’s factual contentions on other grounds, but will raise those objections on summary judgment or at trial.

without relief that would address their alleged injury. Indeed, even if this Court adopts Plaintiffs’ interpretation of “sign” and finds that all displays are regulated signs, the legal status of Plaintiffs’ display would not change—it would still be a sign that is too large to qualify for a permit.

The sign code is concerned with what a display does, not what it says. The text of the sign code makes no reference to topics, ideas, messages, or viewpoints regarding what is announced, the objects or locations to which attention may be directed, or the contents of any advertisement. While in some circumstances City officials may have to look at a display to determine if it is a Sign, a sign code is not content-based merely because it requires a reading of the sign to determine if a content-neutral regulation applies. Structurally, the Cozy Inn sign is a wall sign as defined in Salina Code § 42-781. Salina Code § 42-781 also makes no reference to content and is concerned with the physical structure of a sign; to be a wall sign, the display must also fit within the definition of Sign in § 42-764.

#### The Sign Code is Content-Neutral

On its face, the definition of “Sign” is not content-based. There are no unwritten policies and procedures. City officials, including the Zoning Administrator, do not have unbridled discretion. City officials, including the Zoning Administrator, follow the Sign Code provisions.

The purposes set forth in Salina Code § 42-500 are also content-neutral. As such, intermediate scrutiny applies, and the Sign Code is constitutional because: (1) the purposes articulated in Salina Code § 42-500 (particularly traffic safety, pedestrian safety, property values, and aesthetics) are substantial government interests; (2) the Sign Code is narrowly tailored to advance those interests because the interests are furthered more effectively under the Sign Code than in the absence of regulation; and (3) Plaintiffs have ample alternative channels of communication of their information. In fact, Plaintiffs can display the exact same sign in a smaller

size, Plaintiffs have other existing signs on the Cozy Inn premises that fit within the allowable sign area, and Plaintiffs already communicate information through a number of other channels including radio, billboards, and social media.<sup>5</sup>

In considering whether the Sign Code is content-based as-applied to the Cozy Inn, the Court only considers how the sign code was applied to the Plaintiffs' sign. No other display is germane to Plaintiffs' case. The City applied the definition of "Sign" as written to the Cozy Inn sign. The City outlined its application of the Sign Code to the Cozy Inn sign in a document entitled the "Cozy Inn Sign Analysis." The City provided this memorandum to Howard and explained why the Sign was too large to qualify for a sign permit. On November 13, 2023, City staff informed the City Commission why Howard's display was a "Sign" under the Sign Code. The deposition testimony of City staff also supports the City's position that it applied the definition of Sign as written to the Cozy Inn sign.

Plaintiffs appear to make the argument that the Sign Code represents a commercial speech regulation that is unconstitutional. The Sign Code is not a commercial speech regulation. However, assuming *arguendo* this Court finds the Sign Code distinguishes between "signs" and displays that are not signs based on whether the display is commercial speech or noncommercial speech, the commercial-noncommercial distinction is not a classification of speech that is content-based or otherwise implicates strict scrutiny. Commercial speech is subject to an intermediate standard of review (discussed above). The Sign Code does not favor commercial speech over noncommercial speech. Indeed, Plaintiffs' Amended Complaint concedes this at ¶ 210 ("This demonstrates Salina's antipathy toward content related to a business and commercial speech. This

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<sup>5</sup> Although the City's purposes are substantial government interests as a matter of law and require no evidence, the City has disclosed evidence, including its expert report, that the Sign Code actually advances the City's interests.



also demonstrates Salina’s preference for content unrelated to a business and noncommercial speech.”). Interestingly, Plaintiffs complain that noncommercial speech is favored and simultaneously allege that their sign displays noncommercial speech. However, Plaintiffs do not request declaratory judgment that the Sign Code does not apply to their sign.

The City Determined Howard’s Display was a “Sign”

Salina Code § 42-501 directs a property owner to obtain a sign permit before a sign is painted, constructed, erected, remodeled, relocated, or expanded. The sign permit application form identifies the information required to be submitted for review. Plaintiffs did not seek a sign permit before beginning construction of the wall sign. Plaintiffs knew the City regulated signs, but did not review the regulations. Plaintiffs testified that they have no intent to read the regulations. On November 3, 2023, Plaintiffs started painting the wall sign. On November 6, 2023, the City reviewed the wall sign that was fully outlined and partially painted on the wall. The City determined that Plaintiffs’ display is a wall sign under Salina Code §§ 42-764 and 42-781.

The Cozy Inn wall sign announces (among other things, the infamous onion smells of The Cozy Inn that Howard admitted “tag” anyone who enters). It “directs attention to” by way of a large arrow that points to the building entrance and ordering window. The sign also advertises, by way of pictorial representations, the hamburgers and hamburger toppings (ketchup, mustard, pickles, onions) that are available for sale at The Cozy Inn. Salina Code § 42-521 provides the sign area and number limitations for signs in the C-4 district (where The Cozy Inn is located). Using the dimensions of The Cozy Inn north wall (which the City obtained from a prior application submitted by The Cozy Inn for an awning sign and software the City has to assist in measuring the height of buildings), and noting the sign occupied the entire north wall, the City determined The Cozy Inn sign was too large to qualify for a sign permit under the sign area limitations in § 42-521.

Given the existing sign inventory, the Cozy Inn had approximately 10 square feet of remaining sign allowance, but the wall sign was approximately 528 square feet in size.

On November 6, the City contacted Howard and asked him to pause the painting, advising him that the painting was a wall sign under the sign code, it needed a sign permit, and it was too big to qualify for a sign permit as proposed. Howard did not administratively appeal this determination. The City met with Howard again on November 13. At this meeting, the City provided Howard with the Cozy Inn Sign Analysis memorandum that outlined the specific provisions of the sign code the City applied to Howard's sign to determine it was a sign and that it was too large to qualify for a sign permit. Howard did not administratively appeal this determination either.

The City understood that Howard was upset by the City's determination, and the City wanted to work with him to see if a code-based solution could be reached. In doing so, the City explained to Howard that it was going to engage a sign consultant that would help the City evaluate if the Salina community was in favor of permitting wall signs as large as The Cozy Inn sign on the sides of smaller buildings, and if the City could amend the Sign Code in a content-neutral fashion while continuing to advance its content-neutral purposes. While uncertain if this was possible, the City wanted to try to work with Howard, and the City understood that Howard was interested in pursuing this option. The City did not have any official submission from Howard regarding the sign, so it invited him to submit a sign permit application.<sup>6</sup> Unbeknownst to the City, Howard had already contacted the Kansas Justice Institute on November 11, 2023 to ask about representation in this case.

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<sup>6</sup> Howard submitted this application, which included a rendering of the proposed final wall-sign that was different than the wall sign painted on the side of the Cozy Inn. After a review of the allegedly final rendering, the City confirmed the display was a sign.

### The Sign Code Is Not an Impermissible Prior Restraint

With respect to Plaintiffs’ prior-restraint claim, the Sign Code, on its face, does not promote arbitrary enforcement because it provides sufficient standards to limit the City and its officials’ discretion. The Sign Code has numerous procedural safeguards including avenues for variances and appeals to resolve issues with the City. Further, the standard in the Sign Code is whether the display:

(1) Is a structure or any part thereof, or a portable display, or is attached to, painted on, or in any other manner represented on a building or other structure or on the ground; (2) Is used to announce, direct attention to, or advertise; and (3) Is not located inside a building.

City staff under the supervision of the zoning administrator are capable of determining whether the structure or display is attached to, painted on, or represented on a building or other structure or on the ground. City staff under the supervision of the zoning administrator are capable of determining whether a display announces, directs attention to, or advertises. The City has been interpreting the definition of sign consistently for decades. The City applies the plain language and ordinary use of the words and phrases “announce, direct attention to, or advertise.” The word “advertise” – which the Cozy Inn sign does – is widely used in defining “sign” for regulatory purposes. It is particularly clear when, as here, the advertisements pertain to or reference “goods or services for sale.” “Building” is also a defined term in the Salina Code, and City staff under the supervision of the zoning administrator are capable of determining when a display is not located inside of a building. These criteria are constitutionally sufficient.

Further, the Sign Code provides for a brief, specified period of time within which the City must issue or deny a sign permit. In this case, the City informed Howard within three days after he began painting the sign that it was too large to qualify for a sign permit. In an effort to cooperate with Howard regarding a possible code-based solution, and understanding that he was interested

in pursuing this option, the City placed the Plaintiffs’ application “on-hold” instead of outright denying it. This approach was intended to be collaborative and helpful, and while it was relatively novel, it was neither illegal nor unconstitutional. The City did not need to again inform Howard that the sign was too large for a sign permit. He already knew that, and indicated as much on the sign permit application.

### The Sign Code Is Not Unconstitutionally Vague

As to Plaintiffs’ vagueness claim, the Sign Code provides people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Its text provides clear standards that ordinary people can understand, and therefore does not encourage arbitrary and discriminatory enforcement. During depositions, both Howard and Windholz testified that they had not read the Sign Code, did not attempt to read the Sign Code, and do not intend to read the Sign Code.

The Sign Code does not regulate “murals.” It regulates signs. As such, the Sign Code is not vague simply because it does not define mural or any number of other terms and phrases enumerated by Plaintiffs that are simply not pertinent to regulating signs. Other words and phrases that are used in the Sign Code need no definition and do not render the Sign Code vague as they have well-understood meanings.

## **4. LEGAL CLAIMS AND DEFENSES.**

### **a. Plaintiffs’ Claims.**

- i. Violation of the First Amendment Free Speech Clause: Salina’s mural-sign code regime (which includes Salina’s written sign code, § 42-500 et seq., Salina’s unwritten policies and practices, Salina’s Sign Permit requirement, and their concomitant enforcement penalties) violate Plaintiffs’ First Amendment rights because, both on its face and as applied to the mural at The Cozy Inn, it is a content-based restriction on speech, a speaker-based restriction on speech, and a prior restraint of speech. The mural-sign code regime is unconstitutional under strict scrutiny, intermediate scrutiny, or rational basis review. Plaintiffs also contend, to preserve the issue for appellate review, that the “commercial speech”

doctrine is inconsistent with the First Amendment and should be overturned.

- ii. Void-for-Vagueness Doctrine of the Fourteenth Amendment: the mural-sign code regime is void for vagueness under the Fourteenth Amendment. Salina’s mural-sign code regime “is so standardless that it authorizes or encourages seriously discriminatory enforcement,” in violation of the Due Process Clause. The mural-sign code regime is so vague “that regulated parties [do not] know what is required of them,” and fails to provide the “precision and guidance” required to guarantee “that those enforcing the law do not act in an arbitrary or discriminatory way.

**b. Defendant the City’s Defenses.**

The City asserts the following defenses:

- i. Plaintiffs have not sought declaratory judgment from this Court to declare that their display is not a sign under the Sign Code, so Plaintiffs have not requested a declaration that will redress their asserted injuries.
- ii. The Sign Code is content-neutral on its face and as applied to the Plaintiffs because the germane provisions of the Sign Code are not concerned with the idea, topic, subject, or viewpoint of the message displayed, the Sign Code is justified without reference to the content of the regulated speech, and the Sign Code was applied as it is written.
- iii. The Sign Code passes intermediate scrutiny because it is narrowly tailored to advance the City’s substantial interests of traffic safety, pedestrian safety, aesthetics, and property values, and it leaves open ample alternative channels because Plaintiffs can communicate the information with the exact same sign in a smaller size, with other existing signs on the Cozy Inn premises that fit within the allowable sign area, and through a number of other alternative channels.
- iv. The Sign Code is not a prior restraint because it provides sufficient standards to limit the City and its officials’ discretion, so it does not promote arbitrary enforcement.
- v. The Sign Code is not a prior restraint because it provides for a brief, specified period of time within which the City must issue or deny a sign permit, and the City informed Mr. Howard within three days after he began painting the sign that it was too large to qualify for a sign permit. The unique circumstances of this case, in which the City attempted to collaborate with the Plaintiffs to achieve a legislative solution, do not transmogrify the Sign Code into an unconstitutional prior restraint.
- vi. Plaintiffs may not seek relief on behalf of “others similarly situated.”

- vii. The Sign Code is not vague because it provides people of ordinary intelligence with a reasonable opportunity to understand what conduct is prohibited.
- viii. The Sign Code is not vague because it provides narrow, objective, and definite standards that properly guide the City and its permitting officials.
- ix. The “overbreadth” doctrine, which relates to vagueness, does not apply to commercial speech.

## 5. DAMAGES AND NON-MONETARY RELIEF REQUESTED.

Plaintiffs seek the following relief:

- a. A declaratory judgment that the City’s mural-sign code regime—which includes the City’s written sign code, unwritten policies and practices, Sign Permit requirement, and its concomitant enforcement of penalties (“mural-sign code regime”)—as written and enforced:
  - i. is an unconstitutional content-based restriction on speech, on its face and as applied to Plaintiffs and others similarly situated;
  - ii. is an unconstitutional speaker-based restriction on speech, on its face and as applied to Plaintiffs and others similarly situated;
  - iii. (alternatively, if the mural-sign code regime is ruled to be content-neutral and speaker-neutral) fails to satisfy intermediate scrutiny, on its face and as applied to Plaintiffs and others similarly situated;
  - iv. is an unconstitutional prior restraint on speech, on its face and as applied to Plaintiffs and others similarly situated; and
  - v. is void for vagueness, on its face and as applied to Plaintiffs and others similarly situated.
- b. A prospective permanent injunction enjoining the City, its officers, agents, employees, attorneys, servants, assigns, and all those in active concert or participation who receive, through personal service or otherwise, actual notice of this Court’s order, from enforcing or directing the enforcement of the City’s mural-sign code regime on its face and as applied to Plaintiffs and other similarly situated.
- c. A permanent injunction prohibiting Defendant from taking any enforcement or other action against Plaintiffs for displaying their mural in its current position on The Cozy Inn, or for completing the mural on The Cozy Inn.
- d. Should plaintiffs prevail, they will seek their attorney fees and costs pursuant to 42 U.S.C. § 1988.

Defendant seeks the following relief:

- a. Should the City prevail, it will seek its attorney fees and costs pursuant to 42 U.S.C. § 1988 on the grounds that Plaintiffs' case is frivolous, vexatious, harassing, and/or groundless.

## **6. AMENDMENTS TO PLEADINGS.**

The parties do not anticipate any amendments to the pleadings. Should the Court deny the motion to dismiss in whole or in part, Defendant will file an answer to the amended complaint.

## **7. DISCOVERY.**

Under the scheduling order and any amendments, all discovery was to have been completed by **October 18, 2024**. All discovery is complete.

Unopposed discovery may continue after the deadline to complete discovery so long as it does not delay briefing or ruling on dispositive motions or other pretrial preparations. Although discovery may be conducted beyond the deadline to complete discovery if all parties agree to do so, under these circumstances the court will not be available to resolve any disputes that arise during the course of such extended discovery.

## **8. MOTIONS.**

### **a. Pending Motions.**

- i. Defendant's Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (ECF 26).
- ii. Plaintiffs' Motion to Strike or Exclude Opinions of Attorney Mark White.
- iii. Defendant's Motion to Exclude Plaintiffs' Rebuttal Expert Pursuant to F.R.E. 702.

### **b. Additional Pretrial Motions.**

After the pretrial conference, the parties intend to file the following motions:

- i. Plaintiffs intend to file a motion for summary judgment and any necessary motions in limine.



- ii. Defendant intends to file a motion for summary judgment and any necessary motions in limine.

The original dispositive-motion deadline, as established in the scheduling order and any amendments, was vacated on December 17, 2024 (ECF 96). The dispositive-motion deadline is now re-set for **February 7, 2025**. The parties must follow the summary-judgment guidelines on the court's website:

<https://ksd.uscourts.gov/sites/ksd/files/Summary-Judgment-Guidelines%202023.pdf>

Principal briefs in support of, or in response to, summary judgment motions must not exceed 40 pages and replies must not exceed 15 pages. *See* D. KAN. RULE 7.1(d)(2). Any motion to exceed these page limits or for an extension of briefing deadlines must be filed at least three days before the brief's filing deadline. *See* D. KAN. RULE 6.1(a), 7.1(d)(4).

c. **Motions Regarding Expert Testimony.** The parties have both filed motions to exclude the testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, as of the filing deadline of **December 20, 2024**.

## 9. TRIAL.

The trial date was vacated on December 17, 2024. The trial date is re-set for **October 7, 2025, at 9:00 a.m., in Wichita, Kansas**. This case will be tried by the court sitting without a jury. Trial is expected to take approximately 2 days. The court will attempt to decide any timely filed dispositive motions approximately 60 days before trial. If no dispositive motions are timely filed, or if the case remains at issue after timely dispositive motions have been decided, then the trial judge may enter an order or convene another pretrial conference to set deadlines for filing final witness and exhibit disclosures, exchanging and marking trial exhibits, designating deposition

testimony for presentation at trial, motions in limine, proposed instructions in jury trials, and proposed findings of fact and conclusions of law in bench trials.

**10. ALTERNATIVE DISPUTE RESOLUTION (ADR).**

The parties have not participated in mediation. They currently believe the prospects for settlement of this case are poor and they do not believe that court-ordered ADR would be helpful.

The parties are reminded that, under D. Kan. Rule 40.3, they must immediately notify the court if they reach an agreement that resolves the litigation as to any or all parties. Jury costs may be assessed under this rule if the parties do not provide notice of settlement to the court's jury coordinator at least one full business day before the scheduled trial date.

**IT IS SO ORDERED.**

Dated January 16, 2025, at Kansas City, Kansas.

s/ Angel D. Mitchell  
Angel D. Mitchell  
U.S. Magistrate Judge

10/7/2024

1

**STEPHEN HOWARD**

1 .

2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF KANSAS

4 .

5 .

6 COZY INN, INCORPORATED, d/b/a

7 THE COZY INN; STEPHEN HOWARD,

8 Plaintiffs,

9 .

10 vs. Civil Action No. 6:24-cv-01027-TC-ADM

11 .

12 CITY OF SALINA, KANSAS,

13 Defendant.

14 .

15 .

16 DEPOSITION OF

17 STEPHEN HOWARD,

18 taken on behalf of the Defendant, pursuant to

19 Notice to Take Deposition, beginning at 9:07 a.m.

20 on the 7th day of October, 2024, at the law office

21 of Clark, Mize & Linville, 129 South 8th Street,

22 in the City of Salina, County of Saline, and State

23 of Kansas, before Sandra S. Biggs, Kansas CCR No.

24 0716.

25 .



5111 SW 21st Street  
Topeka, KS 66604  
785-273-3063  
www.appinobiggs.com

6420 W. 95th Street  
Suite 101  
Overland Park, KS 66212  
913-383-1131

800 E. 1st Street  
Suite 305  
Wichita, KS 67202  
316-201-1612

**EXHIBIT H**

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**STEPHEN HOWARD**

1 Q. Okay. So you call them burgers because  
2 they're too small to be called a hamburger?

3 A. If you will.

4 Q. Okay. But essentially, it's the same  
5 thing, right?

6 A. It's the same thing, yes.

7 Q. Okay.

8 A. Burger's easier to say.

9 Q. All right. So let's talk about the  
10 burgers. What is The Cozy burger made of?

11 A. 90 percent or leaner ground beef, inside  
12 round is the trim we use, diced onions, salt and  
13 pepper and ketchup, mustard and pickle if you  
14 want. That's the only choice you get. All the  
15 burgers are cooked with onions.

16 Q. Okay. And that's what I was going to ask  
17 you. You said chopped onions. Are those chopped  
18 onions put into the patty?

19 A. Put on top and smacked into it.

20 Q. Okay. So it's cooked into the patty  
21 itself?

22 A. Yeah. Yeah.

23 Q. All right. And then you mentioned that  
24 the toppings that you offer are pickles?

25 A. Yep.

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**STEPHEN HOWARD**

1 Q. Okay. And the condiments are ketchup?

2 A. Yes.

3 Q. And mustard?

4 A. Yes.

5 Q. Okay. And that's it?

6 A. That's it.

7 Q. All right. And every burger comes with  
8 onions?

9 A. Yes.

10 Q. Do you ever have people walk up and say I  
11 want a burger without onions?

12 A. Every day.

13 Q. Okay. And what do you tell them?

14 A. If you're willing to try one, you're  
15 going to eat four. If you're not willing to try  
16 one, I'm sorry, you're missing out. A lot of  
17 people say, well, I'm allergic. I'm sorry. This  
18 isn't the place for you then.

19 Q. So there's no substitutions when it comes  
20 to the onions?

21 A. Right. Not even if it's for your dog.

22 Q. Okay. All right. So you don't offer  
23 cheese?

24 A. No.

25 Q. Okay. No mayonnaise?

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**STEPHEN HOWARD**

1 A. No.

2 Q. No barbecue sauce?

3 A. No.

4 Q. No lettuce?

5 A. No.

6 Q. No tomatoes?

7 A. No.

8 Q. Okay.

9 A. Very simple.

10 Q. All right. And how are The Cozy burgers  
11 sold?

12 A. Individually.

13 Q. Okay. Are they also sold in sacks?

14 A. Yes.

15 Q. Okay. Tell me about the sacks. Like  
16 what -- are they sold in bundles? How are they  
17 sold in the sacks?

18 A. Usually in bag of six.

19 Q. Okay. Is the bag of six like the most  
20 popular bundle that you sell?

21 A. Divisions of six are.

22 Q. Okay. So when you say divisions of six,  
23 you mean six, 12?

24 A. 18, 24, 36, 48, 72.

25 Q. Okay.

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**STEPHEN HOWARD**

1 Q. Okay. So when someone comes inside, you  
2 can talk to them and suggest how many they should  
3 have?

4 A. Yes.

5 Q. Okay. What about at the ordering window?

6 A. It is -- at the walk-up window, it's not  
7 as personal because you don't get the feel of --  
8 our entertaining is inside. You know, all of us  
9 talk with everybody, and the conversations are  
10 always appropriate. They are timely. Walk up --  
11 if you use the walk-up window, you're just kind of  
12 missing the whole point.

13 Q. Okay. Do you feel like you're able to  
14 upsell better for customers that come inside?

15 A. Yes.

16 Q. Okay. Does that increase your sales for  
17 customers that come inside?

18 A. Not always.

19 Q. Okay. But does it typically?

20 A. No. Because the walk-up window can get  
21 every bit as busy as the inside. And if it's  
22 snowing, they're probably going to come inside to  
23 order and not the walk-up window which won't be  
24 very many because wintertime is slow.

25 Q. Okay. Well, what about in the summer?



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**STEPHEN HOWARD**

1           A.     Summertime's my busy season, and it's  
2     about half and half. I don't know, I guess,  
3     what...

4           Q.     Okay. So of your customers,  
5     approximately 50 percent use the walk-up window  
6     and 50 percent go inside?

7           A.     I don't have any numbers to prove, but  
8     just by experience, yeah, 50/50.

9           Q.     Okay. Do you ever track that? I know  
10    you said you don't have the numbers, but do you  
11    ever track that --

12          A.     No.

13          Q.     -- in your head?

14          A.     No.

15          Q.     No. So it's --

16          A.     I have a very simple cash register. It  
17    tells me how many transactions I do and that's it.  
18    Doesn't tell me window or inside.

19          Q.     Okay. But you said coming up to the  
20    walk-up window is impersonal?

21          A.     Yeah. You're missing the whole point of  
22    going to The Cozy Inn.

23          Q.     Okay. Well, tell me about. What's the  
24    whole point of going to The Cozy Inn?

25          A.     You go inside, you get tagged right away

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**STEPHEN HOWARD**

1 by the onion smell. And that's the butt of all  
2 jokes with The Cozy. Hey, I went to -- you can't  
3 -- Aaron can't go to his friend and say, hey, I  
4 went to The Cozy Inn today. Did you go inside?  
5 No. That's not -- that's not -- that's enough.  
6 You can't brag to your friends if you don't go  
7 inside.

8 Q. Okay.

9 A. My opinion.

10 Q. And is that because the onion smell in  
11 The Cozy is infamous?

12 A. Yes.

13 Q. Okay. And is the onion smell inside The  
14 Cozy distinctive?

15 A. Yes.

16 Q. And when someone -- let me see how I'm  
17 going to ask this. All right. So you had  
18 mentioned that -- well, let me ask you this. So  
19 the whole purpose or you said something like you  
20 want customers to come inside The Cozy, right?

21 A. Yes.

22 Q. Okay. And you want them to come inside  
23 of the Cozy because you want them to order food  
24 inside, correct?

25 A. Yes.

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**STEPHEN HOWARD**

1 Q. Okay. So if someone came -- you're  
2 asking people to come inside The Cozy to purchase  
3 something, correct?

4 A. Yes.

5 Q. Okay. And I mean because it would be --  
6 how would you as a business make money if people  
7 just came into The Cozy and just congregated there  
8 and didn't buy anything, right?

9 A. Well, that would be a problem. I don't  
10 have very much room.

11 Q. Okay. What's the square foot for the  
12 customers?

13 A. Maybe 40 square feet.

14 Q. 40 square feet where the customers can  
15 sit?

16 A. Yeah. I have six stools.

17 Q. Okay. And another than the six stools,  
18 is there really anyplace else for people to hang  
19 out inside The Cozy?

20 A. Behind the stools against the wall.

21 Q. Okay.

22 A. I've fit 12 to 15 people in there before.

23 Q. Okay.

24 A. Some sitting and most standing.

25 Q. Okay. So other than the six people who

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**STEPHEN HOWARD**

1 a good time.

2 Q. You want them to -- the entertainment  
3 piece is you want them to remember you or remember  
4 The Cozy so that they can come back?

5 A. Yes.

6 Q. Okay. And is that so when they come back  
7 they can then purchase more products from you?

8 MR. SHAW: Objection to form.

9 A. Yeah.

10 BY MS. JOKERST:

11 Q. Okay. Do you -- are you selling cupcakes  
12 at The Cozy?

13 A. Not anymore.

14 Q. Okay. But you were for a time?

15 A. I was.

16 Q. Okay. How did that come to be?

17 A. I found a bakery, a baker out of Blue  
18 Skye Brewery and I was like, hey, would you want  
19 to make some for me. So she goes okay. And so  
20 she was -- I'd order cupcakes from her.

21 Q. Okay. And was it -- I guess how was that  
22 set up? Did you -- you bought them from her and  
23 then you resold them at The Cozy?

24 A. Yes.

25 Q. Okay. So it was not -- you didn't like

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1 Q. Okay. And I'm done referencing Exhibit A  
2 for now.

3 In the community of Salina, is it known that  
4 if you go inside The Cozy, you'll carry that onion  
5 aroma with you after you leave?

6 A. Yes.

7 MR. SHAW: Objection to form.

8 BY MS. JOKERST:

9 Q. And is that why the painting on the side  
10 of The Cozy says Don't Fear the Smell?

11 A. Yes.

12 Q. So the phrase Don't Fear the Smell, it's  
13 referring to that distinctive onion aroma, right?

14 A. Right.

15 Q. Okay. And does The Cozy reference that  
16 distinctive onion aroma in its advertising?

17 MR. SHAW: Objection to form.

18 A. Sometimes.

19 BY MS. JOKERST:

20 Q. Okay. How does it do that?

21 A. Some people ask me to hold their shirt or  
22 their hat above the grill so they get the extra  
23 steam on it.

24 Q. That's a unique request.

25 A. Yeah.

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## STEPHEN HOWARD

1 A. Yes.

2 Q. And in 2021, you applied for a  
3 Certificate of Compatibility permit for an awning  
4 at The Cozy. Is that right?

5 A. Yes.

6 Q. Okay.

7 A. As far as the date goes, I don't know.  
8 But, yes, I did do that.

9 Q. It was 2021?

10 A. Ish. I don't remember.

11 Q. Okay. Well, why did you apply for a  
12 Certificate of Compatibility permit for the  
13 awning?

14 A. Because I was told to.

15 Q. Okay. Who told you that?

16 A. I don't know.

17 Q. You don't know who told you to apply for  
18 it?

19 A. And then I was just going to put up a red  
20 awning to match what was going on beside me which  
21 they never ended up putting up their awnings  
22 anyway. And then I thought before that awning was  
23 made, I thought, man, that's wasted space. Put  
24 The Cozy Inn on it so people finally -- they know  
25 that they're there. And then that became a sign

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**STEPHEN HOWARD**

1 to the city. So that's when somebody said, hey,  
2 you've got writing on it now. Now, you've got to  
3 do this.

4 Q. Okay. So someone at the city told you to  
5 apply for the Certificate of Compatibility for the  
6 awning?

7 A. Yes.

8 Q. Okay. And then did you fill out that  
9 permit?

10 A. That one I did, yes.

11 Q. Okay. Was there another permit that you  
12 didn't fill out?

13 A. No.

14 Q. So I want to direct your attention to  
15 Exhibit H. You can flip there. Are you there?

16 A. Yeah.

17 Q. All right. So go ahead and take a look  
18 at this. You can see property, address, name of  
19 business. It says Cozy Inn. Top of that page  
20 says Certificate of Compatibility Application. At  
21 the bottom, it says property owner's signature and  
22 4/27/21. Do you see that?

23 MR. SHAW: Objection to form.

24 A. Where are you looking?

25 BY MS. JOKERST:



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## STEPHEN HOWARD

1 A. No.

2 Q. Okay. And here it says that Design  
3 Review Board held a meeting on May 13th, 2021 to  
4 review Certificate of Compatibility Application  
5 No. CC21-6 filed by you on behalf of The Cozy Inn.  
6 Do you see that?

7 A. Yes.

8 Q. Okay. And -- all right. Go down to page  
9 2, if you want to flip to page 2 at the top  
10 there. Okay. And do you see it says in  
11 approving this Certificate of Compatibility  
12 Application, the Design Review Board attached the  
13 following condition of approval. Do you see that?

14 A. Yes.

15 Q. Okay. So they approved this Certificate  
16 of Compatibility Application?

17 MR. SHAW: Objection to form.

18 A. Are you waiting on an answer?

19 BY MS. JOKERST:

20 Q. Yeah.

21 A. What did you ask me?

22 Q. I said so they did approve the  
23 Certificate of Compatibility Application for the  
24 awning, right?

25 A. Yes.

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## STEPHEN HOWARD

1 MR. SHAW: Objection to form.

2 BY MS. JOKERST:

3 Q. Okay. And underneath that, there's 1, 2,  
4 and then right under that it says because. Do you  
5 see that?

6 A. Um-hum.

7 Q. Okay. And it says because the proposed  
8 awning will contain lettering, including The Cozy  
9 Inn name, staff classifies this type of awning as  
10 a sign which requires a sign permit. Do you see  
11 that?

12 A. Yes.

13 Q. Okay. So when they approved this  
14 Certificate of Compatibility Application, they  
15 told you you needed to apply for a sign permit?

16 MR. SHAW: Objection to form.

17 A. Apparently.

18 BY MS. JOKERST:

19 Q. Okay. Well, it's right there.

20 A. Yeah.

21 Q. So did they tell you to apply for a sign  
22 permit?

23 MR. SHAW: Objection to form.

24 A. Okay.

25 BY MS. JOKERST:

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**STEPHEN HOWARD**

1 Q. Well, that's a yes or no question. Did  
2 the city tell you to apply for a sign permit for  
3 the awning?

4 MR. SHAW: Objection to form.

5 A. Yes.

6 BY MS. JOKERST:

7 Q. Okay. Mr. Howard, you've -- The Cozy Inn  
8 has participated in community events throughout  
9 Salina, right?

10 A. Yes.

11 Q. Okay. And it's participated in some  
12 community events that are hosted by the city. Is  
13 that right?

14 A. Probably.

15 Q. Okay. Well, the Smoky Hill Museum, it  
16 has a street fair?

17 A. Yes.

18 Q. Are you familiar with that?

19 A. Yes.

20 Q. Okay. And then The Cozy Inn as part of  
21 that street fair held an eating contest?

22 A. Yes.

23 Q. Is that right?

24 A. Yes.

25 Q. Okay. And The Cozy Inn has been

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**STEPHEN HOWARD**

1 it's there.

2 Q. At some point, were you displaying that,  
3 though?

4 A. Oh, yeah.

5 Q. Okay.

6 A. Just up until last week somebody knocked  
7 it off. I asked one of my people, I said what  
8 happened to that picture that was there. And they  
9 said, well, it fell and broke. It's in the  
10 office.

11 Q. So I want to talk to you about the  
12 painting on the side of The Cozy. And what I'm  
13 talking about is the sign that's the subject of  
14 this lawsuit?

15 MR. SHAW: Objection to form.

16 MS. JOKERST: Well, it wasn't a question.  
17 I was telling him what I'm referring to.

18 BY MS. JOKERST:

19 Q. When did you first get the idea of  
20 painting that side wall at the Cozy?

21 A. October of last year.

22 Q. So October of 2023?

23 A. Yeah.

24 Q. Okay. And what led to that idea?

25 A. Well, I had a couple about my age come to

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## STEPHEN HOWARD

1 BY MS. JOKERST:

2 Q. All right. And I hate to flip you around  
3 here, but let's go back down to page 346?

4 A. Okay.

5 Q. All right. So I want to talk about the  
6 arrow. Why was the arrow included in the  
7 painting?

8 A. Showing people where the front door is.

9 Q. Okay. So it was directing people to the  
10 front door?

11 A. Yes.

12 Q. Okay. All right. So when did Colin  
13 start working on the painting on the side wall?

14 A. I thought it was the 3rd.

15 Q. November 3rd?

16 A. November 3rd.

17 Q. Okay. And before November 3rd, he came  
18 by to talk to you about the final draft of what  
19 he was going to paint on the wall?

20 A. Yes.

21 Q. Okay. And that's when he brought like  
22 the printout of it?

23 A. Yes.

24 Q. Okay. So you had agreed to pay Colin for  
25 the work, right?

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## STEPHEN HOWARD

1 A. Yes.

2 Q. Okay. And what was the agreed upon  
3 amount?

4 A. \$500.

5 Q. Okay. And who purchased the paint that  
6 was used?

7 A. Colin did.

8 Q. Okay. Do you know where he purchased it  
9 from?

10 A. I do not.

11 Q. Okay. Who supplied all the supplies that  
12 Colin needed to do the painting?

13 A. He did.

14 Q. He did. Okay. And what were the terms  
15 of the payment? Did you agree when you were going  
16 to pay Colin?

17 A. No.

18 Q. You didn't have --

19 A. He started in without payment.

20 Q. Okay. He started without payment?

21 A. Right.

22 Q. Okay. And you said he started on what  
23 you thought was November 3rd of 2023.

24 Approximately how long was the painting supposed  
25 to take before it was completed?

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**STEPHEN HOWARD**

1 A. He said on the text, might be over the  
2 weekend.

3 Q. Okay. So was he going to be done --  
4 predicted to be done by Monday?

5 A. He thought he was, but he actually fell  
6 behind. So he goes, yeah, I'll probably be done  
7 Wednesday. So that would be 6, 7, 8.

8 Q. Okay. All right. So Colin started work  
9 on the painting. And then what happened?

10 A. He started painting the wall.

11 Q. Okay. He started painting the wall. And  
12 then -- and then at some point did he stop paint  
13 the wall?

14 A. Monday.

15 Q. Okay. And why did he stop painting the  
16 wall?

17 A. Because I asked him to.

18 Q. Okay. And why did you ask him to stop?

19 A. Because I was told I couldn't do it.

20 Q. Okay. Who told you that?

21 A. City of Salina.

22 Q. Okay. Was it a specific person?

23 A. I don't remember who I talked to.

24 Q. Was it Dustin Herrs?

25 A. I did go his office, but it wasn't him --



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**STEPHEN HOWARD**

1 I don't know who called. I didn't receive the  
2 first phone call. I just called him back. Yes,  
3 it was Dustin, though.

4 Q. Okay. So Dustin Herrs told you to stop?

5 A. Yes.

6 Q. Okay. And why did he tell you to stop?

7 A. That's where you're going to lose me, all  
8 this sign stuff. I have no idea what code is and  
9 this and this and this. He lost me.

10 Q. Okay. Did he tell you that the painting  
11 was a sign?

12 A. His opinion.

13 Q. Okay. But he told you that it was the  
14 city's opinion that the painting was a sign?

15 A. Yes.

16 Q. Okay. Did he tell you that the painting  
17 was too large to qualify for a sign permit?

18 A. Something like that, yes.

19 Q. Okay. And is that why you reached an  
20 agreement to stop work on the painting?

21 MR. SHAW: Objection to form.

22 A. I thought I had to get permission. So I  
23 don't know if I paid my \$35 permit fee that day  
24 or if even if it's that commission meeting night  
25 that I went. I don't remember.

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## STEPHEN HOWARD

1 BY MS. JOKERST:

2 Q. Okay. But you were told by the City of  
3 Salina that that painting was too big to qualify  
4 for a sign permit, right?

5 A. Yes.

6 Q. Okay.

7 A. But I thought I was just painting a  
8 mural.

9 Q. Okay. But the city told you that it was  
10 a sign?

11 A. Yes.

12 Q. So before Colin Benson went out and  
13 started painting the side wall, did you think to  
14 apply for a sign permit?

15 A. No.

16 Q. Okay. Did you think to apply for a  
17 Certificate of Compatibility?

18 A. No.

19 Q. Okay. So you -- before Colin started  
20 painting, you did not apply for a sign permit?

21 A. No.

22 Q. Before Colin started paint, you did not  
23 apply for a Certificate of Compatibility, right?

24 A. No.

25 Q. Okay. Well, in 2021 with the awning

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**STEPHEN HOWARD**

1 Amanda. We're going to exchange the colored ones.

2 MS. JOKERST: Okay. Perfect.

3 THE REPORTER: Thank you.

4 MS. JOKERST: Yeah. All right. Are we  
5 ready?

6 THE REPORTER: Yes.

7 BY MS. JOKERST:

8 Q. Okay. Mr. Howard, are you on Exhibit S?

9 A. Yes.

10 Q. Okay. I'd like to direct your attention  
11 to the second page, and it's page 54. And I  
12 should say the Bates number on it is 54.

13 A. Yes.

14 Q. Okay. You might have to turn it. I  
15 don't know how it's positioned there, but you  
16 might have to turn it a quarter --

17 A. I have.

18 Q. -- so you can see it the right side up.

19 A. I have.

20 Q. Okay. Is this the painting that's on the  
21 wall at The Cozy?

22 A. Currently.

23 Q. Okay. And is this the current state of  
24 what that painting looks like?

25 A. Yes. As of November 6th, he has not

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## STEPHEN HOWARD

1 touched the wall.

2 Q. Okay. And so the Don't Fear the Smell,  
3 The Fun is inside is on the wall, right?

4 A. Yes.

5 Q. Okay. The arrow pointing to the door is  
6 on the wall, right?

7 A. Yes.

8 Q. Okay. The big burger is in the middle,  
9 right?

10 A. Yes.

11 Q. Okay. You can see the ketchup and  
12 mustard on the burger. Is that right?

13 A. Yes.

14 Q. Okay. And I want you to look down to the  
15 left of the big burger on the left side of that  
16 bench. Do you see that?

17 A. Yes.

18 Q. Okay. That's a smaller -- that's a  
19 depiction of a smaller burger, right?

20 A. Right.

21 Q. Okay. And I want you to go to kind of --  
22 say kind of like to the ride or right underneath  
23 the arrow, the point of the arrow, do you see  
24 that?

25 A. Yes.

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## STEPHEN HOWARD

1 Q. Okay. And that's also a depiction of a  
2 burger?

3 A. Yes.

4 Q. Okay. I want you to go directly to the  
5 right of the big hamburger. Do you see that  
6 smaller depiction of the burger?

7 A. Yes.

8 Q. Okay. And straight up from there, above  
9 where it says the smell, that's another depiction  
10 of a smaller burger, right?

11 A. Yes.

12 Q. Okay. Okay. And on the depiction of the  
13 big burger in the middle, that's ketchup on that  
14 burger, right?

15 A. Yes.

16 Q. Okay. And on the right side of the big  
17 burger, that is a depiction of mustard on the  
18 burger, right?

19 A. Yes.

20 Q. Okay. And it looks like this outline is  
21 complete. Is that right?

22 A. Not quite.

23 Q. Okay. But Colin had started painting it  
24 in, right?

25 A. Yes. I don't know what day this picture

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## STEPHEN HOWARD

1 Q. Okay. All right. So is there -- we  
2 don't need to look at the exhibits anymore at this  
3 time. Is there a jingle about the infamous onion  
4 aroma at The Cozy?

5 MR. SHAW: Objection to form.

6 A. On the radio?

7 BY MS. JOKERST:

8 Q. On the radio. Okay. So do you do radio  
9 advertising for The Cozy?

10 A. Yes.

11 Q. Okay. And the radio advertising contains  
12 a jingle?

13 A. Part of it.

14 Q. Okay. And the jingle relates to the  
15 aroma, onion aroma emanating from The Cozy?

16 A. No. My ads finish with mosey into The  
17 Cozy Inn.

18 Q. Okay.

19 A. It's a catchy jingle.

20 Q. I'm sorry?

21 A. It's a catchy jingle.

22 Q. Okay. So your ads say mosey into the  
23 Cozy?

24 A. Yeah.

25 Q. Okay. So your radio --

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## STEPHEN HOWARD

1 MR. SHAW: Objection to form.

2 BY MS. JOKERST:

3 Q. Okay. All right. So then you had  
4 mentioned that you also showed up at the -- you  
5 also showed up at the Smokey -- or, I'm sorry, the  
6 city commission meeting, right?

7 A. Yes.

8 Q. Okay. And that was on November 13th?

9 A. That's the day I paid my sign -- my  
10 permit.

11 Q. Okay. Did you go down to the -- to the  
12 meeting on the day that you submitted your permit  
13 application?

14 A. Yes.

15 Q. Okay. So let's talk about that. So you  
16 -- you filled out a sign permit -- or scratch  
17 that. I'm going to turn our direction or your  
18 attention to Exhibit AA.

19 A. Okay.

20 Q. Okay. Is this the sign permit  
21 application you submitted for the wall sign?

22 A. What's the date on it?

23 Q. The date is on page 2 if you want to  
24 look.

25 A. Yeah, I did.



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**STEPHEN HOWARD**

1 MR. SHAW: What was your pending  
2 question?

3 BY MS. JOKERST:

4 Q. I asked if this was the sign permit  
5 application he submitted for the wall sign?

6 MR. SHAW: Objection to form.

7 A. Yes.

8 BY MS. JOKERST:

9 Q. Okay. And is this a true and accurate  
10 depiction of the sign permit application you  
11 submitted?

12 A. Yes.

13 MS. JOKERST: Okay. I will move to  
14 formally Exhibit AA into the deposition record.

15 BY MS. JOKERST:

16 Q. Mr. Howard, who filled this sign permit  
17 out?

18 A. I believe it was Leslie Bishop.

19 Q. Okay. Leslie Bishop filled this out for  
20 you. And how did she come to fill out for you?

21 A. I asked for help filling it out.

22 Q. Okay. So did you contact Leslie Bishop?

23 A. Yes.

24 Q. Okay. And what did you say to Leslie  
25 Bishop?

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**STEPHEN HOWARD**

1 A. I don't remember. I just said I don't --  
2 I think I said I don't remember -- I don't  
3 understand any of this.

4 Q. Okay. And you just asked her for help to  
5 fill it out?

6 A. Yes.

7 Q. Okay. So I want you to look at page 2 on  
8 that signature of applicant. Is that your  
9 signature?

10 A. Yes.

11 Q. Okay. And I want you to look back up on  
12 page 1. Towards the bottom of page 1, it says  
13 Proposed Signs in the middle. On the bottom right  
14 the box Other is checked?

15 MR. SHAW: Objection to form.

16 MS. JOKERST: I'm just directing him to  
17 it.

18 BY MS. JOKERST:

19 Q. Do you see that there where the Other box  
20 is checked?

21 A. Yeah. There's --

22 Q. An X in it?

23 A. Wall and Other, yeah.

24 Q. Okay. Next to that, do you see where it  
25 says mural exceeding allowable space for

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## STEPHEN HOWARD

1 mural/signage?

2 A. Yes.

3 Q. Okay. So when you submitted this  
4 application, you had conceded that the painting on  
5 the wall exceeded the allowable space for signage?

6 MR. SHAW: Objection to form.

7 A. I didn't see that that she wrote that.

8 BY MS. JOKERST:

9 Q. Okay. You signed it, right?

10 A. I signed it, yes.

11 Q. Okay. So you submitted it to the city in  
12 that format?

13 A. Yeah.

14 Q. Okay. All right. I want to direct your  
15 attention to Exhibit F, and this is in black and  
16 white, so it's not supposed to be in color.

17 A. Okay.

18 Q. Okay. Is this the Certificate of  
19 Compatibility Application you submitted?

20 A. Yes.

21 Q. Okay. Who filled this application out?

22 A. I don't know. I signed it.

23 Q. Okay. Well, did you fill it out?

24 A. That's not my writing.

25 Q. Okay. Did Leslie fill this out?

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**STEPHEN HOWARD**

1 BY MS. JOKERST:

2 Q. Well, did you have a meeting with Brad  
3 Anderson that wasn't at the Smoky Hill Museum?

4 A. I don't remember.

5 Q. Okay. Well, did Colin?

6 A. I don't know.

7 Q. Okay. Well, what was he talking about  
8 when he said he was all riled up?

9 MR. SHAW: Objection to form.

10 A. I don't know.

11 BY MS. JOKERST:

12 Q. Okay. So on November 6th, you told Colin  
13 to stop the mural, right?

14 A. Yes, that was Monday.

15 Q. You told him stop the sign -- stop the  
16 painting on the wall at The Cozy?

17 A. Yes, on the 6th.

18 Q. Okay. And you've said nothing's been  
19 done since the 6th, right?

20 A. Right.

21 Q. Okay. So I want to direct your attention  
22 to page 354 of Exhibit V, as in Victor?

23 A. Okay.

24 Q. Okay. And on November 7th, you sent  
25 Colin Benson and text and said finish the mural.

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## STEPHEN HOWARD

1 It's on me?

2 MR. SHAW: Objection to form.

3 BY MS. JOKERST:

4 Q. Did you send that to Colin?

5 A. Yes.

6 Q. Okay. Why did you say that?

7 A. Because I was drunk.

8 Q. Okay. And you wanted him to finish the  
9 painting?

10 A. Yeah. I was being emotional.

11 Q. Okay.

12 A. Had no meaning behind it. Obviously, he  
13 did not finish.

14 Q. Okay. And then you sent him a YouTube  
15 video, right?

16 A. That was sent to me. I don't recall even  
17 opening it.

18 Q. Well, look at those blue bubbles?

19 A. Yes.

20 Q. So you said finish the mural. It's on  
21 me, right?

22 A. Yes.

23 Q. And then the other blue bubble, that's  
24 from you as well, right?

25 A. Yes.

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## STEPHEN HOWARD

1 Q. Okay. So that's the YouTube link?

2 A. Yeah, I don't know.

3 Q. Okay. Well, do you remember you sent him  
4 a YouTube link to a clip from Animal House?

5 A. I don't know if I remember that, but I  
6 think I saw that.

7 Q. Okay. Why did you send him the clip from  
8 Animal House?

9 A. Because it was funny.

10 Q. Okay. All right. So I want to direct  
11 your attention to page 35 -- I'm sorry, Bates 356.  
12 It's page about 22 of Exhibit V. Okay. And you  
13 say -- you sent Colin a text that says starts with  
14 so find Doug Rempp. Okay. I want you to scroll  
15 down to the next one, the next page, 357. And  
16 then you say here, yep. He should unload his gun  
17 and back off. Do you see that?

18 A. Yes.

19 Q. Okay. So you sent that text message to  
20 Colin?

21 A. Yes.

22 Q. Okay. And what did you mean by he should  
23 unload his gun and back off?

24 A. I don't remember why I would have said  
25 that.

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**STEPHEN HOWARD**

1 Q. Okay. Does Jenni's Liquor sell any food?

2 A. No. Candy bars, snacks, sunflower seeds.

3 Q. All right. And how long have you owned

4 Jenni's Liquor?

5 A. Maybe 2020.

6 Q. Okay.

7 A. Maybe 2021, June is when we took over,  
8 one of those years.

9 Q. All right. And on the wall at Jenni's  
10 Liquor, you had a similar display painted. Is  
11 that right?

12 MR. SHAW: Objection to form.

13 A. Yes.

14 BY MS. JOKERST:

15 Q. Okay. But it's not the exact same  
16 display, right?

17 A. No.

18 Q. Okay. So I want to direct your attention  
19 to Exhibit Y.

20 MR. SHAW: I will object to the use of  
21 all these photos as they were not timely disclosed  
22 in accordance with the scheduling order.

23 MS. JOKERST: Okay. And I recall just  
24 note for the record on the purpose of this is that  
25 is our position they should have been disclosed



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## STEPHEN HOWARD

1 Q. Okay.

2 A. -- can't figure things out like that.

3 Q. So your wife responded to the question is  
4 this a Cozy reference and said yes, right?

5 A. She's her own person.

6 Q. Okay. But she responded and she said  
7 yes, right?

8 A. Yes.

9 Q. Okay. And that's because this painting  
10 is a reference to The Cozy wall sign, right?

11 MR. SHAW: Objection to form.

12 A. Sure, if you look at it like that.

13 BY MS. JOKERST:

14 Q. Okay. Well, your wife looked at it like  
15 that?

16 MR. SHAW: Objection to form.

17 BY MS. JOKERST:

18 Q. Right?

19 A. I just had fun with it.

20 Q. Okay. But I'm saying your wife looked at  
21 it that way, right?

22 MR. SHAW: Objection to form.

23 A. Yes.

24 BY MS. JOKERST:

25 Q. Okay. And so do you also look at it that

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**STEPHEN HOWARD**

1 way as a reference to The Cozy?

2 A. It's a continuation of my story.

3 Q. Okay. You're talking about your story as  
4 it relates to the painting at The Cozy?

5 MR. SHAW: Objection to form.

6 A. The ships had to come from somewhere.

7 BY MS. JOKERST:

8 Q. Okay. Well, that's a yes or no question.  
9 You're saying that it relates to your story as it  
10 relates to the painting that's at The Cozy, right?

11 MR. SHAW: Objection to form.

12 A. Yes.

13 MS. JOKERST: All right. I will formally  
14 move to admit Exhibit Y into the deposition  
15 record.

16 MR. SHAW: We will renew our objection.

17 MS. JOKERST: Okay. And we can, again,  
18 just for the court reporter, that can be noted,  
19 and that does not affect that the entire exhibit  
20 will be included with the deposition testimony.

21 BY MS. JOKERST:

22 Q. All right. So I want to talk to you a  
23 little bit about the painting that's on the wall  
24 at Jenni's Liquor. I mean how did that come into  
25 existence?

10/7/2024

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**STEPHEN HOWARD**

1 A. I've got a crazy mind.

2 Q. Okay. It was your idea?

3 A. Yes.

4 Q. Okay. So did you talk to Colin Benson  
5 about it?

6 A. After I asked the mayor if I could do  
7 that, the mayor of Brookville.

8 Q. Oh so you asked the mayor of Brookville  
9 for --

10 A. If I could paint a mural.

11 Q. Okay. So you asked the mayor of  
12 Brookville whether or not you could paint that,  
13 and what did the mayor of Brookville say?

14 A. You don't want to know, but, of course,  
15 he said yes.

16 Q. Okay. Well, I don't want to know. Why  
17 don't I want to know?

18 A. He goes I don't care what the fuck you do  
19 on your wall.

20 Q. Okay. And so you decided that you were  
21 going to work with Colin again?

22 A. Yes.

23 Q. Okay. Did you call Colin up, did you  
24 text Colin? How did you get in touch with Colin?

25 A. Probably called him.

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**STEPHEN HOWARD**

1 Rick Benson about the lawsuit?

2 MR. SHAW: Objection to form.

3 A. Pretty much about everything.

4 BY MS. JOKERST:

5 Q. Okay. Well, you told him that you  
6 thought the lawsuit was bullshit, right?

7 MR. SHAW: Objection to form.

8 A. He thought it was.

9 BY MS. JOKERST:

10 Q. Okay. Well, what part of the lawsuit do  
11 you think is bullshit?

12 MR. SHAW: Objection to form.

13 A. None of it. None of it.

14 BY MS. JOKERST:

15 Q. Okay. Well, you said that you don't  
16 understand the sign code, right?

17 A. Right.

18 Q. Okay. But then you told Rick Benson that  
19 this was bullshit?

20 MR. SHAW: Objection to form.

21 A. I guess.

22 BY MS. JOKERST:

23 Q. Okay. So what I'm trying to understand  
24 is when you were telling him this is bullshit,  
25 what's the this you were talking about?

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**STEPHEN HOWARD**

1 MR. SHAW: Objection to form.

2 A. That it went this far.

3 BY MS. JOKERST:

4 Q. Okay. Have you read the Salina sign  
5 code?

6 A. No.

7 Q. Okay.

8 A. I wouldn't understand it.

9 Q. Okay. But you haven't even tried to read  
10 it?

11 A. No.

12 Q. Okay. And you don't care about reading  
13 it, do you?

14 MR. SHAW: Objection to form.

15 A. No.

16 BY MS. JOKERST:

17 Q. Okay. Have you spoken to anyone  
18 associated with Blacksmith Coffee about their sign  
19 on the Ohio Street building?

20 A. I did.

21 Q. Okay. Who did you talk to?

22 A. I don't remember. Some girl.

23 Q. Some girl. Was she a worker, an owner?

24 A. I think a worker.

25 Q. Okay. And how did you strike up a

10/10/2024

1

**ANDREA WINDHOLZ**

1 .

2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF KANSAS

4 .

5 .

6 COZY INN, INCORPORATED, d/b/a

7 THE COZY INN; STEPHEN HOWARD

8 Plaintiffs,

9 .

10 vs. Civil Action No. 6:24-cv-01027-TC-ADM

11 .

12 CITY OF SALINA, KANSAS,

13 Defendant.

14 .

15 .

16 DEPOSITION OF

17 ANDREA WINDHOLZ,

18 taken on behalf of the Defendant, pursuant to

19 Notice to Take Deposition, beginning at 2:00 p.m.

20 on the 10th day of October, 2024, at Clark, Mize &

21 Linville, 129 S. 8th Street, in the City of

22 Salina, County of Saline, and State of Kansas,

23 before Sandra S. Biggs, Kansas CCR No. 0716.

24 .

25 .



5111 SW 21st Street  
Topeka, KS 66604  
785-273-3063  
www.appinobiggs.com

6420 W. 95th Street  
Suite 101  
Overland Park, KS 66212  
913-383-1131

800 E. 1st Street  
Suite 305  
Wichita, KS 67202  
316-201-1612

**EXHIBIT I**

10/10/2024

19

**ANDREA WINDHOLZ**

1 A. Yes.

2 Q. Do you handle any of the ordering for the  
3 meat?

4 A. Sometimes if my dad is unavailable.

5 Q. Okay. All right. And then I understand  
6 you handle the advertising for The Cozy. Is that  
7 right?

8 A. Most of the time. Sometimes my dad will  
9 do it, but a lot of times I will just because I'm  
10 more tech savvy and whatnot. I run The Cozy Inn  
11 Facebook page.

12 Q. Okay. And that's what I was going to  
13 ask, too. So what social media accounts does The  
14 Cozy have an account for?

15 A. That I run is just Coz -- is just the  
16 Facebook page. If there's other ones out there,  
17 it's not from me.

18 Q. Okay. So you don't run a Cozy Inn  
19 Instagram account?

20 A. Huh-uh.

21 Q. Okay. And what do you do as part of  
22 handling The Cozy Inn Facebook page? What does  
23 that involve?

24 A. I'll post on there that we're hiring.  
25 I'll make posts of like if we're going to close



**ANDREA WINDHOLZ**

1 early for a holiday. Or for like when we had the  
2 really bad storm a few months ago, I posted on  
3 there that we were closing for the day to let our  
4 employees clean up their debris. It's pretty much  
5 there just to update customers. And also, like  
6 when we do fun things like with The Cozy Inn  
7 eating contest, I live streamed on there for that.  
8 It's just there to like stay with customers and  
9 keep them informed and keep them with The Cozy  
10 Inn.

11 **Q. Okay. Do you also handle the purchasing**  
12 **of Cozy merchandise?**

13 A. I do the ordering, yes.

14 **Q. Okay. And what does that entail?**

15 A. So I'll go through the shirts and I'll  
16 see which ones we're running low on, and I'll do  
17 the order for that. And if we're running low on  
18 like our hats or koozies, I'll decide -- like here  
19 in the next couple weeks, I'll be doing a hoodie  
20 order. So like I'll just go -- I'll go on --  
21 I'll e-mail Messenger and tell them what sizes and  
22 colors of hoodies I want. And I'll change the  
23 colors of koozies up. I pretty much have free  
24 range on what I bring in as long as it's not like  
25 an astronomical price.

10/10/2024

21

**ANDREA WINDHOLZ**

1 Q. Okay. Do you help determine what designs  
2 go on the T-shirts?

3 A. For the most part, yes.

4 Q. Okay. And how do you determine what  
5 designs go on the T-shirts?

6 A. We don't really change it up. We really  
7 keep it the same. But we did like any new  
8 shirts, new styles, my dad will tell me what he  
9 wants and I'll kind of do like a little draw-up of  
10 it and be like is this what you're envisioning.  
11 And he'll tell me yes or no or maybe do this or  
12 whatever. Then I'll take that into Messenger, and  
13 I'll talk to their designer there and we'll come  
14 up with the actual design that would go onto  
15 something.

16 Q. Okay. Is Messenger, is that the vendor  
17 that you use?

18 A. Yes.

19 Q. Okay. And I assume they're just like a  
20 merchandise vendor. They screen print on T-shirts  
21 or hats?

22 MR. SHAW: Objection to form.

23 A. Yes. They do the printing on the shirts.  
24 And then they have Salina Embroidery works with  
25 them and they embroider like our hats and stuff

10/10/2024

22

**ANDREA WINDHOLZ**

1 like that. And then we get our koozies and stuff  
2 printed from Messenger as well.

3 BY MS. JOKERST:

4 Q. Okay. So when's like the last time you  
5 guys have updated a T-shirt design?

6 A. From my knowledge, I think my dad kept  
7 everything the same even when he bought it.

8 Q. Okay.

9 A. I'm not sure if he came up with any of  
10 the designs. I really -- I honestly don't know.  
11 I was nine.

12 Q. Okay.

13 A. So I'm assuming -- I mean, obviously, the  
14 logo itself stayed the same, but the designs on  
15 the shirts, I don't know if he came up with them  
16 or if they were already like that when he bought  
17 it.

18 Q. Okay. Or than ordering merchandise, what  
19 do you do in your role -- let me reask that.  
20 Other than handling the Facebook account and  
21 ordering merchandise, what do you do in your role  
22 as handling the advertising for The Cozy?

23 A. I -- I pretty much just kind of pay  
24 attention to what Salina, Downtown Salina is  
25 doing. And if we're able to participate, then I

10/10/2024

23

**ANDREA WINDHOLZ**

1 will bring that up to dad. Or I will e-mail  
2 Chamber of Commerce maybe and kind of see what we  
3 could do to be a part of it. We just like to  
4 stay with the times of Downtown Salina and keep  
5 with just our name out there, letting them know  
6 that we're a part of Salina and we love being part  
7 of Downtown Salina. Like it's so much fun.

8 **Q. Okay. Do you also coordinate radio**  
9 **advertisement?**

10 A. Yes. I talk on the radio, yes.

11 **Q. Okay. You talk on the radio?**

12 A. Um-hum.

13 **Q. When you say that, do you do like radio**  
14 **interviews or do you have like a recording of**  
15 **yourself for a part of an advertisement?**

16 A. I have talked on the radio before, like  
17 answered -- like interview.

18 **Q. Okay.**

19 A. And then right now it's just a recording.

20 **Q. Okay. What does the recording say?**

21 A. It's pretty much saying football season  
22 is here and school's back in session, so let  
23 Cozy's help you with your tailgating and, you  
24 know, late night dinner needs. I think that's  
25 what one says. And the other one, I cannot recall

10/10/2024

24

**ANDREA WINDHOLZ**

1 what it says. I recorded it a couple months ago.

2 **Q. Okay.**

3 A. A month ago.

4 **Q. And do either of these recordings have**  
5 **like a jingle that says mosey on in to The Cozy?**

6 A. Yes.

7 **Q. Okay. Do they both have it?**

8 A. Yes. I think each one has a different  
9 part of the jingle, but they both have it.

10 **Q. Okay. Does the jingle say more than**  
11 **mosey on in to The Cozy?**

12 A. It -- yeah. So for the most part, it  
13 says that -- I honestly haven't heard the entire  
14 jingle in a very long time, so I could not tell  
15 you. But I know that like the beginning of it's  
16 just like really upbeat and like -- yeah. It says  
17 it at the beginning, at the end. And in the  
18 middle, I cannot tell you what it says. I'm  
19 sorry.

20 **Q. Okay. So as part of like the radio**  
21 **advertisement, you record the audio. Do you also**  
22 **coordinate with the radio station regarding when**  
23 **the ads will air?**

24 A. They try to -- they kind of tell me like  
25 we're going to air it a little bit more during

10/10/2024

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**ANDREA WINDHOLZ**

1 envelope, and that way my dad knows to take it  
2 home and pay it. If I take it out, then we could  
3 lose it.

4 **Q. Okay. Do you -- does The Cozy have like**  
5 **an advertising plan?**

6 A. Could I ask what you mean by that?

7 **Q. Yeah. Do you or do you and your dad, I**  
8 **guess, get together and set out what kind of**  
9 **advertising you're planning to do for The Cozy?**

10 A. Oh, yeah. We will sit there and we'll  
11 talk at Cozy's or something. Like, hey, I heard  
12 this was going on. Do you want to do something  
13 for it? Or there's like indoor football. We  
14 always advertise there. We do a lot for them and  
15 whatnot. And then so, yeah, we just -- we keep  
16 our eye out for things that we're able to get our  
17 name out there with and do that. We do a lot of  
18 -- yeah, a lot of the just local advertisements  
19 and whatnot.

20 **Q. Okay. For indoor football, is that the**  
21 **Salina Liberty team?**

22 A. Um-hum, yes.

23 **Q. Yes. Okay. And what kind of advertising**  
24 **do you do with them?**

25 A. We have like a banner that they hang in

10/10/2024

27

**ANDREA WINDHOLZ**

1 there, and we also throw burgers into the stands  
2 at the football games.

3 Q. Okay. Do you launch them in one of those  
4 little machines?

5 A. I wish. No. It's -- they hand throw it.

6 Q. Okay.

7 A. As hard they I can.

8 Q. Okay. So what does the banner say that  
9 you hang? And I'm assuming you hang that banner  
10 in the stadium?

11 A. Yes. It's just our logo.

12 Q. Okay.

13 A. Like it's just the red logo, and then it  
14 says since 1922, like literally, whatever you see  
15 on line for our logo is what the banner is.

16 Q. Okay. So is it the red like neon sign  
17 logo?

18 A. Yes.

19 Q. Okay. Anything else like that that you  
20 do? I don't know if you have any other sports  
21 teams there, soccer teams, anything local to the  
22 area where you advertise with a specific  
23 organization or event?

24 A. Not that I know of, no.

25 Q. Okay. And then you participate in



10/10/2024

29

**ANDREA WINDHOLZ**

1 wear. It's just something that sets us a little  
2 different and makes it look a little nicer and put  
3 together.

4 Q. Okay. So I know you said that you sit  
5 down and talk with your dad about what kind of  
6 advertising you want to do. Do you write out a  
7 plan for the year? Is there anything that you put  
8 on paper about that?

9 A. No.

10 Q. Okay. Do you do any TV commercials?

11 A. No.

12 Q. Do you buy any billboards?

13 A. Yes.

14 Q. Okay. Tell me about that.

15 A. We have three of them. One when you're  
16 coming from I have to think of my direction, east  
17 to west, there's one. And that one I think is  
18 just -- it has like the four original workers that  
19 we have framed in Cozy's, and then it just has  
20 like something that says what we are and what we  
21 do and that we're like the best burger joint in  
22 Kansas voted by U.S.A. Today. And there's two  
23 coming from west to east. One of them is just  
24 like the one on the east side. And then the  
25 other one is closer to Salina. It says you're

10/10/2024

30

**ANDREA WINDHOLZ**

1 almost there and it's pretty much the gist of it.

2 Q. Okay. And when you're talking about east  
3 and west, are you referring to spaces that are off  
4 of I-70?

5 A. Yes.

6 Q. Okay. So the one that says you're almost  
7 there, is it just lettering or is there other  
8 images on that billboard?

9 A. I think that one has the four original  
10 workers on it as well. I haven't been from -- I  
11 haven't been from Hays to Salina in a little bit,  
12 so I cannot remember. But that one is like you're  
13 almost there, and has like the four original  
14 workers I think and then our logo and then where  
15 to exit.

16 Q. Okay. And what about the last one? Does  
17 that also just have the logo on it or what's on  
18 that one?

19 A. The one that's also on the west side?

20 Q. Um-hum, yes.

21 A. Okay. That one I think is the one that  
22 says like best burger joint in Kansas, has our  
23 logo and then where to exit -- or where to exit  
24 off of to go to.

25 Q. Okay. And were you responsible for

10/10/2024

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**ANDREA WINDHOLZ**

1 Q. Did you help him at all in filling out  
2 the Certificate of Compatibility application?

3 A. No.

4 Q. What was your dad's opinion about the  
5 city determining that the painting was a sign?

6 MR. SHAW: Objection to form.

7 A. I'm -- I'm sure he was upset. I'm not --  
8 I don't remember his exact reaction.

9 BY MS. JOKERST:

10 Q. Well, did he tell you anything about his  
11 opinion?

12 A. Oh, I mean sure he was upset, but he  
13 really didn't say much. He was just kind of  
14 bummed that the city put a stop to it and was --  
15 yeah. He was just -- he was probably -- he was  
16 just upset. He didn't really tell me too much.  
17 And if he did, I don't remember.

18 Q. When's the last time you talked to your  
19 dad about the display that's painted on the wall  
20 at The Cozy?

21 A. I mean we get asked questions about it  
22 all the day -- all the time. But since all this  
23 started, we really haven't talked too much about  
24 it.

25 Q. Okay. Well, let's go back to Exhibit B

10/10/2024

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**ANDREA WINDHOLZ**

1 BY MS. JOKERST:

2 Q. Have you ever worked at Jenni's Liquor?

3 A. No.

4 Q. Do you help out with the Jenni's Liquor  
5 Facebook page?

6 A. Yes.

7 Q. Okay. Do you run that Facebook page?

8 A. Yes.

9 Q. Do your parents pay you for that service?

10 A. No.

11 Q. And are you familiar with the burger  
12 display that was painted on the wall at Jenni's  
13 Liquors?

14 MR. SHAW: Objection to form.

15 A. I am aware of it, yes.

16 BY MS. JOKERST:

17 Q. Okay. How are you familiar with that  
18 display?

19 A. I just know the concept of it. I've seen  
20 it a couple times, but I haven't been out there  
21 and really looked at it.

22 Q. Okay. How do you know the concept of it?

23 A. They told me it.

24 Q. Okay. Who is they?

25 A. My parents.

10/10/2024

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**ANDREA WINDHOLZ**

1 Q. Okay. And when did they tell you about  
2 that display?

3 A. I don't remember. I don't even remember  
4 when they finished it.

5 Q. Approximately like the summer of 2024?

6 A. I'm sure once they figured out that they  
7 were going to do it I knew about it, but I don't  
8 remember when I first found out about it.

9 Q. Okay. And what did your parents tell you  
10 about that display?

11 MR. SHAW: Objection to form.

12 A. They were just going to tell -- they were  
13 just trying to tie it to Jenni's -- tie what's  
14 painted on Jenni's to Cozy's just because it's  
15 both of my parents' restaurants -- or restaurants.  
16 I guess Jenni's isn't a restaurant. It's a liquor  
17 store. But it's both their businesses, both their  
18 businesses, so they were just trying to tie them  
19 together.

20 BY MS. JOKERST:

21 Q. All right. And so you haven't gone out  
22 there to view it in person?

23 A. Huh-uh. If I've gone out there, it  
24 wasn't to look at that. It would be my dad took  
25 something of mine. Like the last time I was out

10/10/2024

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**ANDREA WINDHOLZ**

1 questions.

2 MR. SHAW: Sounds good.

3 MS. JOKERST: All right. We'll go off  
4 the record.

5 (THEREUPON, a recess was taken.)

6 BY MS. JOKERST:

7 Q. Okay. Miss Windholz, have you ever read  
8 the Salina sign code?

9 A. No.

10 Q. Have you ever attempted to read the  
11 Salina sign code?

12 A. No.

13 Q. And did you have any discussions with  
14 your dad about the design of the painted display  
15 on the north wall at The Cozy?

16 A. No.

17 Q. You said that at some point you saw a  
18 rendering of the design of the display on the  
19 north wall at The Cozy. Is that right?

20 A. I saw like what it's supposed to look  
21 like finished.

22 Q. Okay. And when did you see that  
23 rendering?

24 A. I don't remember.

25 Q. Okay. Did you see that rendering before

10/10/2024

1

COLIN BENSON

1 .

2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF KANSAS

4 .

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EXHIBIT J



10/10/2024

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## COLIN BENSON

1 A. And maybe -- I don't -- I don't remember  
2 exactly, but I do, you know, think of the arts  
3 committee as being the Arts Center committee, and  
4 they are a part of everything that happens  
5 downtown Salina.

6 Q. Okay.

7 A. So I don't remember exactly who I spoke  
8 with about on this day. Obviously, it was not the  
9 city committee on the 11th or 13th, whatever.

10 Q. 13th.

11 A. Yeah, 13th. It was not part of that.

12 Q. Okay. Is Eric Montoy a representative of  
13 the city?

14 A. He's just part of the Boom! project  
15 maybe.

16 Q. Okay.

17 A. Or Arts Center part. Like when they need  
18 something done, he would contact me or, again, if  
19 I did something wrong, he did contact me about  
20 that, you know --

21 Q. Okay.

22 A. -- of like signage.

23 Q. Okay. All right. So then let's scroll  
24 down to page 16. It's Bates 354. Okay. At the  
25 top of that page, Steve sent you -- or it looks

10/10/2024

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## COLIN BENSON

1 like Steve sent you a text saying finish the  
2 mural. It's on me. Do you see that?

3 A. Yes.

4 Q. Okay. And is it on November 7th at 8:42  
5 p.m.?

6 A. Yes.

7 Q. Okay. Did Steve send you that text?

8 A. Yes.

9 Q. Okay. Did you finish the mural?

10 A. No.

11 Q. Okay. Did you take any action in  
12 response to this text you received from Steve?

13 A. No.

14 Q. Okay. So you didn't go back and start  
15 working on the mural?

16 A. No.

17 Q. Okay. And why not?

18 A. It was already a problem. And until the  
19 problem got resolved, I definitely didn't need any  
20 repercussion of, you know, anything.

21 Q. After you received this text from Steve,  
22 did you talk to him and say, hey, I'm not going  
23 to do any further work on that display?

24 A. Yes.

25 Q. Okay. When did you talk to him?

10/10/2024

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## COLIN BENSON

1 A. I think of what people might like.

2 Q. Okay.

3 A. A lot of -- a lot of people like flowers.

4 A lot of people like animals, stuff like that.

5 And I add color to it to make it bright, exciting,

6 stuff like, you know, whatever pops into my head

7 that morning is normally what I put on paper.

8 Q. All right. Let's back to -- or I guess I

9 want to orient you back to the week of November 6.

10 So you -- we had previously looked at your texts.

11 And on November 6th, you had paused the painting,

12 painted display at The Cozy, right? And if you

13 want, we can go back to Exhibit L.

14 A. Yes, yes.

15 Q. Okay. And then at some point after

16 November 6, you met with the city?

17 MR. SHAW: Objection to form.

18 A. Yes.

19 BY MS. JOKERST:

20 Q. Okay. And let's go back to Exhibit L,

21 and we'll go to page 25 of 26, so it's Bates 363.

22 Do you see that dated Monday, November 13th?

23 A. Yes.

24 Q. Okay. And this was the day that you went

25 to the meeting with the city?

10/10/2024

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**COLIN BENSON**

1 A. Yes.

2 Q. Okay. Where was that meeting held?

3 A. The Salina Arts Center, I believe, is  
4 what it's called. Salina Arts Center Museum.

5 Q. Was it the Smoky Hill Museum?

6 A. Smoky Hill Museum. There you go.

7 Q. Okay. And who was at that meeting?

8 A. Leslie Bishop, Brad Anderson, two city  
9 workers or city people that I do not remember,  
10 Michael -- Michael somebody with the -- he was the  
11 head of the permit. Mike, Michael something. And  
12 maybe one or two other people that I don't  
13 remember their names.

14 Q. Was there someone from the city named  
15 Dustin Herrs there?

16 A. What did you say?

17 Q. Was there someone from the city named  
18 Dustin Herrs there?

19 A. Dustin. Maybe.

20 Q. Okay. Other than people from the city,  
21 who was in attendance at that meeting?

22 A. Steve, myself and two other -- two other  
23 people that were sitting against the wall.

24 Q. Okay. Was your dad there?

25 A. Yeah, it was like I don't remember, but I

10/10/2024

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**COLIN BENSON**

1 think he might have showed up later, because it  
2 was like a closed door open door deal. Like they  
3 said it was closed door and then they allowed  
4 people to come in, if that makes sense.

5 **Q. Okay.**

6 **A. So, yeah. So I believe he did walk in at**  
7 **the end.**

8 **Q. Okay. And what was discussed at that**  
9 **meeting?**

10 **A. There were sign permits put in front of**  
11 **us before I even got into the room or put on the**  
12 **table, and it was about why we didn't get a sign**  
13 **permit is what I remember.**

14 **Q. Okay. So did the city inform you at that**  
15 **meeting that they considered the display a sign?**

16 **A. Correct.**

17 **Q. Did the city inform you at the meeting**  
18 **that the display was too large to qualify for a**  
19 **sign permit?**

20 **A. Correct.**

21 **Q. Okay. Did the city give you a handout**  
22 **that had like an analysis about the sign and the**  
23 **size?**

24 **A. Yes, I believe so.**

25 **Q. Okay.**

10/10/2024

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**COLIN BENSON**

1 A. Of what he was able -- maybe they just  
2 told us of what he was able to do on the side of  
3 the building.

4 Q. Okay. Let's take a look at Exhibit G in  
5 that binder. All right. Do you see that?

6 A. Yes.

7 Q. Is that something that you received?

8 A. Yes, I believe this is -- this is part of  
9 that.

10 Q. Okay. So you recognize this document?

11 A. Yes.

12 Q. Okay. And this document's entitled The  
13 Cozy Inn Sign Analysis?

14 A. Yes.

15 Q. Okay. And is this what you received from  
16 the city during that Smoky Hill Museum meeting?

17 A. Yes.

18 MS. JOKERST: I will move to formally  
19 admit Exhibit G into the deposition record. All  
20 right.

21 BY MS. JOKERST:

22 Q. So they gave this -- a copy to you. Did  
23 they also give a copy to Steve?

24 A. I believe so.

25 Q. Okay. Did you say anything while you

10/10/2024

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## COLIN BENSON

1 so it became the whole wall.

2 Q. Okay. And did you discuss the display at  
3 Jenni's Liquor with Mr. Howard?

4 A. Yes.

5 Q. Okay. Did you provide him with any  
6 renderings of what you were going to do on this  
7 wall?

8 A. Yes.

9 Q. Okay. And did he have feedback for you  
10 about what he wanted to include?

11 A. Yes.

12 Q. Okay. What was that feedback?

13 A. The burger invasion that we talked about  
14 previously on The Cozy's, he wanted to take it to  
15 his hometown. And that's when I created the  
16 porthole and the burgers coming through it.

17 Q. Okay. So what is the porthole supposed  
18 to do? You said the burgers coming through it,  
19 what do you mean by that?

20 A. They're, again, as you can see on the  
21 exhibit, they're driven by aliens. So they're  
22 actually spacecrafts and they would come through a  
23 porthole through different dimensions. And the  
24 dimension would be The Cozy's.

25 Q. Okay. So they were going to -- so are



10/10/2024

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## COLIN BENSON

1 sure.

2 BY MR. SHAW:

3 Q. Yeah. It was a bad question. It doesn't  
4 show the entire Cozy wall?

5 A. It does not show the entire building.

6 Q. And had you and Steve decided to have the  
7 mural cover the entire building?

8 A. Yes.

9 Q. Okay. And so this rendition that's here  
10 on this page, that wasn't the complete, I guess,  
11 vision of what the mural would look like. Is that  
12 correct?

13 A. Correct.

14 MS. JOKERST: Object to form. Did we get  
15 my objection on the record.

16 THE REPORTER: Yes. You might pause just  
17 a little bit before you answer, because we've got  
18 that lag.

19 THE WITNESS: Oh.

20 THE REPORTER: Thank you.

21 BY MR. SHAW:

22 Q. And was the intention for all of the  
23 burgers in the mural to all be UFOs?

24 A. Yes.

25 MS. JOKERST: Object to form.

10/30/2024

1

**DUSTIN HERRS, AS CORP REP**

1 .

2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF KANSAS

4 .

5 .

6 COZY INN, INCORPORATED, d/b/a

7 THE COZY INN; STEPHEN HOWARD,

8 Plaintiffs,

9 .

10 vs. Civil Action No. 6:24-cv-01027-TC-ADM

11 .

12 CITY OF SALINA, KANSAS,

13 Defendant.

14 .

15 .

16 DEPOSITION OF

17 CORPORATE REPRESENTATIVE

18 DUSTIN HERRS,

19 taken on behalf of the Plaintiffs, pursuant to

20 Notice to Take Deposition, beginning at 9:27 a.m.

21 on the 30th day of October, 2024, at Clark, Mize &

22 Linville, 129 S. 8th Street, in the City of

23 Salina, County of Saline, and State of Kansas,

24 before Sandra S. Biggs, Kansas CCR No. 0716.

25 .



5111 SW 21st Street  
Topeka, KS 66604  
785-273-3063  
www.appinobiggs.com

6420 W. 95th Street  
Suite 101  
Overland Park, KS 66212  
913-383-1131

800 E. 1st Street  
Suite 305  
Wichita, KS 67202  
316-201-1612

**EXHIBIT K**

**DUSTIN HERRS, AS CORP REP**

1 character of that neighborhood. It could also  
2 impact property values. So there are examples of  
3 painted signs that could have negative impacts.

4 **Q. Okay. But so section 5 here, subsection**  
5 **5 here, does the property damage that is discussed**  
6 **include aesthetic harms?**

7 **A. Okay. Okay. I understand your question**  
8 **better now. You could also have multiple signs, I**  
9 **guess, that could create litter and clutter if you**  
10 **had a lot of painted signs. So I think -- I**  
11 **think it's -- I don't know that whether it's a**  
12 **painted sign or a non-painted sign it makes much**  
13 **of a difference according to our sign code. It's**  
14 **about the time, place and manner, where the signs,**  
15 **how many signs are there, how large are the signs,**  
16 **how tall are the signs.**

17 **Q. Okay. But subsection 5 here, is that**  
18 **dealing with the aesthetics of signs?**

19 **A. No. This is property damage, personal**  
20 **injury.**

21 **Q. Okay. I guess at least I'll explain what**  
22 **I'm thinking when I read this.**

23 **A. Okay.**

24 **Q. When I think, okay, an improperly**  
25 **constructed sign that could cause property damage**

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**DUSTIN HERRS, AS CORP REP**

1           A.     So we regulate signs in the aggregate  
2 across the entire community. And if we didn't,  
3 there would be a potential that you could have a  
4 lot more signs producing sign clutter which could  
5 enhance the aesthetic of the community. You can  
6 have signs that are very large and possibly  
7 distracting which could impact the aesthetics of  
8 the community.

9           Q.     Sorry. Let me stop you. I'm not asking  
10 about the sign code as a whole right now --

11          A.     Sure.

12          Q.     -- and how that may or may not enhances  
13 aesthetics. What I'm getting at is this.  
14 Interrogatory 4 here --

15          A.     Yes.

16          Q.     -- specifically claims that the interests  
17 served by regulating the specific types of signs  
18 like The Cozy sign include aesthetics. And so I'm  
19 asking what facts support that contention that  
20 regulating signs like The Cozy sign enhances  
21 aesthetics?

22          A.     Well, it says the sign code regulates all  
23 signs, and so that's what I was answering to. I  
24 guess I'm still not -- I'm sorry.

25          Q.     Right now, I'm focusing here on the last

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**DUSTIN HERRS, AS CORP REP**

1 district, is there any reason to believe that that  
2 change would be factually incorrect?

3 MS. JOKERST: Object to form and scope.

4 A. That's very similar to earlier when you  
5 asked me if I think what is -- well, I don't  
6 remember the exact question. But I think it's --  
7 yeah, that's something I couldn't answer.

8 BY MR. SHAW:

9 Q. Okay. What facts does the government  
10 contend show that regulating signs like The Cozy  
11 sign enhances pedestrian safety?

12 A. So if you have -- the idea is that the  
13 sign regulations are designed to, again, for each  
14 district limit the size of signs, the number of  
15 signs, the height of signs, the location of signs  
16 in order to reduce clutter. We don't want a lot  
17 of sign clutter because that can become  
18 distracting. It could impair the visual sight  
19 lines for motor vehicles as well as pedestrians.  
20 Sign sizes, we want to limit them so they don't  
21 become a distraction. We don't want signs that  
22 hold the eye longer than they should. We want to  
23 make sure that signs are effective. Again, that  
24 comes down to clutter where if you have too many  
25 signs, it becomes --

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**DUSTIN HERRS, AS CORP REP**

1 Q. I don't want to interrupt you, but is the  
2 city aware of any factual data showing its  
3 regulating the specific type of signs that The  
4 Cozy Inn has enhances pedestrian safety?

5 MS. JOKERST: Object to scope.

6 A. You're asking if The Cozy Inn enhances  
7 traffic safety? Is that what you said?

8 BY MR. SHAW:

9 Q. No. I'm asking is the city aware of any  
10 like factual data showing that regulating this  
11 type of sign enhances pedestrian safety?

12 MS. JOKERST: Object to scope.

13 A. I don't know.

14 BY MR. SHAW:

15 Q. Is the city aware of any -- let me  
16 rephrase. What facts does the city contend  
17 support the allegation that regulating signs like  
18 The Cozy sign enhances traffic safety?

19 A. So our regulations, again, are designed  
20 to limit the number of signs, the location of  
21 signs, the size of signs so that businesses have  
22 opportunities or property owners, if they are not  
23 even businesses, have opportunities to have signs  
24 that give them opportunities to display and post  
25 those while at the same time limiting the number

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**DUSTIN HERRS, AS CORP REP**

1 Q. All right. When did the city first learn  
2 about the mural painted on the side of The Cozy  
3 Inn?

4 A. We received a -- Lauren Driscoll received  
5 a message from Brad Anderson who's a City of  
6 Salina employee and alerted her to the painting  
7 going up, didn't know if there was any problems  
8 with it per se but wanted us to be aware of it.  
9 Sent her a picture, we reviewed it, said that  
10 looks like a sign. I went and walked over and  
11 just looked at it and saw it and like, yes, this  
12 is -- has the elements of a sign for us. It has,  
13 excuse me, has writings, it has pictorial images  
14 and representations, emblems, symbols, it  
15 announces Don't Fear the Smell or makes that  
16 proclamation, invites you to come inside with an  
17 arrow and attracts attention to the walk-up window  
18 and the door to go into the building and has  
19 burgers on it that represent the products that  
20 they sell at The Cozy Inn.

21 Q. So Mr. Anderson I believe you said he's a  
22 city employee, correct?

23 A. Correct.

24 Q. And he -- did you say he texted Miss  
25 Driscoll?

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**DUSTIN HERRS, AS CORP REP**

1 Q. And is this the e-mail you sent to the  
2 planning group that you're referring to right now?

3 A. Yes.

4 Q. Okay. So it was there on November 6th  
5 that Mr. Anderson informed Miss Driscoll?

6 A. That's my understanding.

7 Q. All right. And what action did the city  
8 take upon learning about the mural being painted  
9 at The Cozy Inn?

10 A. I contacted Mr. Howard and invited him to  
11 come to my office to speak about it. He did. He  
12 accepted my invitation. He came to my office and  
13 we talked. I explained to him our concerns with  
14 the sign that he was in the process of painting on  
15 his north wall of The Cozy Inn property and  
16 explained to him the sign limitations that are in  
17 the C-4 district and how it appeared his sign was  
18 exceeding the maximum allowable sign area for the  
19 C-4 district.

20 Q. And that was all on November 6th?

21 A. That was on November 6th.

22 Q. All right. When you first contacted Mr.  
23 Howard, had the city already determined that the  
24 mural at the Cozy Inn was a sign?

25 A. Yes.



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**DUSTIN HERRS, AS CORP REP**

1 Q. Fun?

2 A. Yeah.

3 Q. Okay. And at any point, has the city  
4 reevaluated it's determination that the mural is a  
5 sign based on Mr. Howard's input?

6 A. No.

7 Q. Okay. So that determination that had  
8 been made even before speaking to Mr. Howard that  
9 it was a sign, that has never been reconsidered by  
10 the city. Is that correct?

11 A. Correct.

12 Q. Okay. Was Mr. Schrage involved in that  
13 determination?

14 A. The determination, no.

15 Q. Okay. When the city first contacted Mr.  
16 Howard, had a determination already been made that  
17 the mural was too large for the C-4 zoning  
18 district?

19 MS. JOKERST: Object to form.

20 A. Yes. We had already -- when I talked --  
21 when I spoke with him, I had already did an  
22 estimate, if you will, of the size of the sign, an  
23 approximation.

24 BY MR. SHAW:

25 Q. Okay. How did that -- how do you

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**DUSTIN HERRS, AS CORP REP**

1 **calculate that approximation?**

2 A. The building has kind of -- well, what I  
3 would call -- what we would call a broken facade  
4 where it's got a flat roof and a facia that has  
5 different elevations to it because there's a  
6 parapet in the middle. What I did is I measured  
7 the height of the wall using Pictometry software  
8 which can get pretty close, at least for an  
9 estimation, it's good for that, where I can get  
10 the height of the wall of the lower parapet and  
11 the taller parapet. I think the lower parapet was  
12 like 11 feet and the top of the taller parapet was  
13 13. So I took an average of like 12 feet,  
14 multiplied it by the length of the wall. And that  
15 gave me an estimate of how large that wall sign  
16 was.

17 Q. Okay. Did you save that Pictometry  
18 analysis or file?

19 A. No.

20 Q. I don't know exactly how Pictometry  
21 works.

22 A. No, I don't know if you can save but I  
23 didn't save.

24 Q. All right. So there's no document  
25 showing that measurement?

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**DUSTIN HERRS, AS CORP REP**

1 A. No.

2 Q. Okay. At any point since then, has the  
3 city reevaluated whether the sign at The Cozy Inn  
4 or the painting at The Cozy Inn that we're  
5 fighting over here about whether or is or isn't a  
6 sign --

7 A. Sure.

8 Q. -- at any point has the city reevaluated  
9 whether or not that painting was too large for the  
10 C-4 zoning district?

11 A. Well, we ran some -- a mental exercise to  
12 see if a text amendment could be approved to --  
13 let me back up. The C-4 district allows for 3  
14 square feet of sign area per lineal foot of  
15 building frontage. And The Cozy Inn is 20.8,  
16 nominally 21 feet of building frontage. So that  
17 comes out to nominally 63 total square foot of  
18 sign area that's allowed. We ran a scenario where  
19 if we were to propose a text amendment to allow a  
20 side wall to also be incorporated and function as  
21 a frontage of a building, even though it's not  
22 facing a street, would that provide sufficient  
23 square footage to allow the proposed Cozy Inn  
24 sign, and it was insufficient. That idea, that  
25 proposed text amendment would be insufficient for

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**DUSTIN HERRS, AS CORP REP**

1 in this e-mail, you got those from the Pictometry  
2 software. Is that also correct?

3 A. The height, the 12 feet is an estimate  
4 based on an average of the building. And the 20.8  
5 is from the legal description. So, basically, the  
6 deed that shows the lot depth since the building  
7 is -- the building takes up the entire lot.

8 Q. And that 44.4 feet measurement, how was  
9 that one taken?

10 A. Yeah, I apologize. I said lot depth.  
11 The 20.8 is lot width and the 44.4 is the lot  
12 depth. And that's from the deed as well, from the  
13 legal description.

14 Q. The 20.8 and the 44.4, those are both  
15 from the deed description?

16 A. Um-hum. From the legal description of  
17 the property.

18 Q. And 12 feet, you said that's from  
19 Pictometry?

20 A. Yeah. It's an average estimate because  
21 it's got a broken facade or that has multiple  
22 heights to it.

23 Q. Okay. Was any other measurement ever  
24 taken of The Cozy Inn?

25 A. I think later on when we did a more

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**DUSTIN HERRS, AS CORP REP**

1 thorough analysis, I think rather than taking  
2 average height, I measured the height and width  
3 using Pictometry of like three -- there's three  
4 different sections. I have three different  
5 heights of the building. So I measured more  
6 accurately the area of the wall. So I think in  
7 my later analysis, it's a similar approximation  
8 but it's more accurate.

9 **Q. All right. Discussing your analysis, I**  
10 **believe what you're talking about will be Exhibit**  
11 **7, so a few pages down.**

12 A. I have Exhibit 7.

13 **Q. Is this the analysis you were just**  
14 **referring to?**

15 A. Yes.

16 MR. SHAW: Okay. We'll go ahead and  
17 admit Exhibit 7.

18 BY MR. SHAW:

19 **Q. So I'm trying to find here is there --**  
20 **you said somewhere in here you did a different**  
21 **calculation than the one that was in the previous**  
22 **exhibit?**

23 A. Yeah. So the previous exhibit, the e-  
24 mail that we were just discussing which was -- I  
25 forgot the exhibit number already, 3 maybe.

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**DUSTIN HERRS, AS CORP REP**

1 Q. Yes, 3.

2 A. Had 540 square feet. This analysis says  
3 528. I wanted to make clear that I measured it  
4 differently and that I believe this is more  
5 accurate --

6 Q. Okay.

7 A. -- than the other one. The previous one  
8 was more estimated. This one, I was measuring the  
9 height of the portion, the east portion that's  
10 lower. And there's a central portion that's  
11 taller, measured that separate. And then there's  
12 a west portion that's lower again, I measured that  
13 and then added them together.

14 Q. All right. Did this analysis subtract  
15 any wall area for the existing signs on that  
16 facade of The Cozy Inn?

17 A. It did not subtract the area of the  
18 existing signs on that side.

19 Q. Okay. Did it subtract any area for the  
20 service window or door on that facade of The Cozy  
21 Inn?

22 A. It did not.

23 Q. Did it subtract for any of the other  
24 architectural features on that facade of The Cozy  
25 Inn?

**DUSTIN HERRS, AS CORP REP**

1 received it on.

2 Q. All right.

3 A. That's the date he signed it anyway.

4 Q. Okay. Can you confirm that the city has  
5 received this application?

6 A. Yes.

7 MR. SHAW: Okay. I'll admit Exhibit 8.

8 BY MR. SHAW:

9 Q. On the third page there of Exhibit 8, is  
10 that a rendition of the mural that the Cozy was  
11 attempting to paint on their wall?

12 A. Yes. According to Mr. Howard, this is  
13 what he was proposing.

14 Q. Okay. Does the city have any reason to  
15 doubt Mr. Howard when he says that this is what he  
16 was proposing?

17 MS. JOKERST: Object to scope and form.

18 A. I don't know.

19 BY MR. SHAW:

20 Q. Does the city have any reason to believe  
21 that this rendition is not the planned mural that  
22 The Cozy Inn was intending to paint?

23 MS. JOKERST: Object to scope and form.

24 A. I'm not sure, but some of the outlines of  
25 some of the pictorial representations are

10/30/2024

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**DUSTIN HERRS, AS CORP REP**

1 **application was neither granted or denied?**

2 A. Correct. So when we met with Mr. Howard,  
3 we informed him, and when I say when we met with  
4 him, when we met with him on November -- I've got  
5 to get that, November 6 of 2023, we informed him  
6 that his proposed sign exceeded the sign maximum  
7 limitation in the C-4 district and that staff was  
8 unable to approve. And in talking with him about  
9 potential options, we expressed that we could  
10 potentially look at a text amend, and that was  
11 expressed at the meeting that we had with him  
12 later at the Smoky Hill Museum. And he seemed  
13 responsive to the idea of exploring a text  
14 amendment which would be a public process to  
15 potentially change the sign code to potentially  
16 allow signage like what Mr. Howard was proposing.  
17 And so we had -- even though we were not able to  
18 approve the sign and we informed Mr. Howard of  
19 that, we were open to trying to come up with a  
20 potential sign amendment that could allow  
21 something similar to what he was being -- what he  
22 was proposing.

23 **Q. So at that meeting, you mentioned at the**  
24 **Smoky Hill Museum?**

25 A. Um-hum.



**DUSTIN HERRS, AS CORP REP**

1 A. Yes.

2 Q. Was The Cozy Inn ever provided with a  
3 written statement of the reasons of denial?

4 MS. JOKERST: Object to form and scope.

5 A. The Cozy Inn was informed before the  
6 application was even applied for and the sign  
7 permit was applied for that the sign was -- did  
8 not conform to the C-4 regulations and is not  
9 something the staff had the authority to permit.

10 BY MR. SHAW:

11 Q. Was that a written statement?

12 A. It was not a written statement. It was a  
13 verbal statement in a meeting that I had with Mr.  
14 Howard on November 6th and then also at a later  
15 meeting that took place at the Smoky Hill Museum.

16 Q. Was The Cozy Inn provided with any  
17 recommendations about potential changes to the  
18 project that might allow it to be approved?

19 A. I did mention to Mr. Howard that he could  
20 reduce the signage -- the size of the signage to  
21 an area that would fit within the 63 total square  
22 feet that he had, that he could either reduce the  
23 proposed sign down to the remaining nominally 10  
24 square feet that he has or he could remove some  
25 existing signs as well but reduce his total

10/30/2024

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**DUSTIN HERRS, AS CORP REP**

1 signage down to the 63 square feet that he's  
2 allowed.

3 Q. Was that -- you said that to him orally?

4 A. Correct.

5 Q. Okay. Was there any written --

6 A. No.

7 Q. -- statement of that to Mr. Howard?

8 A. No. We did not record that. That was in  
9 our initial meeting.

10 Q. All right. All right. Can we go back to  
11 Exhibit 11 which was Mr. Michelson's letter.

12 A. I have Exhibit 11.

13 Q. And so did this letter inform Mr. Howard  
14 that both his Sign Permit Application and  
15 Certificate of Compatibility Application had been  
16 placed on hold?

17 A. Yes.

18 Q. And when was this letter sent?

19 A. February 8th, 2024.

20 Q. Was any other written correspondence sent  
21 to Mr. Howard informing him that his applications  
22 were on hold?

23 A. No. We thought we were of a common  
24 understanding from our verbal conversations that  
25 we were going through a comprehensive review of

10/30/2024

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**DUSTIN HERRS, AS CORP REP**

1 material facts. Do you see that?

2 A. Oh, the very top. Yep, sorry. Defendant  
3 interprets this to mean the material facts and  
4 respond to this request with material facts.

5 Q. Okay. So is it your understanding that  
6 this response encompasses the material facts as  
7 stated in that sentence right there?

8 A. Yes.

9 Q. All right. We can no longer need to  
10 refer to No. 42.

11 I have one clarification for you. So Mr.  
12 Howard when he submitted the sign permit and the  
13 Certificate of Compatibility Permit Application,  
14 and I'll wait for you to get that organized and  
15 then I'll ask?

16 A. Okay. Can I shut the book?

17 Q. Yeah.

18 A. Okay.

19 Q. Dustin, just shut the book. We've got to  
20 keep moving.

21 A. Yeah. Sorry.

22 Q. All right. So when Mr. Howard submitted  
23 the Certificate of Compatibility Application and  
24 the Sign Permit Application, he included a  
25 rendering of his proposed final -- what he said

**DUSTIN HERRS, AS CORP REP**

1 was going to be his proposed final sign. Is that  
2 right?

3 A. Correct.

4 Q. Okay. And the city looked at the photo  
5 of the final proposal that Mr. Howard submitted,  
6 correct?

7 A. Yes.

8 Q. Okay. And the city after looking at that  
9 photo confirmed that the proposed final rendering  
10 was still a sign, correct?

11 A. Yeah. It was not only the same as what  
12 is up there, all the elements and character of the  
13 sign that cause it to be a sign are in place.

14 Q. Okay. And the city didn't like redo a  
15 whole sign analysis, though, after receipt of  
16 that, right?

17 A. No. The area was still nominally the  
18 entire wall, the entire north face, and it still  
19 exceeded the 10 square feet that he would --  
20 surplus area that he still had in terms of  
21 additional signage that he could add. And,  
22 therefore, we were not able to permit it.

23 MS. JOKERST: That's all I have.

24 MR. SHAW: That's all we have for you,  
25 Mr. Herrs. Thank you for your time.





0058

EXHIBIT L



Community & Development Services  
Planning Division  
300 West Ash | Room 205 | PO Box 736  
Salina, Kansas 67402-0736



PHONE | 785.309.5720  
FAX | 785.309.5713  
TDD | 785.309.5747  
WEB | [www.salina-ks.gov](http://www.salina-ks.gov)

## SIGN PERMIT APPLICATION

Site plan, elevation drawings with dimensions, & shop drawings are required with this submittal

108 N. 17th The Cozy Inn  
Address Where Sign(s) is / are to be installed Name of Business

Steve Howard 8822 S Sunnyside Rd 67425 785-462-1163  
Name of Business Owner Mailing Address (if different than above) Zip Code Phone Number

West 44.4 ft of the S. 20.8 ft of lot 103 on 17th St located at  
Legal Description (attach separate page if necessary) 108 N. 17th St

Steve Howard 8822 S Sunnyside Rd 67425 785-462-1163  
Property Owner of Record Mailing Address Zip Code Phone Number

Same  
Owner of Sign Mailing Address Zip Code Phone Number

Colin Benson 117 S. Santa Fe 67401 \*  
Sign Installer / License # Mailing Address Zip Code Phone Number

### PROPOSED SIGN(S)

Class of Work: ☒ New ☒ Alteration Estimated Date of Installation: \_\_\_\_\_

Illumination: ☐ Internal ☐ External ☐ Electronic Message Center ☒ None

Will any new electrical work be necessary? ☒ NO ☐ YES\* - Electrical Contractor: \_\_\_\_\_

\*If YES, separate permit is required and will be issued to the electrical contractor at the time the sign permit is issued

Are there overhead power lines within 10 feet of proposed location of sign? ☒ NO ☐ YES

Type of Proposed Sign(s) – Indicate number of signs next to sign type:

☐ Pole ☐ Ground ☒ Wall ☐ Awning ☐ Canopy ☐ Marquee

☐ Projecting ☐ Roof ☐ Decorative ☒ Other (Describe): Mural Exceeding  
allowable  
space for mural/sign  
age

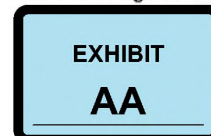
### EXISTING SIGN(S)

☐ Check box if there are no existing signs at this address at time of sign permit application or if existing sign(s) will be removed to install new sign(s).

If box is not checked, provide the information requested in the following table for each existing sign. Do not include signs or square footage of the sign(s) listed as proposed signs above or sign(s) that will be removed to install new sign(s).

BLF\_051\_Rev. 05-2017

See Next Page >



CITY000020

EXHIBIT M

City of Salina  
Sign Permit Application | Page 2

### INVENTORY OF EXISTING SIGNS

Type of Sign (Pole, Ground, Wall, Etc.)	Description	Square Footage (Per Individual Sign)	Height (If Applicable)
* wall	See Attached	528 sq ft	
Wall Sign	N. facing wall sign	24 sq ft	
Projection sign	7th St Projection sign	24 sq ft	
Awning Sign	7th St Awning sign	4.88 sq ft	

Steve Howard  
PRINTED Name of Applicant

The Cozy Inn  
Applicant's Company / Employer Name

Steveh@cozyburger.com  
Applicant's Email Address

785-452-1153  
Applicant's Phone Number

[Signature]  
SIGNATURE of Applicant

11-13-23  
Date

### For Office Use Only Below Line

Date Received: \_\_\_\_\_ Sign Permit Number \_\_\_\_\_

Is business part of a shopping center or zoning lot with multiple businesses? ☐ NO ☐ YES

Zoning	Square Footage of Signs	Illumination Approved	SPECIAL CONDITIONS: _____ _____ _____ _____	
Historic District	New	Electrical Permit Required?		
B.I.D.	Existing	Contr. License Verified?		
Vision Triangle	Total	Proposed Set-back		
	Total Allowed	Required Set-back		
Approved for Issuance By		Date	Permit Fee	Receipt #, Staff Initials



CITY000023



10/30/2024

1

DEAN ANDREW, AS CORP REP

1 .

2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF KANSAS

4 .

5 .

6 COZY INN, INCORPORATED, d/b/a

7 THE COZY INN; STEPHEN HOWARD,

8 Plaintiffs,

9 .

10 vs. Civil Action No. 6:24-cv-01027-TC-ADM

11 .

12 CITY OF SALINA, KANSAS,

13 Defendant.

14 .

15 .

16 DEPOSITION OF

17 CORPORATE REPRESENTATIVE

18 DEAN ANDREW,

19 taken on behalf of the Plaintiffs, pursuant to

20 Notice to Take Deposition, beginning at 2:10 p.m.

21 on the 30th day of October, 2024, at Clark, Mize &

22 Linville, 129 S. 8th Street, in the City of

23 Salina, County of Saline, and State of Kansas,

24 before Sandra S. Biggs, Kansas CCR No. 0716.

25 .



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Topeka, KS 66604  
785-273-3063  
www.appinobiggs.com

6420 W. 95th Street  
Suite 101  
Overland Park, KS 66212  
913-383-1131

800 E. 1st Street  
Suite 305  
Wichita, KS 67202  
316-201-1612

EXHIBIT N

10/30/2024

11

**DEAN ANDREW, AS CORP REP**

1 maybe rather than have him go through each one, is  
2 there anything in there that hasn't been disclosed  
3 by either party?

4 MS. JOKERST: No, I don't believe so.

5 MR. SHAW: Okay.

6 MS. JOKERST: Dean, you have what I sent  
7 you?

8 A. It is what you sent me. It includes the  
9 set of Interrogatories, the responses to those,  
10 the Requests For Admissions, the things that I was  
11 supposed to be questioned about under the topics  
12 list.

13 BY MR. SHAW:

14 Q. All right. So we will start off kind of  
15 just discussing how the city defines a sign under  
16 the sign code. So if you can open the binder in  
17 Exhibit 1 there, we have excerpts of the code. Go  
18 to Section 42-764.

19 A. The methodology in using something is a  
20 sign is determined whether it's a structure or  
21 part of a structure or portable display, whether  
22 it's either attached to the ground or painted onto  
23 a building or structure on the ground. And then  
24 we determined whether it announces, directs  
25 attention to or advertises. And then we confirm

10/30/2024

12

**DEAN ANDREW, AS CORP REP**

1 whether it is inside or outside of a building.

2 Q. Give me one second here. So when you,  
3 and when I say you, I mean the city, determine if  
4 a display is used to announce, what methodology  
5 does the city use to make that determination?

6 A. We look to see whether it declares some  
7 fact or occurrence or event or some entity.

8 Q. And does that announcement have to be of  
9 a commercial nature, or can it be any  
10 announcement?

11 A. It could be any type of announcement.

12 Q. Okay. And does the city need to review  
13 the proposed display in order to determine if it  
14 announces or not?

15 A. Yes.

16 Q. Okay. And when the city determines if a  
17 display directs attention to something, what  
18 methodology does the city use to make that  
19 determination?

20 A. We look to see if there is something in  
21 the visual display that points to or directs  
22 attention to a particular location or position or  
23 something that's occurring in their building if  
24 there is one.

25 Q. And does it have to direct attention to a

# The Cozy Inn Sign Analysis

## Sign Definitions

### **Sec. 42-764. Sign.**

*Sign* is any writing (including letters, words or numerals), pictorial representation (including illustrations or decorations), emblem (including devices, symbols, or trademarks), flag, banner, streamer, pennant, string of lights, or display calculated to attract the attention of the public, or any other figure of similar character which:

- (1) Is a structure or any part thereof, or a portable display, or is attached to, painted on, or in any other manner represented on a building or other structure or on the ground;
- (2) Is used to announce, direct attention to, or advertise; and
- (3) Is not located inside a building.

### **Sec. 42-768. Sign, business.**

*Business sign* is a sign which directs attention to a business or profession conducted, or to a commodity or service sold, offered or manufactured, or an entertainment offered, on the premises where the sign is located or to which it is affixed.

### **Sec. 42-781. Sign, wall.**

*Wall sign* is a sign fastened to or painted on a wall of a building or structure in such a manner that the wall becomes merely the supporting structure or forms the background surface, and which does not project more than twelve (12) inches from such building.

## C-4 Sign Regulations

### **Sec. 42-521. C-4 commercial districts.**

The following sign regulations shall apply in the C-4 central business districts:

- (1) *Functional types permitted.* Any type listed in section 42-506, except that advertising signs for other than special public events sponsored by governmental, philanthropic and nonprofit organizations shall be prohibited in the C-4 district.
- (2) *Structural types permitted.* Any type listed in section 42-507, except that mobile signs and roof signs shall be prohibited in the C-4 district.
- (3) *Number of signs permitted.* In the C-4 district, four (4) signs per business with a maximum of ten (10) signs per zoning lot; provided, however, the following additional restrictions shall apply:
  - a. No more than one (1) projecting sign or ground/pole sign shall be allowed per street frontage.
  - b. Ground/pole signs shall be allowed only on zoning lots without buildings or those with buildings having a front yard setback of ten (10) feet or more.

- c. Ground/pole signs and projecting signs shall not be allowed in combination along the same street frontage.

(4) *Maximum gross surface area:*

- b. In the C-4 district, three (3) square feet of sign area for each lineal foot of building frontage for allowable signage other than a ground/pole sign or a projecting sign; where no building frontage exists, one (1) square foot of sign area for each lineal foot of street frontage. Irrespective of building or street frontage, no property or zoning lot shall be restricted to less than thirty-six (36) square feet of sign area. No more than sixty-seven (67) percent of allowable sign area may be displayed on any building wall or street frontage. In regards to projecting signs and ground/ pole signs, the following maximum area limitations shall apply:

Building Frontage	Projecting Signs*	Ground/Pole Signs
25 feet or less	30 sq. ft.	45 sq. ft.
26—50 feet	36 sq. ft.	54 sq. ft.
51 feet or more	48 sq. ft.	72 sq. ft.

\*The maximum area for a projecting sign on a building wall without street frontage shall be four (4) square feet.

- (5) *Maximum height.* Ground/pole signs may not exceed thirty (30) feet in height above grade. Projecting or wall signs may not project above the lowest point of the roof of the structure to which it is attached.

### **The Cozy Inn Information and Background**

The subject property is legally described as the West 44.4 feet of the South 20.8 feet of Lot 103 on Seventh Street in the Original Town (now City) of Salina and addressed as 108 North 7<sup>th</sup> Street.

The subject property is owned by Steven Howard, he is also the owner and proprietor of the business within the building known as The Cozy Inn. The Cozy Inn Restaurant was one of the earliest known prototypes for a fast food “Hamburger Joint” in the State. The small diner-type restaurant has operated continuously from this location since opening in 1922. The utilitarian commercial building is one story and constructed of masonry with a white-painted stucco finish. Its most recognizable feature is a trademark red neon sign that hangs above the front façade on North 7th Street. The original 1922 interior, with grill, bar and five stools remains relatively intact. The restaurant and its simple hamburger and soda fare have gained notoriety over the years and have become a community icon.

The Cozy Inn occupies a property that is 20.8 feet in width and 44.4 feet in depth facing N. 7<sup>th</sup> Street. The property lines coincide with the building’s exterior walls. The restaurant is bounded on the south by the old Public Utilities Building, at 110-120 W. Iron, and on the north and east by a six foot walkway and City Parking Lot 6A. The parking lot with

landscaping, lighting and service areas was constructed by the City in 1986 as part of the Downtown Revitalization project.

In 2003, the DRB approved a Certificate of Compatibility (5-0) for the design and location of the new walk-up window, awning, signs, lighting and bench. Because the off-premise seating area would occur on public property, the DRB could only make recommendations regarding the proposed seating area. Other locations for the seating area were also evaluated. The DRB voted (5-0) to recommend that a License Agreement be approved with The Cozy Inn to allow an outdoor seating area along N. 7th Street. The Salina City Commission approved a License Agreement with The Cozy Inn on **August 11, 2003** which authorized The Cozy Inn to utilize the 50 ft. planter area along the east side of North 7<sup>th</sup> Street as an outdoor seating area.

In 2022, the DRB approved a Certificate of Compatibility (5-0) for the installation of a new awning on the west façade of the Cozy Inn building. The awning included a 4.88 sq. ft. sign on it.

### **Existing Conditions**

Current Allowable Sign Area: 21 ft. x 3 sq. ft. = 63 sq. ft. of allowable sign area and four (4) total signs allowed.

Current Signage:

- |  |                     |
|--|---------------------|
| 1. North facing wall sign:                   | 24.00 sq. ft.       |
| 2. 7 <sup>th</sup> Street projection sign:   | 24.00 sq. ft.       |
| 3. <u>7<sup>th</sup> Street awning sign:</u> | <u>4.88 sq. ft.</u> |
| Total Sign Area:                             | 52.88 sq. ft.       |

The Cozy Inn has the ability to install a fourth (their limit is 4) sign with no more than 10.12 sq. ft. of area.

### **Proposed Hamburger Sign Analysis**

The proposed hamburger sign on the north wall of The Cozy Inn is approximately 528 sq. ft. This would put The Cozy Inn in noncompliance as it would have approximately 581 sq. ft. of total sign area which is 518 sq. ft. over the allowable sign area.

9/11/2024

1

**MICHAEL SCHRAGE**

1 .

2 IN THE UNITED STATES DISTRICT COURT

3 FOR THE DISTRICT OF KANSAS

4 .

5 .

6 COZY INN, INCORPORATED, d/b/a

7 THE COZY INN; STEPHEN HOWARD

8 Plaintiffs,

9 .

10 vs. Civil Action No. 6:24-cv-01027-TC-ADM

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12 CITY OF SALINA, KANSAS,

13 Defendant.

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15 .

16 DEPOSITION OF

17 MICHAEL SCHRAGE,

18 taken on behalf of the Plaintiffs, pursuant to

19 Notice to Take Deposition, beginning at 9:09 a.m.

20 on the 11th day of September, 2024, at Clark, Mize

21 & Linville, 129 S. 8th Street, in the City of

22 Salina, County of Saline, and State of Kansas,

23 before Sandra S. Biggs, Kansas CCR No. 0716.

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Wichita, KS 67202  
316-201-1612

**EXHIBIT P**



9/11/2024

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**MICHAEL SCHRAGE**

1 MR. MACROBERTS: That's all I have.

2 MS. JOKERST: I have a couple of follow-  
3 up.

4 CROSS-EXAMINATION

5 BY MS. JOKERST:

6 Q. Okay. Mr. Schrage, earlier you mentioned  
7 something about a sign handout that was provided  
8 to Mr. Howard. Do you recall mentioning something  
9 about that?

10 A. Yes.

11 Q. Okay. What handout were you referring  
12 to?

13 A. My recollection is a sign code analysis  
14 that was a summary of the applicable sign code and  
15 then staff's analysis of the Cozy zoning category,  
16 lot size, math, relative to the size what was  
17 being proposed.

18 Q. Did you prepare that sign analysis?

19 A. No.

20 Q. All right. Do you -- in your position as  
21 city manager, do you apply the sign code?

22 MR. MACROBERTS: I'm sorry. I just -- I  
23 didn't hear the question.

24 BY MS. JOKERST:

25 Q. I said in your position as city manager,



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

<b>Cozy Inn, Incorporated,</b>	)	
<b>d/b/a The Cozy Inn; Stephen Howard,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>CIVIL ACTION</b>
	)	<b>CASE NO. 6:24-cv-01027-TC-ADM</b>
	)	
<b>v.</b>	)	
	)	
<b>City of Salina, Kansas,</b>	)	
	)	
<b>Defendant.</b>	)	

**AFFIDAVIT OF MARK WHITE**

I, Steven Mark White, a retained expert for the City of Salina, Kansas in the above-entitled action, being first duly sworn, declare under penalty of perjury as follows:

1. I am over 18 years of age and have personal knowledge of the following facts and opinions.
2. I was retained as an expert by the City of Salina in the above-entitled matter.
3. I authored an expert report dated August 16, 2024 and attached hereto as Affidavit Exhibit 1.
4. I make this Affidavit in support of the City's Motion for Summary Judgment.
5. The opinions contained in my expert report are my opinions that I intend to testify to at trial in this matter, are based on facts and data of the type reasonably relied on by experts in my field of urban planning and zoning, and are true to the best of my knowledge and opinion. All statements I have made in my expert report are incorporated into this Affidavit by reference.
6. Specifically, I intend to testify at trial in this matter to the following facts and opinions:

- a. The restrictions established in the City of Salina's sign code ("Sign Code") are reasonable, generally accepted regulations of the size, number, placement and design of signs.
- b. The Sign Code serves several compelling and substantial urban planning purposes. These include the following, all of which are reflected in the Sign Code's statement of purpose (§ 42-500):
  - i. Comprehensive Plan implementation
  - ii. Traffic safety
  - iii. Aesthetics
  - iv. Urban Design and travel behavior
  - v. Public Health and Safety
  - vi. Compromise
- c. Based upon my review of the Sign Code, my knowledge, experience, and education in urban planning and zoning, and the facts and data of the type reasonably relied upon by experts in my field of urban planning and zoning, it is my opinion that the Sign Code directly and materially furthers its recited purposes.
- d. The Sign Code varies sign height, size and design by zoning district. This is a state of the art, and generally accepted, technique for controlling sign clutter.
- e. In the C-4 district, where the Cozy Sign is located, the Sign Code allows 67% of the total sign area on any building wall or street frontage. This proportionality limitation protects aesthetics and architectural integrity.

- f. Salina's Sign Code is consistent, in practice, with the state of the art nationally for how sign regulations interact with decorative building features such as murals. In reaching this conclusion I examined sign and mural regulations for twenty-one sign codes along with several in Kansas and Oklahoma where I was the principal consultant on the sign regulation drafts and Manhattan (KS), where I was part of the consulting team for the Development Code update. The sample codes I reviewed and cited in my expert report demonstrate a range of approaches to regulating signs while accommodating the benefits of murals. This is because murals are integral to buildings, are not designed to direct attention to a place, and as such do not function as signs.
- g. The terms and phrases used in the definition of sign in the Sign Code, such as advertise and announce, are well understood and in common use in sign regulations throughout the nation and in Kansas.

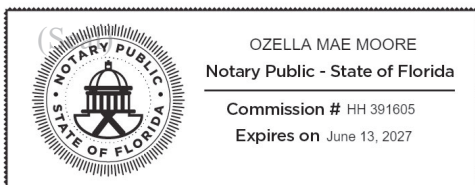
Signed: Steven Mark White  
Steven Mark White

STATE OF Florida )  
 ) ss.  
COUNTY OF Okaloosa )

Subscribed and sworn to before me by Steven Mark White on the 7th day of February, 2025. Type of ID produced: MO DL

Witness my hand and official seal.

My commission expires: 06/13/2027



Ozella Mae Moore OZELLA MAE MOORE  
Notary Public

# ANALYSIS OF SALINA SIGN CODE

---

PREPARED BY:  
S. MARK WHITE, AICP

*Cozy Inn Incorporated v. City of Salina*, Case 6:24-cv-01027  
(United States District Court, District of Kansas)

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## ANALYSIS OF SALINA SIGN CODE | S. MARK WHITE, AICP

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**INTRODUCTION**


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The City of Salina has adopted a comprehensive set of regulations to control signs within its city limits (the “Sign Code”).<sup>1</sup> Plaintiff wants to paint a wall sign on the side of its building that exceeds the size limits of the City’s Sign Code. After plaintiff was informed that its proposed painted wall sign exceeded the Sign Code’s maximum sign size limits, he challenged the Sign Code as a violation of the First and Fourteenth Amendments to the United States Constitution. The complaint states that the following claimed aspects of the city’s Sign Code violate the United States Constitutions because, among other things:

1. The City regulates displays that announce, direct attention to or advertise, but does not regulate artistic displays (such as murals) that do not announce, direct attention to or advertise), under the Sign Code. The plaintiff claims that this is not narrowly tailored to, and does not directly or materially further, a substantial, important, or compelling government interest, in violation of plaintiff’s free speech rights under the First Amendment, and
2. The Sign Code does not define various terms, such as “mural” or “commercial speech.”

Plaintiff’s Verified Amended Complaint for Declaratory Judgment and Injunctive Relief (April 10, 2024)(“Complaint”) would suggest that this case is about its proposed wall sign. It is not. If plaintiff prevails, Salina becomes exposed to proliferation of painted wall signs that exceeds the existing sign parameters its Sign Code. Those metrics are designed to ensure that the City and its Downtown – described in its Comprehensive Plan as the “heart of the community” – is attractive, safe, and economically strong. And the Sign Code stops where it needs to, by not sweeping decorative building elements such as murals that display public art into the same regulatory system that applies to signs. Instead of working with the community to determine a way forward for painted wall signs with some artistic features, the Plaintiff is seeking ad-hoc relief from a federal district

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<sup>1</sup> For purposes of this report, the term "Sign Code" refers to Chapter 42, Article X of the Salina Code. These are shown in the Exhibits to this report beginning on page 14.



## ANALYSIS OF SALINA SIGN CODE | S. MARK WHITE, AICP

court. This not only exposes the City to a flurry of painted signs, but it also threatens to undermine the culture of creativity that has resulted in well-known murals<sup>2</sup> – which would now become subject to wall sign limitations.

It is my opinion as a professional urban planner that the allegations by plaintiff are incorrect to the extent that they relate to content neutrality and the purposes advanced by the Sign Code. It is my opinion that the Salina Sign Code furthers substantial, content neutral interests in urban planning, and that it provides legitimate and well-established tools to control the size, shape, and design of signs.

---

#### BASIS OF OPINIONS

---

I have a Masters in Urban and Regional Planning and have practiced as a professional planner for thirty-four (34) years. I am a member of the American Institute of Certified Planners (AICP) with extensive planning experience throughout the nation. The conclusions set out under "Statement of Opinions," below, are based upon my professional experience and judgment, review of technical literature relating to the field of urban planning, review of technical literature relating to the field of signs, and review of the documents, pleadings and other materials for this lawsuit. I have reviewed the materials listed under "Documents Reviewed", page 22, below.

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#### STATEMENT OF OPINIONS

---

Based on my professional experience and judgment, and my review of the applicable documents and data below, it is my opinion and professional conclusion that:

1. The Sign Code establishes time, place and manner metrics that are not content-based.
2. The Sign Code is supported by substantial and compelling interests in the area of urban planning and code administration.
3. The Sign Code directly and materially furthers its recited purposes.
4. The Sign Code is reasonable in scope in that it targets issues related to wall signs, without unnecessarily expanding its reach to artistic murals.
5. The Sign Code is not vague.
6. The restrictions established in the Sign Code are reasonable, generally accepted regulations of the size, shape, placement, and design of signs.
7. The Sign Code has numerous procedural safeguards.

---

<sup>2</sup> For purposes of this report, a “mural” means an outdoor exhibit painted on a wall that does not fall with the Sign Code’s parameters and that may include art, but does not announce, direct attention to, or advertise.

### DESCRIPTION OF SIGN CODE

The Sign Code is codified at Chapter 42, Article X of the City Code (see Sign Code and Zoning Definitions (Selected Provisions) beginning on page 30). The Sign Code is a conventional sign method for regulating signs, and has been in effect for more than 58 years with periodic amendments (see history notes to Sign Code). The Sign Code includes a comprehensive purpose statement (Salina Code § 42-500).<sup>3</sup> A comprehensive set of definitions embraces virtually every sign category available on the market, and for which sign permit applications are requested in most cities (Salina Code Chapter 42, Article XIV, §§ 42-764 to -781). The sign that is the subject of this lawsuit is a painted “wall sign” as defined by Salina Code § 42-781, as it is painted on and supported by a building wall, and does not project from the building’s surface.<sup>4</sup>

Administrative provisions include permitting, fees and inspections, which are normally necessary to enforce the ordinance (Salina Code §§ 42-501 [sign permits], 42-502 [zoning certificate], 42-596 [enforcement and inspections], and 42-598 [fees]). Exceptions from the regulations or permitting requirements relate to small scale signs, signs oriented to indoor locations (such as scoreboards), government signs needed for public safety (Salina Code § 42-504, -505). These are typical exceptions in sign codes.

In addition to the Zoning Regulations, the Salina Code requires a certificate of compatibility approved by the Design Review Board (DRB) of the Salina Business Improvement District (BID) for changes to buildings (Salina Code § 2-207), in order to protect the architectural character of Salina’s Downtown. Full review by the DRB is required for wall signs that exceed two (2) square feet (such as Plaintiff’s proposed wall sign) and exterior repainting of buildings (Salina Code § 2-209; Lee District Design Review Board, Design Guidelines for Downtown Salina (January 2, 2008)[Certificate of Compatibility Design Matrix]).

The Zoning Regulations also permit variances from sign standards (Salina Code § 42-597 [board of zoning appeals]; 42-597.1 [administrative variance]). Because it is impossible to write an ordinance that addresses every conceivable situation and site configuration, variances are a long-established technique to create flexibility in the administration of zoning and similar land use restrictions and ensuring equitable treatment of property owners (Morris, 2000, at 142-43).

The Sign Code varies sign height, size and design by zoning district. This is a state of the art, and generally accepted, technique for controlling sign clutter (see Mandelker, 2015, at 52 [appropriate proportions for wall graphics]; Mandelker, 2004, and Mandelker, 1988; Weinstein, at 5). Plaintiff’s property lies within the C-4 (Central Business) zoning district. Within the C-4 district, the Sign Code limits signs other than ground, pole or projecting signs to three (3) square feet of sign area for each lineal foot of building frontage (Sign Code § 42-521(4)). Because the existing building frontage is 21 lineal feet, plaintiff is allowed 63 square feet in total sign area (Salina Community and Development Services Department, *The Cozy Inn Sign Analysis* (November 9, 2023)). Plaintiff’s proposed sign is 528 square feet, or 8 times the total allowable sign area. The total sign area is based on the location and structural characteristics of signs, and not their content. Plaintiff’s lawsuit would invite all businesses

---

<sup>3</sup> The plaintiffs do not challenge the constitutionality of § 42-500.

<sup>4</sup> Section 42-781 (Sign, wall) reads: “Wall sign is a sign fastened to or painted on a wall of a building or structure in such a manner that the wall becomes merely the supporting structure or forms the background surface, and which does not project more than twelve (12) inches from such building.” (emphasis added)

## ANALYSIS OF SALINA SIGN CODE | S. MARK WHITE, AICP

to completely ignore the Sign Code's area restrictions – at least if the sign is painted – and contribute to sign clutter.

**SUBSTANTIAL AND COMPELLING INTERESTS UNDERLIE THE SIGN CODE**

The Sign Code serves a number of compelling and substantial urban planning purposes. These include the following, all of which are reflected in the Sign Code's statement of purpose (§ 42-500, page 30):

- Comprehensive Plan implementation (see page 5)
- Traffic safety (see page 7)
- Aesthetics (see page 7)
- Urban Design and travel behavior (see page 8)
- Public Health and Safety (see page 8), and
- Compromise (see page 9).

Each of these purposes are addressed in turn below.

**COMPREHENSIVE PLAN IMPLEMENTATION**

In 2010, the City adopted a Comprehensive Plan for development ([Salina, Kansas Comprehensive Plan, adopted September 20, 2010](#)). A comprehensive plan is a statement of the City's overall land use policies. The comprehensive plan is an extremely important document. It "is atop the hierarchy of local government law regulating land-use" and acts as a "constitution for all future development." *Concerned Citizens of Calaveras County*, 166 Cal. App. 3d 90, 212 Cal. Rptr. 273, 276-77 (Cal. App. 3 Dist. 1985) (citing *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965); *Machado v. Musgrove*, 519 So.2d 629, 632 (Fla.App. 1987), *rev. denied*, 529 So.2d 694 (Fla. 1988) (comprehensive plan is the constitution of land development regulation)); Kansas Statutes Annotated § 12-747(c) (the comprehensive plan is the "basis or guide for public action to insure a coordinated and harmonious development or redevelopment which will best promote the health, safety, morals, order, convenience, prosperity and general welfare"). Comprehensive plans constitute "the general outline of projected development," while zoning is a regulatory tool designed to implement the plan. Haar, "*In Accordance With A Comprehensive Plan*", 68 HARV. L. REV. 1154, 1156 (1955). As such, they are used for the following purposes:

## ANALYSIS OF SALINA SIGN CODE | S. MARK WHITE, AICP

1. Establishing a vision for the community; and
2. Establishing policy guidelines; and
3. Providing sources of information; and
4. Enhancing the legal basis for zoning decisions.

The Salina Comprehensive Plan establishes a number of important policies relating to urban design, including specific policies that include Plaintiff's property. Downtown is the physical and social heart of Salina (Downtown Plan, at 2-77). The Downtown Future Land Use Category includes the C-4 zoning district, and Plaintiff's property is part of the downtown core (Comprehensive Plan, at 2-11, 2-77). This is the City's primary pedestrian district, and "requires higher levels of visual interest and amenities to attract residents and visitors" (Comprehensive Plan, at 2-64). In addition to redevelopment and infill, economic vitality and residential growth, the plan provides for arts and cultural institutions as an anchor for future growth (Comprehensive Plan, at 2-79), with Policy DT.4 providing to "[w]ork with the Community Art and Design Program to create a Downtown Arts Master Plan" (Comprehensive Plan, at 2-93). Downtown economic development policies provide for public art – along with other arts and cultural uses – as a way to draw people there (Comprehensive Plan, at 2-99). Several implementation policies specifically reference public art (Comprehensive Plan, at 3-31):

- DT.5-1 Work with the Community Art and Design Program to plan for the incorporation of public art displays and street art downtown.
- DT.5-2 Incorporate performance art to enhance a sense of place. Identify public / private partnerships and programs to support the installation of art in Downtown.
- DT.5-3 Enhance the downtown arcades with installation of public art, including light and sound.

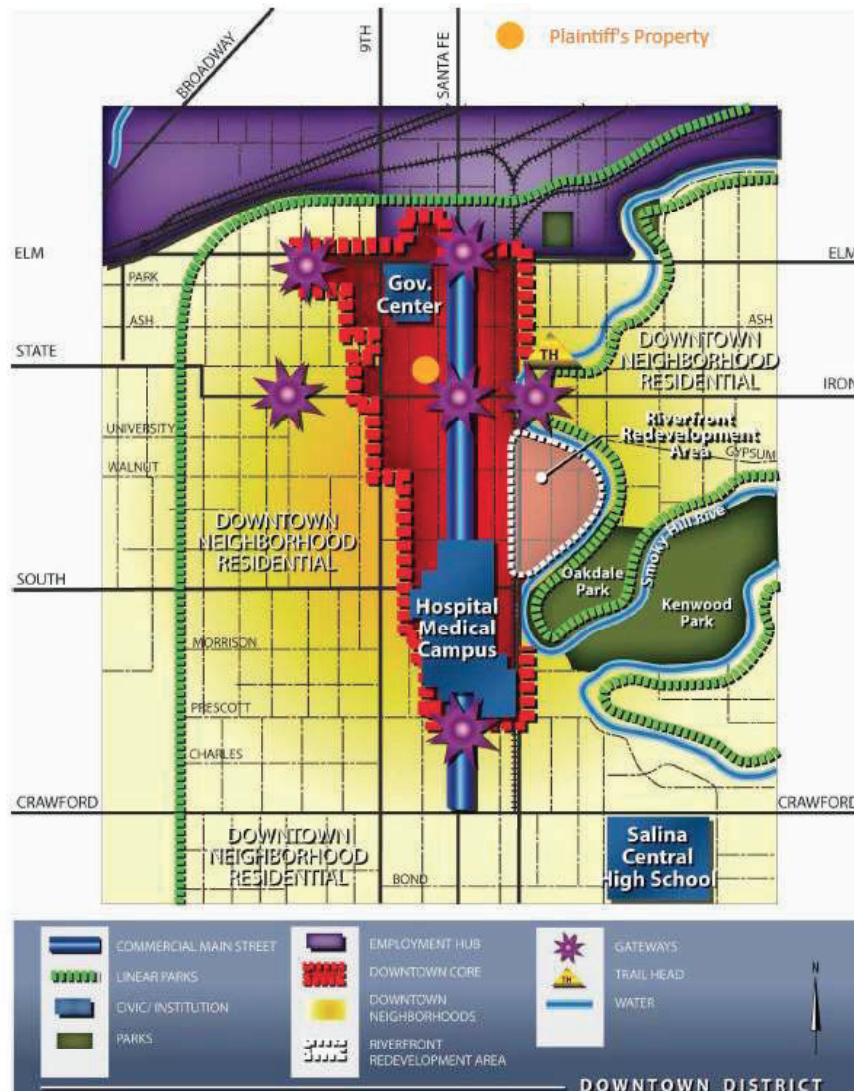


Figure 1 Downtown District Map (Salina Comprehensive Plan, at 2-79)

## ANALYSIS OF SALINA SIGN CODE | S. MARK WHITE, AICP

Appropriate sign restrictions are critical to implementing these policies.<sup>5</sup> Downtown is pedestrian oriented, and is characterized by very unique urban design features. Suburban style signage that is designed for highly trafficked roadway corridors is inappropriate for this location (see Weinstein, at 5). Wall signs that are out of scale to the buildings to which they are applied are inappropriate for an urban, tourist-oriented location such as the Downtown. The unregulated proliferation of this type of sign is harmful to aesthetics and detrimental to the character of the district.

By contrast, the BID's Downtown Design Guidelines (page 30) recognize public art as a tool to maintain a pedestrian friendly environment. The policies relating to alterations and new construction establish a policy that "[t]he street level of a building should be pedestrian friendly," with the following (emphasis added):

"8. Develop the ground floor level to encourage pedestrian activity.

- A storefront should be used on the primary facade of a building.
- On a secondary facades, alternative methods of creating pedestrian interest should be utilized. Consider the following:
  - ◊ A storefront
  - ◊ Display case
  - ◊ **Public art**
  - ◊ Landscaping"

## TRAFFIC SAFETY

Sign clutter contributes to a decline in traffic safety. Scenic America, *Warning Signs: Billboards, Signs and Traffic Safety* (1996). The proliferation of signs that could result from unregulated painted wall signs can distract motorists and contribute to traffic accidents. Because traffic accidents can cause serious bodily harm and even death, traffic safety is a critical government interest. In my experience and professional judgment, traffic safety is an important basis for sign regulations, and reasonable restrictions on the height, spacing, location, and size of signs promote traffic safety.

Public art does not create this type of distraction. In fact, communities have used public art as a tool to provide wayfinding and markings that reduce traffic accidents and collisions with pedestrians. *Cf.* Schwartz, 2022 (asphalt art positively correlated with improved safety).

## AESTHETICS

Sign clutter is considered unattractive by most planning professionals and the general public. The use of reasonable sign regulations to promote aesthetics is well-established and is accepted practice in the planning profession. Mandelker, 2015, at 97-98; *Georgia Outdoor Advertising, Inc. v. City*

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<sup>5</sup> The Comprehensive Plan also recognizes sign standards in other contexts, such as a proposed Urban Industrial Overlay District (page 2-101).



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of *Waynesville*, 833 F.2d 43, 47 (4th Cir. 1987)("It requires neither elaboration nor citation to say that an ordinance regulating billboards is likely to advance the objective of enhancing the beauty of a city, and that no less intrusive method would adequately protect the city's interest."); *City of Belleville v. Kesler*, 428 N.E.2d 617, 101 Ill.App.3d 710, 57 Ill.Dec. 67 (1981).

In my professional experience, a proliferation of unregulated painted wall signs would generate many complaints from the general public with regard to their visual characteristics. These can compete with existing wall signs and other signs the compete for attention, and have a tendency to dominate the streetscape.<sup>6</sup> The planning literature associates the cacophony of multiple signs along street frontages with a decline in community aesthetics. In the Downtown district in particular, a proliferation of large painted signs would be inconsistent with the existing built form of the district, the policies and objectives of the City's Comprehensive Plan, and the Downtown Design Guidelines.

By contrast, public art (including murals) – which the Sign Code does not regulate – is explicitly designed for beautification, fostering civic engagement, and improving quality of life (McMaster University, 2022). Neuroscience studies have demonstrated positive amplitude from persons viewing artwork, as opposed to negative responses from viewing commercial symbols (Cheng, 2023; Scholarly Community Encyclopedia, 2023).

## URBAN DESIGN AND TRAVEL BEHAVIOR

Building design has an impact on travel behavior. The setback and building orientation of commercial structures, in a pedestrian-friendly context like Downtown Salina, encourages pedestrian travel and discourages vehicular trips by nearby residents. Shallow setbacks with small, pedestrian oriented signs are characteristic of an urban environment. Large front setbacks, along with automobile-oriented signs such as pole signs and roof signs, are more characteristic of a suburban environment. While Salina's Downtown is a pedestrian oriented district, a proliferation of oversized painted wall signs along with other inappropriate intrusions into the district would encourage shifts in travel behavior internal to the district. This would, in turn, create pressure for further intrusions, create demand for land consumptive uses such as parking, and discourage the use of public transit.

City policies strongly encourage walkability in the design of new development and structures in Salina. See Salina Comprehensive Plan at 2-11 to -13 (downtown, community center and neighborhood center policies), 2-63 to -65 (pedestrian network and supporting land use policies), 3-6 Policy LU.2-3d, 3-10 Policy GD.1-2. Adherence to these policies is critical in areas such as Downtown, which is already characterized by pedestrian supportive site design and building design. Allowing large painted signs and other forms of automobile-oriented signs in the district would pose a threat to the character of the district, and degrade public health and safety within the district.

## PUBLIC HEALTH AND SAFETY

There is a growing body of evidence that urban sprawl, characterized by low density development, deep front setbacks, and automobile-oriented development patterns, has a real and substantial impact on public health. See documents cited under "Sprawl and Public Health," page 28. This is manifested in several ways. First, development design characteristics that are automobile oriented discourage non-vehicular travel modes such as walking. The result is a more sedentary

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<sup>6</sup> The *Design Guidelines for Downtown Salina* defines "streetscape" as "[t]he distinguishing character of a particular street as created by its width, degree of curvature, paving materials, design of the street furniture, and forms of surrounding buildings.."

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lifestyle, which creates health problems associated with the lack of exercise. Second, increases in traffic congestion resulting from more automobile-oriented development are associated with increases in traffic accidents. Large signs are one characteristic of sprawling, automobile-oriented corridors. In the planning profession, the protection of public health is considered a compelling interest. Restricting the size and number of signs, including the control of painted wall signs, is directly related to this interest.

By contrast, public art murals have significant positive impacts on placemaking, society, culture, economy, sustainability, wellbeing, and education (Cheung et al., 2021). In addition, evidence suggests that public murals are associated with a decrease in crime (Can More Art Equal Less Crime?, 2024).

## COMPROMISE

Recognizing the impacts of signs does not require a community to eliminate them. Appropriately scaled signs are needed for all types of communication – from election messages to business identification. Therefore, it is important for communities to strike a balance that allows signs to communicate messages without generating clutter or safety issues. A feature of Salina’s Sign Code that is not mentioned in the Complaint is the spirit of compromise. See Sign Code § 42-500(2)(a purpose of the Sign Code is to “[b]alance public and private objectives by allowing adequate avenues for both commercial and non-commercial messages”). As the foregoing discussion demonstrates, the city has strong public interest in imposing restrictions on signs, especially in the Downtown area. However, the Sign Code also recognizes the needs of businesses there. Accordingly, the Sign Code includes a number of flexible regulations, contains procedural alternatives, and permits a number of different sign categories throughout the Sign Code and in the C-4 (Central Business) district. In crafting any sign code, the City walks a tightrope between those who would completely ban signs or sign categories, and those who want to deregulate sign type, spacing and size. This Sign Code resolves this tension by coupling its height, size, spacing and locational restrictions with permission to construct an ample variety of signs throughout the city, including provisions for painted wall signs in many locations (including C-4).

**THE SIGN CODE FURTHERS ITS STATED INTERESTS**

## WALL SIGN RESTRICTIONS

Sign codes, including the wall sign restrictions in Salina’s Sign Code, directly further the interests listed above. The Sign Code limits, but does not completely eliminate, painted wall signs. This allows a person, business or property owner to install wall signs, so long as they fit the building’s context. Limiting wall sign size keeps the sign from overwhelming a façade, and limiting the number of signs prohibits clutter (Bishop, 1989, at 7-8). Therefore, most sign codes (including model codes) limit the size and number of wall signs (Weinstein, 2000, at 32; Kelly, 1989, at 6-7).<sup>7</sup> By limiting clutter, the Sign Code avoids driver distractions, and keeps signs from competing for attention with other signs on the façade.

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<sup>7</sup> The Salina Sign Code does not directly limit the number of wall signs. Instead, it limits all signs per business, which includes both wall and freestanding (ground or pole) signs in the C-4 district (§ 42-521(3)). Kelly recommends a limit on freestanding signs, but only a limit on wall sign area (not the number of wall signs) (Kelly, 1989, at 6-7). Salina’s approach is flexible because it allows the business to choose how to allocate its signs within the total sign limit. In this case, Plaintiff’s proposed sign does not increase the number of wall signs, but it exceeds the maximum sign area.



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Limiting wall sign size also promotes aesthetics. While the Sign Code does not directly control the sign's design, it does limit sign size and the number of signs. This keeps the sign in scale with the building's context, which furthers aesthetics by avoiding unsightly clutter (McMahon, 2022). The proliferation of franchise design can degrade aesthetics and local character, while sign controls can simplify the display of information (improving traffic safety) and protect the unique design of pedestrian-friendly environments such as Salina's Downtown Core (Fleming, at 71-72). As with most sign regulations, including the recommendations in model codes, it is reasonable for the City to adjust its sign metrics by zoning districts in a way that protects the area's character (Weinstein, at 5).

Controlling painted wall signs promotes public health and safety. Painted wall signs can consist of text or drawings. Another type of outdoor display that is analogous to in design is graffiti (Understanding the First Amendment Limitations on Government Regulation of Artwork, 2017). Graffiti is a drawing or painting on a wall that is typically placed without the property owner's consent and is considered a public safety issue (Morgan & Louis, 2009; Zelinka, at 160). Graffiti can lead to urban disinvestment, is recognized as criminal behavior, and is often used by criminal gangs to communicate with each other (*State v. Sanchez*, 298 P.3d 1138 (Kan. App. 2013)). Graffiti creates clutter when it proliferates and can dramatically change the character of a neighborhood or district. Salina requires property owners to restore building surfaces that are defaced by graffiti in its Property Maintenance Code (Salina Code § 31-101.6).<sup>8</sup> Requiring a painted wall sign to comply with the number, size and permitting requirements of the Sign Code ensures that neither strangers nor the property owner can create painted signs without public oversight.

Controlling the number of signs, including wall signs, promotes the conspicuity or visibility of individual signs (Morris et al., at 9). As the number of signs increases, the readability of each sign diminishes (Garvey et al., 2004, at 10; McMahon, 2022). This can create traffic safety issues, because it then takes motorist vision off the road, lengthens the time it takes for them to scan information, and creates potential conflicts with cars and pedestrians (Morris et al. at 18). The visual complexity also competes with traffic control signs (Morris et al., at 10). One model sign code proposes a limit on items of information in signs (Morris et al., at 21-22; Mandelker, 2015, at 64). On Plaintiff's building wall, the proposed wall sign would add numerous items of information (including two lines of text and multiple images) to the items already displayed on the wall.

## ACCOMMODATING ARTISTIC MURALS

Promoting art – as distinct from signs that announce, direct attention to, or advertise – has a long history in government projects. From the 1850s through the New Deal, the federal government has sponsored art in new government buildings and projects (Federal Management Regulation: Art in Architecture. 87 Fed. Reg. 5711, 5712; 41 CFR Part 102-77). The New Deal's Section of Fine Arts developed a requirement that for allocating 1% of total building construction cost for the building's embellishment (87 Fed. Reg. at 5712), and the Works Progress Administration's program resulted in numerous murals throughout the United States and Kansas (New Deal Art During the Great Depression). General Services Administration (GSA) started the Fine Arts in New Federal Buildings

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<sup>8</sup> Salina Code § 31-6 defines "graffiti" as "[a]ny letter, word, name, number, symbol, slogan, message, drawing, picture, writing or other mark of any kind visible to the public from a public place that is drawn, painted, chiseled, scratched, or etched on a commercial building or residential building, or any portion thereof, including fencing, that is not consented to by the owner of the commercial building or residential building. There shall be a rebuttable presumption that such letter, word, name, number, symbol, slogan, message, drawing, picture, writing or other mark of any kind is not consented to by the owner. Such presumption may be rebutted by the owner informing the city that the owner consents to the marking and intends that it remain on the building."

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(now Art in Architecture) program, which has become a model for state and local governments (*id.*). There are over 350 local percent for art programs in the United States today (Jenkins, 2021). This has resulted in the following public benefits that also apply to local governments (87 Fed. Reg. at 5712):

- Enhancing the civic meaning of Federal architecture and showcasing the vibrancy of American visual arts.
- Creating a lasting cultural legacy.
- Improving the environment for conducting business in the buildings.
- Promoting equity by increasing access for artists of different backgrounds and art styles to participate in the design of buildings.

Artistic murals promote the public safety objectives listed above, therefore justifying their exclusion from the Sign Code. Murals and public art can replace and deter graffiti and are sometimes used (at least in part) for this purpose, consistent with Crime Prevention Through Environmental Design (CPTED) principles (Craw et al., 2006; Portland Police; Zelinka, at 119, 155, 162). Mural programs are actively used as a way promote public safety and deter disinvestment by:

- providing creative outlets and career opportunities for populations at risk for crime or displacement,
- promoting creative placemaking, which provides a sense of well-being and sense of place,
- promoting a sense of community through collective maintenance of outdoor public art,
- reversing the “broken windows” phenomenon by reducing vandalism, littering, robbery, and drug use,
- deterring crime and the perception of crime,
- reducing targets for graffiti and tagging,
- cultural development,
- youth development,
- public-private partnerships, such as collaborations with businesses improvement districts (BIDs),
- blight mitigation, and
- tourism.

Treskon et al., 2018; Benefits of Murals, accessed 2024; Abatement and Alternatives, accessed 2024; Treskon & Esthappan, 2018; Esthappan, 2018; Parolek, 2014; Sakip, 2016; Young, 2022). “Although public art can be aesthetically valuable, case studies and research have demonstrated that public art can offer critical benefits to residents, such as improved public safety and well-being” (Young,

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2022)(emphasis added). Public art (such as artistic murals) can also promote mental and physical health (Young, 2022; Tanguy & Kumar, 2019).

In addition to the public safety benefits listed above, murals are an effecting tool to prevent graffiti, because it discourages tagging (i.e., painting the surface in a way to achieve notoriety) (Project for Public Spaces, 2008). As is discussed above, graffiti is associated with crime. Not regulating murals through the Sign Code encourages their use in Downtown. Applying the stricter size and permitting standards of the Sign Code would not further the City's objectives to provide the public safety, placemaking, and beautification benefits of public art murals.

Salina's Sign Code is consistent, in practice, with the state of the art nationally for how sign regulations interact with decorative building features such as murals. The author examined sign and mural regulations for twenty-one (21) sign codes referenced in the literature, along with several in Kansas and Oklahoma where the author was the principal consultant on the sign regulation drafts (Oklahoma City, Olathe, Overland Park, Shawnee) and Manhattan, where the author was part of the consulting team for the Development Code update. These codes are cited in "Code Samples" on page 23 of this report.

*Table 1 Sample Sign Regulations*

<b>Community</b>	<b>State</b>	<b>Description</b>
Arlington	VA	Works of art and murals not showing commercial business, product or service offered on the premises exempt from sign regulations
Beaverton	OR	Public art exempt from sign code, and requires City acquisition
Boise	ID	Sign permit not required for murals that do not contain advertising
Fort Collins	CO	Mural cannot depict commercial product brand name or symbolic logo
Ithaca	NY	No compensation for display of art murals, which are not considered signs.
Lake Placid	FL	Murals exempt from sign regulations if they are original artwork
Las Vegas	NV	Mural without advertising exempt from sign regulations
Los Angeles	CA	Mural without advertising exempt from sign regulations
Manhattan	KS	Art without advertising exempt from sign regulations
Marion County	IN	Art without advertising exempt from sign regulations
Minneapolis	MN	Murals (hand-painted, hand-tiled, or digitally printed work of visual art ) exempt from sign regulations
Oklahoma City	OK	Murals permitted in all districts, with words, text, logos, emblems, trademarks or numbers up to the wall sign limit
Olathe	KS	Murals not mentioned, but murals occur pursuant to a public arts plan
Overland Park	KS	Excludes artwork approved as part of design
Pasadena	CA	Sign regulations do not mention murals, but public art incentivized through bonuses.
Philadelphia	PA	Zoning Code silent about murals, outdoor advertising exempts non-commercial murals; mural program in effect
Portland	OR	Exempts public art (city improvements) and original mural art
Salem	OR	Public art exempt from sign code, and requires City acquisition
Shawnee	KS	Treats murals same as painted wall signs; not allowed in most districts
St. Petersburg	FL	Art without advertising exempt from sign regulations. Requires certificate of appropriateness on historic buildings or in historic districts.
Temecula	CA	Art without advertising exempt from sign regulations

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These codes demonstrate a range of approaches to regulating signs while accommodating the benefits of murals. As the Ithaca Zoning Ordinance states: “[a]rt murals have different purposes and benefits than signs and are not signs” (§ 270-250). Las Vegas exempts murals without commercial elements because they are “[w]orks of art or decorative architectural graphics.” Overland Park exempts artwork approved as an integral building feature as part of the site plan review process. Fifty-seven percent (57%) of the codes listed above explicitly provide that murals do not include commercial advertising. In addition, several model sign codes have similar provisions (Montgomery County, § 5.L, at 77; League of Oregon Cities, at 15; Pocono Mountain Chamber of Commerce, at 1-21 [works of art that do not any commercial messages are permitted if they comply with general standards for signs]; Southeastern Wisconsin Regional Planning Commission, at 2; see Moeller, at 15 [treating advertising murals and building wraps as a specific sign category]; Bertucci, at 29 [exempting public art, including original art murals]). This is because murals are integral to buildings, are not designed to direct attention to a place, and as such do not function as signs.

Several of the codes listed above – including two in Kansas (Olathe and Overland Park) – do not address murals as part of their sign regulations. However, those communities accommodate murals through public arts plans and separate programs. This is on point with Salina’s approach, where murals are treated as integral to buildings and a decorative element of structures.

## OVERSIZED WALL SIGN PROLIFERATION

The Complaint seeks a loophole for wall sign regulations that include painted images and text. Controlling painted wall signs is an important way to control sign clutter. When a sign is left unregulated, there is a significant risk – as shown by the experience in other communities – that the City would experience proliferation of large, painted wall signs (Hathaway, 2010). In fact, the Sign Code would allow a smaller version of Plaintiff’s sign if it adjusted the total, cumulative sign area on its building to fit the Sign Code’s allowance for wall signs. If plaintiff prevails, other businesses will have an individual economic incentive to install painted wall signs that exceed the Sign Code’s maximum area standards, simply by painting images along with text. The result could undermine the aesthetic, character, and traffic safety justifications that undergird the C-4 district sign restrictions. This exposes the City to the unregulated proliferation of these signs, as occurred in Los Angeles following initial adverse court decisions overturning its supergraphics regulations which were later reversed on appeal (Hathaway, 2010) (see Figure 2, below).<sup>9</sup>

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<sup>9</sup> See description in *Vanguard Outdoor LLC v. City of Los Angeles*, 648 F.3d 737, 738 (9th Cir. 2011): “This case was one of many ‘copycat’ lawsuits filed after this Court in *World Wide Rush* enjoyed [sic] the City’s enforcement of its ban on offsite and supergraphic signs as an invalid prior restraint on speech under the First Amendment and enjoined enforcement of the City’s Freeway Facing Sign Ban as a fatally underinclusive restriction on commercial speech. See [*World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 683–84 (9th Cir. 2010)]. After that decision, “well-travelled thoroughfares that contained any sort of sizable building were soon pockmarked with Supergraphic Signs.” *World Wide Rush, LLC v. City of Los Angeles*, 605 F.Supp.2d 1088, 1092 (C.D.Cal.2009), *rev’d*, 606 F.3d at 689.”

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*Figure 2 Supergraphics in Los Angeles*



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**THE SIGN CODE IS REASONABLE IN SCOPE**

The Complaint alleges that the Sign Code is, among other things, vague because it does not define “mural.” However, the Sign Code does not regulate “murals” because artistic murals are not signs. The Sign Code only regulates signs – not all forms of expression involving outdoor display such as license plates, T-shirts, handheld signs,<sup>10</sup> or public art. It neither carves out public art for special treatment, nor does it regulate public art.



Figure 3 Salina Art Center Mural



Figure 4 Painted Wall Sign

As defined by Salina’s Zoning Code, “signs” are outdoor displays that are “used to announce, direct attention to, or advertise” (Salina City Code § 42-764). This definition plainly does not cover public art, such as artistic murals, statues, sculptures, or architecture. For example, Ithaca, New York’s Zoning Ordinance defines “art mural” as a “one-of-a-kind work of visual art that is hand-painted, hand-tiled or digitally printed directly on, or affixed directly to, an exterior wall of a building” (Ithaca Zoning Ordinance § 270-5). In addition, public artwork – such as a mural – is a building embellishment and not a sign. This is why some sign codes simply exempt building embellishments and murals from sign regulation, or provide additional area for embellishments. See Arlington County Zoning Ordinance Art. 13, § 13.2.3.D (architectural embellishments not a sign); Lake Placid Code § 154-5 (“sign” not include building embellishments); Las Vegas Unified

<sup>10</sup> In addition, the Sign Code (§ 42-504(4)) exempts “onsite handheld signs,” but makes no reference to “offsite” handheld signs.

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Development Code § 19.06.140.G.3.b.IV (embellishment may increase sign area up to 20%). While public art (as do public spaces such parks, or buildings with architectural significance) can attract people to a place (Cheng, 2023; Scholarly Community Encyclopedia, 2023), it does not direct people to a place.

The signs that Salina regulates are a specific medium of communication, and not a specific type of message. The Complaint would effectively subject all forms of outdoor display to the City's Sign Code. Home builders applying a change of materials to a wall plane would need to comply with the Sign Code. And, muralists creating original outdoor art would need to ensure that the display falls within the Sign Code's overall sign area restrictions. In fact, this would apply not only to displays created by artists, but also to decorative patterns (see Complaint, par. 90 [University of Kansas School of Medicine and School of Nursing wall patterns]; Complaint, par. 96 [Salina Art Center has a ceramic tile mural]).

### THE SIGN CODE IS NOT VAGUE

Plaintiff claims that the Sign Code is vague because it does not define “mural,” “pictorial representation,” “display,” “calculated to attract the attention of the public,” “figure or similar character,” “announce,” “direct attention to,” “advertise,” “pertains to,” “goods or services sold,” “art,” “commercial speech,” or “noncommercial speech.” Many of these terms are simply not used in the Sign Code, and others relate to terms that simply do not appear in the Sign Code and are not needed.

Plaintiff points to several words and phrases embedded in the definition of “sign” that it claims are vague. Salina Code (§ 42-764) defines “sign” as:

“... any writing (including letters, words or numerals), pictorial representation (including illustrations or decorations), emblem (including devices, symbols, or trademarks), flag, banner, streamer, pennant, string of lights, or display calculated to attract the attention of the public, or any other figure or similar character which:

- (1) Is a structure or any part thereof, or a portable display, or is attached to, painted on, or in any other manner represented on a building or other structure or on the ground;
- (2) Is used to announce, direct attention to, or advertise; and
- (3) Is not located inside a building.”

The term “**pictorial representation**” has a well-understood dictionary meaning. Merriam-Webster Dictionary online defines “pictorial” as “of or relating to a painter, a painting, or the painting or drawing of pictures...of, relating to, or consisting of pictures... illustrated by pictures... consisting of or displaying the characteristics of pictographs...suggesting or conveying visual images” (Merriam-Webster online, <https://www.merriam-webster.com/dictionary/pictorial>). “Representation” means “one that represents: such as...an artistic likeness or image” (Merriam-Webster online, <https://www.merriam-webster.com/dictionary/representation>). Therefore, the images of hamburgers on Plaintiff's proposed wall sign are “pictorial representations” – i.e., they present a likeness of hamburgers and condiments served in its restaurant, which are painted pictures or visual images. In addition, the Sign Code buttresses this term by providing examples in a parenthetical. Other sign codes use similar language in their sign definitions. Lake Placid Code § 154-5.



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Similarly, a “**display**” means “a setting or presentation of something in open view... an eye-catching arrangement by which something is exhibited.... type, composition, or printing designed to catch the eye” (Merriam-Webster online, <https://www.merriam-webster.com/dictionary/display>). The Los Angeles, Manhattan, Salem and Temecula codes listed below use the term “display” with no further definition. Plaintiff’s sign is a presentation or composition, consisting of both text and pictures. With Plaintiff’s wall sign exceeding its permitted allowance by 518 square feet (Cozy Inn Sign Analysis) – and nearly 10 times its existing sign area – it is clear that Plaintiff wants its sign to catch the eye. In fact, the sign invites the reader inside the building, where the Plaintiff’s products are sold.

“**Calculated to attract the attention of the public**” or its equivalent is a commonly used – but rarely defined – phrase in sign codes. The sign codes discussed in “The Sign Code Furthers Its Stated Interests” above illustrate this, as do several model sign codes. Sign codes commonly use “attract the attention” or similar language. Los Angeles Planning and Zoning Code § 14.4.20 (“sign” means “[a]ny whole or part of a display board, wall, screen or object, used to announce, declare, demonstrate, display or otherwise present a message and attract the attention of the public”); Manhattan Development Code (“sign” means any object, device, display, ... used to advertise, identify, display, direct or attract attention to ...”); Beaverton Development Code Chapter 90 (sign defined as “[a]ny lettered or pictorial device designed to inform or attract attention”; “attract attention” is not defined); Minneapolis Code of Ordinances § 565.200 (“[a] structure, ... announcement, ...used for direction, information, identification, attraction, or to advertise or promote any business, product, activity, service, interest or entertainment.”); Oklahoma City Municipal Code § 59-16119 (“sign” is “[a] structure or device...used or intended to be used to attract attention.”); Olathe Unified Development Ordinance § 18.90 (a sign is “Any framed, bracketed, free-formed, or engraved surface ... which is sufficiently visible to persons not located on the lot where such device is located to attract the attention of such persons or to communicate information to them.”); Overland Park Municipal Code § 18.440.200 (“sign” means “[a]ny surface or object which is used to display or which is fabricated to create words, numerals, figures, devices, designs, trademarks or logos, and which is sufficiently visible to persons located outside of any building to attract the attention of such persons or to communicate information to them.”); Pasadena Municipal Code § 17.48.170 (“sign” means “[a] device, fixture, surface, or structure of any kind... for the purpose of advertising, identifying or calling visual attention to....”); Philadelphia Zoning Code § 14-203 (“sign” is “[a] name, identification, description, emblem, device, or structure .. that directs attention to ....”); Portland City Code § 32.20.020.YY (“sign” is “[m]aterials placed or constructed, or light projected, that .... is used to inform or attract the attention of the public.”); Salem City Code § 900.005 (“sign” means “[a]ny structure, board, poster, placard, or device which contains or comprises a display designed, used, or intended to attract the attention of the public”); Shawnee Municipal Code Chapter 17.05 Appendix (“sign” is a “visual display of an object or device ... that is intended to communicate, advertise, identify, announce, direct, inform, or attract attention”); St. Petersburg City Code § 16.40.120.4 (“sign” means “[a]ny device, fixture, placard, structure or representation that uses any color, form, graphic, illumination, or writing to advertise, attract attention, announce the existence of, or identify the purpose of a person, entity, product or service or to communicate information of any kind to the public”); Temecula Municipal Code § 17.34.010 (“sign” means “[a]ny object, device, display or structure, ... used to identify, display, direct or attract attention ....”). Similarly, sign codes often refer to attracting the attention of the “public,” which is not defined. Arlington County Zoning Ordinance § 18.2 (sign defined as “[a]ny word, numeral, figure, ... used to direct, identify, or inform the public...”); see also Portland City Code and St. Petersburg City Code,

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above. None of those codes define “attract attention” or “public.” And, “attract,” “attention” and “public” all have defined dictionary meanings.<sup>11</sup>

“**Advertise**” also has a well-understood meaning, and is often embedded in sign regulations with no further definition. Ithaca Zoning Ordinance § 270-5 (sign is “[a] device for visual communication publicly displayed to identify, advertise, and/or convey information”); Marion County Rev. Code § 744-902 (sign is “[a]ny structure, fixture, placard, announcement, declaration, device, demonstration or insignia used for direction, information, identification or to advertise or promote any business, product, goods, activity, services or any interests.”); see also Lake Placid, Minneapolis, Pasadena, Shawnee and St. Petersburg codes cited above. Merriam-Webster online defines “advertise” as “to make the public aware of (something or someone) especially by means of a published or broadcast notice” or “to present (something or oneself) to the public in a way that is intended to attract customers” (<https://www.merriam-webster.com/dictionary/advertise>).

The Las Vegas Unified Development Code (§ 19.18.020) uses three of the terms listed above, including “**announce**” (“sign” is “[a]ny device, fixture, placard, structure or other medium, including its structure and component parts, that uses any color, form, graphic, illumination, symbol or writing to advertise,<sup>12</sup> announce the purpose of, or identify the purpose of a person or entity, or to communicate information of any kind to the public”). The Lake Placid, Los Angeles, Shawnee, and St. Petersburg regulations listed above also use the term “announce.” Merriam-Webster online defines “announce” as “to make known publicly” (<https://www.merriam-webster.com/dictionary/announce>).

The terms “commercial speech” and “noncommercial speech” do not appear in the Sign Code. The Sign Code does use the terms “commercial” and “noncommercial” in relation to “messages” or “copy,” which have well-understood meanings. Of the sign codes reviewed above, only Arlington County, Las Vegas and Oklahoma City define “commercial message” or “copy” and “noncommercial message” or “copy.” In addition, well-known model sign codes use these terms without a definition (Mandelker, 2015, at 71-72). This is because the common law meaning of “commercial” refers to proposing a commercial transaction (i.e., selling items), while “noncommercial” refers to speech that is entitled to full protection under the free speech clauses of the federal and state constitutions (Mandelker, 2015, at 134-35 notes 2, 18).

As this discussion shows, the supposed vague terms and phrases are well understood and in common use in sign regulations throughout the nation and in Kansas. In addition, these terms are defined – and in a free, online dictionary used in court decisions (including 10<sup>th</sup> Circuit Court of Appeals decisions). See *United States v. Lesh*, 23-1074 (10th Cir. 2024) (citing to Merriam-Webster online dictionary). If Plaintiff is really confused about these terms, there is a free and easily accessible resource to resolve that confusion.

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<sup>11</sup> Merriam-Webster online has the following definitions: “Attract” means “to draw by appeal to natural or excited interest, emotion, or aesthetic sense” (<https://www.merriam-webster.com/dictionary/attract>, using “attract attention” as an example). “Attention” means “the act or state of applying the mind to something” (<https://www.merriam-webster.com/dictionary/attention>). Public means “a place accessible or visible to the public —usually used in the phrase in public” or “the people as a whole” (<https://www.merriam-webster.com/dictionary/public>).

<sup>12</sup> The Las Vegas Code does define “advertising” as “[a]ny writing, painting, display, emblem, drawing, sign or other device designed, used, or intended for display or any type of publicity for the purpose of making anything known or attracting attention to a place, product, goods, services, idea or statement.” This uses several of the undefined but generally accepted terms listed above, with no further definition.

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“Mural” and “art” are not used in the Sign Code. The Sign Code simply does not regulate these building features, so there is no need to use them. Similarly, the terms and phrases “pertains to” and “goods or services sold” appear nowhere in the Sign Code. It is pointless for the Sign Code to define terms not used in the body of the code, or in other definitions.

**SALINA’S SIGN RESTRICTIONS ARE REASONABLE**

Plaintiff’s building is located in the C-4 (Central Business) zoning district. Sign Code § 42-521 regulates signs in this district, allowing all of the functional categories listed in the Sign Code (§ 42-506) and 16 of the 18 structural categories (§ 42-507).

For the C-4 district, the Sign Code allows four (4) signs per business (§ 42-521(3)), and up to three (3) square feet of sign area per lineal foot of building frontage with up to 67 percent of the total sign area on any building wall or street frontage (§ 42-521(4)b). This is a very flexible system, giving the business the choice to allocate its sign across the building walls as it sees fit, subject to the cumulative sign area. A maximum number of signs prevents clutter, but does not necessarily prevent customers from locating a site (Mandelker 2015, at 100). With these flexible standards, Plaintiff still has room for an additional sign of up to 10 square feet (The Cozy Inn Sign Analysis, page 3). Therefore, Plaintiff has ample opportunity to provide additional advertising and messaging on its building, without overwhelming the scale of the building or site.

While the Plaintiff’s proposed sign significantly exceeds allowable sign size, allowing 67 percent of the cumulative sign area on a wall protects aesthetics and architectural integrity. Typical problems with signs, including wall signs, including context and scale with surroundings, incompatibility with the architecture of buildings to which they are attached, and overwhelming building architecture through location, shape, and color (Morris et al., at 47). To ensure that the wall and signs attached to it are correctly proportioned, experts recommend a maximum display area of 40-60% of the signable area<sup>13</sup> of a wall, with the lower figure applicable to pedestrian-oriented districts such as Salina’s Downtown Core (Mandelker, 2015, at 52; Jourdan et. al. at 38 [recommending a maximum of 50% wall coverage]). Salina’s Sign Code is a more generous standard – allowing up to 67% of the total sign allowance on one wall. Unfortunately, Plaintiff’s proposed wall sign exceeds even this allowance.

**THE SIGN CODE HAS NUMEROUS PROCEDURAL SAFEGUARDS**

As is described in the Description of Sign Code (page 4), the Sign Code has an administrative permitting process, along with avenues such as variances and appeals to resolve issues with the City. And the Downtown BID’s certificate of compatibility process includes a flexible, case-by-case review procedure to assess how signs fit into the City’s historic, walkable downtown. This type of case-by-case review is a common process for reviewing changes to buildings for architectural compatibility, so that they become individually significant, fit into their historic context, and are properly maintained (Burns).

The zoning regulations also allow for a variance or an appeal to the Board of Zoning Appeals (Sign Code § 42-597). A variance allows the Board of Zoning Appeals to adjust the sign size, subject to the statutory variance criteria. This section allows the Board of Zoning Appeals to grant a variance if:

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<sup>13</sup> “Signable area” is the “continuous portion of a building unbroken by doors or windows (Mandelker 2015, at 52).

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- The request arises from a condition unique to the property in question and not ordinarily found in the C-4 district, and is not created by an action or actions of the property owner.
- The variance will not adversely affect the rights of adjacent property owners or residents.
- Strict application of the Sign Code will constitute an unnecessary hardship upon the property owner represented in the application.
- The variance will not adversely affect the public health, safety, morals, order, convenience, prosperity, or general welfare.
- The variance desired is not opposed to the general spirit and intent of the zoning regulations.

The zoning regulations prohibit variances that would increase the allowable number of signs on a zoning lot (Salina Code § 42-597(c)(4)g), but that is not the case here. City staff determined that Plaintiff may install an additional sign (The Cozy Inn Sign Analysis, page 3), so the Plaintiff would need to request additional sign area.<sup>14</sup>

Plaintiff could also appeal the City's decision to require a sign permit (Salina Code § 42-597(c)(1)). If Plaintiff believes that the City improperly determined that its proposed wall sign is subject to the Sign Code and not an unregulated wall decoration, it could make that case to the Board of Zoning Appeals. If the Board of Zoning Appeals finds that decision erroneous, it could reverse the decision or make any decision that the Zoning Administrator could have made pursuant to Sign Code § 42-502, including issuance of a zoning certificate (sign permit).

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#### COMPENSATION

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Mr. White's compensation for preparing this report is \$350 per hour.

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<sup>14</sup> The zoning regulations also have a process for administrative variances by the Zoning Administrator if the sign does not exceed 15% of the City's requirements. This avenue is not available, unless the applicant reduced its sign size to 11.5 feet (15% over its remaining available sign area).


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**CONCLUSIONS**

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For the foregoing reasons, Salina's Sign Code furthers compelling and substantial public purposes, and is calibrated to accomplishing those purposes. The Sign Code does not extend its reach to decorative and artistic building elements such as artistic murals, as that is not the Sign Code's mission. The City promotes the aesthetics and public safety benefits of murals – which are not shared by wall signs – through its regulatory program that achieves the design and character of its historic Downtown. The Sign Code presents a reasonable, workable system of regulation, and is also accompanied by procedural safeguards that protect both property owners and the general public.

Dated this 16<sup>th</sup> day of August, 2024.

 Digitally signed by  
Mark White  
Date: 2024.08.16  
14:38:29 -05'00'

S. Mark White

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## EXHIBITS

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### Sign Code and Zoning Definitions (Selected Provisions)

#### Chapter 42 Zoning Regulations

##### ARTICLE X. SIGNS

##### *DIVISION 1. GENERALLY*

##### **Sec. 42-500. Purpose.**

This article promotes the public health, safety and welfare of the community through a comprehensive system of reasonable, effective, consistent, content-neutral and nondiscriminatory sign standards and requirements, narrowly drawn to:

- (1) Ensure that all signs installed in the city are compatible with the character and visual environment of the community and promote the goals, objectives and policies of the comprehensive plan;
- (2) Balance public and private objectives by allowing adequate avenues for both commercial and non-commercial messages;
- (3) Improve pedestrian and traffic safety by promoting the free flow of traffic and the protection of pedestrians and motorists from injury and property damage caused by, or which may be fully or partially attributable to, unsecured, cluttered, distracting, and/or illegible signage;
- (4) Protect the aesthetic appearance of the city's natural and built environment for its citizens and visitors;
- (5) Prevent property damage, personal injury, and litter caused by signs that are improperly constructed or poorly maintained;
- (6) Protect property values, the local economy, and quality of life by preserving and enhancing the appearance of the streetscape; and
- (7) Provide for the placement of temporary signs in limited circumstances, without regard to the communicative content of the sign.
- (8) Provide consistent design standards that enable the fair and consistent enforcement of these sign regulations.
- (9) Enhance the city's ability to maintain its public rights-of-way.

(Ord. No. 17-10882 , § 1, 7-10-17)



**Sec. 42-501. Permits.**

No sign, except for normal repair and for signs listed in sections 42-504 and 42-505, shall be painted, constructed, erected, remodeled, relocated or expanded until a zoning certificate (sign permit) for such sign has been obtained pursuant to the procedure set forth in this article.

(Code 1966, § 36-900)

**Sec. 42-502. Zoning certificate (sign permit) required.**

- (a) The zoning certificate (sign permit) must be obtained from the office of the zoning administrator.
- (b) A zoning certificate (sign permit) shall be either issued or refused by the zoning administrator within ten (10) days after the receipt of an application therefore or within such further period as may be agreed to by the applicant. No zoning certificate for any sign shall be issued unless the sign complies with the regulations of this article.
- (c) A zoning certificate (sign permit) shall become null and void four (4) months after the date on which it is issued unless within such four-month period, construction, building, moving, remodeling or reconstruction of a structure or sign is commenced or a use is commenced.

(Code 1966, § 36-901)

**Sec. 42-503. Sign standards.**

- (a) The gross surface area of a sign shall be the sum of all surface areas of all sign faces, except that for signs designed as double faced signs, with both faces parallel and the distance between the faces does not exceed two (2) feet, then only one (1) face of the sign shall be considered in determining the gross surface area. When two (2) or more signs are located on a zoning lot, the gross surface area of all signs on the lot shall not exceed the maximum allowable for the district regulations. For computing the area of any wall sign which consists of letters, numbers and symbols mounted or painted on a wall, the area shall be deemed to be the area of the smallest rectangular figure which can encompass all of the letters, numbers or symbols.
- (b) Sign height shall be measured from ground level at the base of or below the sign to the highest element of the sign.
- (c) All signs must conform to the regulations and design standards of the building code of the city and all wiring of all electrical signs must conform to the electrical code of the city.
- (d) Illuminated signs shall be shaded wherever necessary to avoid direct casting of light upon property located in any residential district or upon any public street or park. Any illuminated sign located on a lot adjacent to or across the street from any residential district, which sign is visible from such residential district, shall be illuminated only during business hours or between the hours of 7:00 a.m. and 10:00 p.m.
- (e) Electronic changeable copy signs.
  - (1) Electronic changeable copy signs shall be permitted: (i) in residential districts subject to the limitations of Section 42-517(7); (ii) in U districts subject to the limitations of Section 42-518(9); (iii) in P districts subject to the limitations in Section 42-518.2(7); (iv) in H-M districts; (v) in the C-1, C-2, C-3, C-5, C-6 and C-7 commercial districts; and (vi) in the I-2 and I-3 industrial districts. No electronic changeable copy signs shall be permitted in the C-4 district, except on theatres listed on a historic register. Applications for electronic changeable copy signs for historic theatres shall be reviewed and approved by the Heritage Commission. Electronic changeable copy signs shall comprise only a portion of the overall theatre marquee or sign design package for the theatre.
  - (2) All electronic changeable copy signs must be equipped with a photo cell dimmer or some other automatic dimmer control that automatically adjusts for day and night brightness. The sign owner or sign installer shall provide written certification from the equipment

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- manufacturer that the sign is so equipped. No electronic changeable copy sign shall exceed a brightness level of three-tenths (0.3) foot-candle above ambient light as measured using a foot candle meter at a preset distance depending on sign size. The measuring distance shall be determined using the following equation: the product of the square root of the sign copy area times one hundred (100). Text and moving pictorial images shall be permitted; however, blinking, flashing, rotating, revolving, spinning or fluttering lighting or graphic animation is not allowed. Transitions between messages must fade, scroll or reveal. No signs with moving parts, revolving beacons, strobe lights or signs which emit an audible sound, shall be permitted in any district.
- (f) No sign shall block any required accessway or window.
  - (g) No sign shall be attached to a tree or utility pole whether on public or private property.
  - (h) On corner and through lots, each lot line that abuts a street or highway shall be considered a separate street frontage.
  - (i) No metal sign shall be located within eight (8) feet vertically and four (4) feet horizontally of electric wires or conductors in free air carrying more than forty-eight (48) volts, whether or not such wires or conductors are insulated or otherwise protected.
  - (j) No sign shall be maintained at any location where by reason of its position, size, shape or color it may obstruct, impair, obscure, interfere with the view of, or be confused with any traffic-control sign, signal or device, or where it may interfere with, mislead or confuse traffic.
  - (k) No sign shall be located in any vision triangle formed by the curb lines of any two (2) intersecting streets, except signs mounted ten (10) feet or more above the ground whose supports do not constitute an obstruction. See also section 42-81.
  - (l) No sign shall be permitted to be located in the public-right-of-way in any zoning district, except for the following:
    - (1) Signs placed or authorized by the city, county, state, or federal government for the protection of the public health, safety, and general welfare, including, but not limited to, the following:
      - a. Emergency and warning signs necessary for public safety;
      - b. Traffic and wayfinding signs;
      - c. Signs showing the location of public facilities including public and private hospitals and emergency medical services; and
      - d. Any sign, posting, notice, or similar sign placed by or required by a governmental agency in carrying out its responsibilities to protect the public health, safety, and general welfare.
    - (2) Projecting signs within the C-4 (central business) zoning district, provided that no such sign may project over the public right-of-way more than half the width of the abutting public sidewalk or alley. Any sign so extending must be a minimum of ten (10) feet above grade.
    - (3) Movable A-frame and sandwich board signs within the C-4 (central business) zoning district complying with section 35-40.2 of the Salina Code.
    - (4) Neighborhood entry signs placed and displayed in any RS, R, R-1, R-2, R-2.5, R-3 or MH residential zoning district, if authorized by the city pursuant to a written license agreement

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which shall specify the message content, size, placement, illumination, design, and material to be used.

- (5) Vertical banners attached to light or utility poles in any zoning district, if authorized by the governing body pursuant to a banner program.
- (6) Decorative flags within the Salina Business Improvement District No. 1, if authorized by the governing body pursuant to a decorative flag program.
- (7) Temporary signs placed and displayed in the unpaved public right-of-way for a city street, in any zoning district, during the period prior to an election, in accordance with the requirements set forth in subsection 42-508(d).
- (8) Signs authorized by the city to be permanently affixed on bus benches in the public right-of-way at bus stops located on arterial streets. Signs affixed to bus benches must face toward the adjacent public street. If signs are placed on bus benches by a private contractor pursuant to an agreement between the city and such contractor, the agreement shall be in writing and shall specify the allowable message content, size, placement, illumination, design, and material for each of the signs, so as to minimize the visual impacts of such signs on the general public and surrounding properties.
- (m) All signs which are more than four (4) feet above grade shall be securely fastened so as to prevent movement.
- (n) Any time a sign is removed from its structural support, except for the purposes of maintenance, repair, replacement, repainting or cleaning, or due to an act of God, the structural support shall be removed within twenty-four (24) hours, provided further, that if a sign removed for the purposes of maintenance, repair, replacement, repainting or cleaning, or due to an act of God, if not reinstalled within thirty (30) days of the removal, then the structural support shall be removed within twenty-four (24) hours.

(Code 1966, § 36-901; Ord. No. 80-8821, § 1, 11-24-80; Ord. No. 81-8857, § 1, 6-22-81; Ord. No. 90-9381, §§ 1, 9, 5-14-90; Ord. No. 06-10337, § 1, 7-10-06; Ord. No. 19-10990, § 1, 1-14-19; Ord. No. 19-11020, § 1, 12-2-19)

#### **Sec. 42-504. Exemptions generally.**

The following signs shall be exempt from the requirements of this article:

- (1) Noncommercial flags displayed on private property;
- (2) Signs placed or authorized by the city, county, state, or federal government for the protection of the public health, safety, and general welfare, including, but not limited to, the following:
  - a. Emergency and warning signs necessary for public safety;
  - b. Traffic and wayfinding signs;
  - c. Signs showing the location of public facilities including public and private hospitals and emergency medical services; and
  - d. Any sign, posting, notice, or similar sign placed by or required by a governmental agency in carrying out its responsibilities to protect the public health, safety, and general welfare;

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- (3) Signs placed in or attached to a motor vehicle, bus, or railroad car that is regularly used for purposes other than the display of signs;
- (4) Onsite handheld signs;
- (5) Memorial signs and tablets displayed on private property;
- (6) Address numerals and other signs required to be maintained by law or governmental order, rule or regulation, provided that the content and size of the signs does not exceed the requirements of such law, order, rule or regulation;
- (7) Small signs, not exceeding five (5) square feet in area, displayed on private property for the convenience of the public, including signs to identify entrance and exit drives, parking areas, one-way drives, restrooms, freight entrances, and the like;
- (8) Scoreboards in athletic stadiums;
- (9) Window signs affixed to the interior of a window that do not display an advertising message or cover more than thirty-three (33) percent of the total window area on a single wall.

(Code 1966, § 36-903; Ord. No. 90-9381, §§ 2, 9, 5-14-90; Ord. No. 04-10218, § 1, 10-11-04; Ord. No. 19-11020, § 2, 12-2-19)

Editor's note(s)—Ord. No. 04-10218, adopted § 42-504, combining former §§ 42-504, 8-386, and 8-387.

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#### **Sec. 42-506. Classification of signs—Functional types.**

The following signs are classified by function:

- (1) *Advertising sign.* A sign displaying a commercial message that directs attention to a business, commodity, service or entertainment conducted, sold, or offered at a location other than the premises on which the sign is located, or to which it is affixed (off-premise sign).
- (2) *Bulletin board sign.* A sign that indicates the name of an institution or organization on whose premises it is located and which contains the name of the institution or organization, the name or names of persons connected with it, and announcements of persons, events or activities appearing or occurring at the institution. Such signs may also present a greeting or similar message.
- (3) *Business sign.* A sign displaying a commercial message that directs attention to a business or profession conducted, or to a commodity or service sold, offered or manufactured, or an entertainment offered, on the premises where the sign is located or to which it is affixed.
- (4) *Identification sign.* A sign having the name and address of a building, business, development or establishment. Such signs may be wholly or partly devoted to a readily recognized symbol.
- (5) *Menu board sign.* An on-site sign designed and used for the display of menu items and pictures and/or prices of menu items.

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- (6) *Nameplate sign.* A sign giving the name and/or address of the owner or occupant of a building or premises on which it is located, and where applicable, a professional status.

(Code 1966, 36-905; Ord. No. 04-10218, § 1, 10-11-04; Ord. 07-10396, § 1, 7-9-07; Ord. No. 17-10882, § 2, 7-10-17)

Editor's note(s)—Ord. No. 04-10218 adopted § 42-506, combining §§ 8-385 and former 42-506.

**Sec. 42-507. Same—Structural types.**

The following signs are classified as types:

- (1) *Awning, canopy and marquee sign.* A sign that is mounted or painted on, or attached to, an awning, canopy or marquee that is otherwise permitted by this chapter. No such sign shall project more than twenty-four (24) inches above, below, or twelve (12) inches beyond the physical dimensions of the awning, canopy or marquee, and a minimum of eight (8) feet of clearance shall be provided above grade.
- (2) *Banner sign.* A temporary sign composed of cloth, canvas, plastic, fabric, or similar light-weight, non-rigid material that is mounted to a wall, canopy, or solid fence with cord, rope, cable, or a similar method.
- (3) *Changeable copy sign.* Any sign on which message copy can be changed through the use of attachable letters and numerals or by electronic switching of lamps, light emitting devices, or illuminated tubes. This includes public message displays or any sign which features automatic switching such as time and temperature signs.
- (4) *Electronic changeable copy sign/Computer-operated electronic message signs.* A sign containing a computer or digital software generated message or other automated or remote method of changing copy.
- (5) *Feather flag.* A temporary, freestanding, vertical sign, also referred to as a teardrop flag, swooper flag or wind flag, consisting of a loose polyknit or other semi-rigid membrane sign face that flutters in the wind from a pole or staff attached to, anchored or placed into the ground.
- (6) *Flashing sign.* A sign which contains an intermittent or flashing, pulsating, blinking or traveling light source which includes signs that give the illusion of intermittent or flashing light by means of animation, or an externally mounted intermittent light source.
- (7) *Ground sign.* Any sign placed upon or supported by, and permanently affixed to, the ground independently of the principal building or any accessory structure on the property.
- (8) *Illuminated sign.* Any sign which is directly lighted by any electrical light source, internal or external, regardless of technology.
- (9) *Inflatable sign.* Any sign made of flexible material enlarged, activated or inflated by inserted air or gas, which floats, is tethered in the air, or is located on the ground or on a building.
- (10) *Mobile sign.* A sign that is not permanently affixed to the ground or a building and is designed or constructed to be easily moved from one (1) location to another, including signs mounted upon or designed to be mounted on a trailer, even if the sign has had its wheels removed.

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- (11) *Pole sign*. A sign that is mounted on a freestanding pole, the bottom edge of which sign is six (6) feet or more above ground level.
- (12) *Projecting sign*. A sign that is wholly or partly dependent upon a building for support and which projects more than twelve (12) inches from such building.
- (13) *Pylon sign*. A freestanding sign, other than a pole sign, permanently fixed to the ground by shafts, posts or other supports wrapped with an aesthetic veneer, but not having the appearance of a solid base.
- (14) *Roof sign*. A sign erected, constructed and maintained wholly upon or projecting above any portion of the roof of a building or having the roof as the principal means of support. A mansard shall be considered part of the wall of the building.
- (15) *Rotating sign*. Any sign or portion of a sign which moves in a revolving or similar manner.
- (16) *Temporary sign*. A sign that is to be displayed for a short period of time and not designed or constructed for permanent display, including but not limited to yard signs, banners, flags, balloons, feather flags, and inflatable signs. Temporary signs shall not include mobile signs.
- (17) *Wall sign*. A sign fastened to or painted on a wall of a building or structure in such a manner that the wall becomes merely the supporting structure or forms the background surface, and which does not project more than twelve (12) inches from such building.
- (18) *Yard sign*. A temporary, freestanding sign made of lightweight or nondurable materials such as paper, cardboard, canvas, fabric, wood, metal, or vinyl that is supported by a frame, pole, or other support structure placed directly in the ground without foundation or other anchor. Yard signs shall not include banner signs.

(Ord. No. 88-9283, § 1, 11-14-88; Ord. No. 90-9381, §§ 3, 9, 5-14-90; Ord. No. 07-10396, § 1, 7-9-07; Ord. No. 17-10882, § 3, 7-10-17)

....

#### **Sec. 42-509. Maintenance and safety.**

All signs, including attendant braces, supports, guys and anchors, shall be kept in a safe and sound structural condition and maintained in a presentable state of appearance. Defective parts shall be repaired or replaced and display surfaces shall be kept neatly painted or posted and readable at all times. Every sign and its immediate surroundings shall be maintained in a clean and sanitary condition and free of all offensive substances, rubbish and weeds. All maintenance required is the responsibility of the owner of the sign. Where ownership cannot be determined, the property owner is responsible for the maintenance of the sign. If the zoning administrator shall find that any sign is unsafe, insecure, has been abandoned, or has been erected or is being maintained in violation of the article, he shall give written notice to the owner thereof to repair, alter or remove the sign so as to comply with the standards herein set forth.

(Ord. No. 90-9381, § 4, 5-14-90)

....

#### **Sec. 42-511. Sign substitution.**

The owner of any sign which is otherwise allowed by this article may substitute noncommercial copy in lieu of any other commercial or noncommercial copy. This substitution of copy may be made without any additional approval or permitting. The purpose of this provision is to prevent any inadvertent favoring of any



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particular commercial or noncommercial message over any other noncommercial message. This provision prevails over any more specific provision to the contrary.

(Ord. No. 17-10882 , § 5, 7-10-17)

...

## DIVISION 2. DISTRICT REGULATIONS

### Sec. 42-521. C-3 and C-4 commercial districts.

The following sign regulations shall apply in the C-3 shopping center and C-4 central business districts:

- (1) *Functional types permitted.* Any type listed in section 42-506, except that advertising signs for other than special public events sponsored by governmental, philanthropic and nonprofit organizations shall be prohibited in the C-4 district and district and advertising signs other than computerized electronic message displays shall be prohibited in the C-3 district.
- (2) *Structural types permitted.* Any type listed in section 42-507, except that mobile signs and roof signs shall be prohibited in the C-4 district.
- (3) *Number of signs permitted.* No maximum limitation in the C-3 district. In the C-4 district, four (4) signs per business with a maximum of ten (10) signs per zoning lot; provided, however, the following additional restrictions shall apply:
  - a. No more than one (1) projecting sign or ground/pole sign shall be allowed per street frontage.
  - b. Ground/pole signs shall be allowed only on zoning lots without buildings or those with buildings having a front yard setback of ten (10) feet or more.
  - c. Ground/pole signs and projecting signs shall not be allowed in combination along the same street frontage.
- (4) *Maximum gross surface area:*
  - a. In the C-3 district, four (4) square feet of sign area for each lineal foot of building frontage; where no building frontage exists, one (1) square foot of sign area for each lineal foot of street frontage.
  - b. In the C-4 district, three (3) square feet of sign area for each lineal foot of building frontage for allowable signage other than a ground/pole sign or a projecting sign; where no building frontage exists, one (1) square foot of sign area for each lineal foot of street frontage. Irrespective of building or street frontage, no property or zoning lot shall be restricted to less than thirty-six (36) square feet of sign area. No more than sixty-seven (67) percent of allowable sign area may be displayed on any building wall or street frontage. In regards to projecting signs and ground/ pole signs, the following maximum area limitations shall apply:

Building Frontage	Projecting Signs*	Ground/Pole Signs
25 feet or less	30 sq. ft.	45 sq. ft.
26—50 feet	36 sq. ft.	54 sq. ft.



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51 feet or more	48 sq. ft.	72 sq. ft.
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\*The maximum area for a projecting sign on a building wall without street frontage shall be four (4) square feet.

- (5) *Maximum height.* In the C-3 and C-4 districts, ground/pole signs may not exceed thirty (30) feet in height above grade. In the C-4 district, projecting or wall signs may not project above the lowest point of the roof of the structure to which it is attached.

(Ord. No. 90-9381, §§ 5, 9, 5-14-90; Ord. No. 07-10425, § 1, 12-03-07)

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## ARTICLE XIV. DEFINITIONS

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**Sec. 42-764. Sign.**

*Sign* is any writing (including letters, words or numerals), pictorial representation (including illustrations or decorations), emblem (including devices, symbols, or trademarks), flag, banner, streamer, pennant, string of lights, or display calculated to attract the attention of the public, or any other figure of similar character which:

- (1) Is a structure or any part thereof, or a portable display, or is attached to, painted on, or in any other manner represented on a building or other structure or on the ground;
- (2) Is used to announce, direct attention to, or advertise; and
- (3) Is not located inside a building.

(Code 1966, § 36-1301(145))

**Sec. 42-765. Sign, advertising.**

*Advertising sign* is a sign which directs attention to a business, commodity, service, or entertainment conducted, sold, or offered at a location other than the premises on which the sign is located, or to which it is affixed (off-premise sign).

(Code 1966, § 36-1301(146))

....

**Sec. 42-781. Sign, wall.**

*Wall sign* is a sign fastened to or painted on a wall of a building or structure in such a manner that the wall becomes merely the supporting structure or forms the background surface, and which does not project more than twelve (12) inches from such building.

(Code 1966, § 36-1301(162))

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**RESUME AND QUALIFICATIONS**


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## Curriculum Vitae S. Mark White

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### BACKGROUND

S. Mark White is a planner and attorney recognized as an expert in zoning and subdivision law, form-based zoning and New Urbanism, land use and takings litigation, housing, development of comprehensive growth management plans, and implementation systems. He has 30 years of experience representing clients at every level from city, state and local governments, as well as major private developers, many of whom are involved in environmental permitting proceedings and takings litigation.

Mr. White is a former partner of Freilich, Leitner & Carlisle. He received his Bachelor of Arts degree, magna cum laude, in History and Political Science from Bethany College in Lindsborg, Kansas, and holds a Juris Doctor and Master of Regional Planning from the University of North Carolina at Chapel Hill. While in law school, Mr. White was a Research Editor for the North Carolina Journal of International Law and Commercial Regulation, and worked at the Department of City and Regional Planning as a Research Assistant in the Center of Urban and Regional Studies. He is a former President of the board of directors of the nonprofit community development group Westside Housing Organization, and is a member of the North Carolina and Missouri Bars, the American Institute of Certified Planners, and the American Planning Association. Recently, Mr. White was a member of the leadership team for the City of Lee's Summit, Missouri's Livable Streets Committee. This resulted in adoption of the Kansas City region's first Complete Streets resolution.

Mr. White's articles have appeared in a variety of notable publications, including the American Planning Association's *Planning Advisory Service*, the American Bar Association's *Urban Lawyer*, the International Municipal Attorneys Association's *Municipal Lawyer*, and the United Kingdom's *Transport Policy*.

Mr. White is a frequent speaker at the national meetings of the American Planning Association, the American Center for National and International Law, the Congress for the New Urbanism, the University of Wisconsin, and various other professional organizations. He is an adjunct professor at the University of Kansas Department of Urban Planning.

### Education

Bachelor of Arts, magna cum laude, History/Political Science (Bethany College, Lindsborg, Kansas)

Juris Doctor/Master of Regional Planning (University of North Carolina at Chapel Hill)

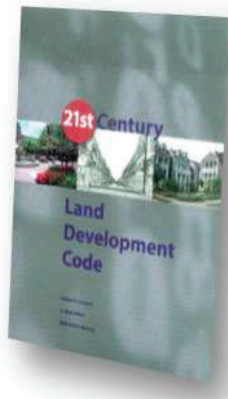
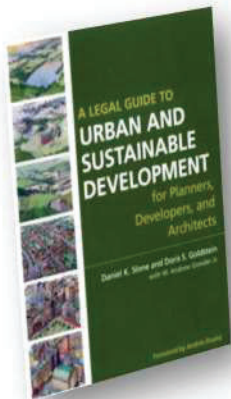
Member, Lee's Summit Land Clearance and Redevelopment Authority

### Work Experience

Partner & Associate, Freilich, Leitner & Carlisle (Kansas City, MO) 1990-2005

Partner, White & Smith, LLC Planning & Law Group (Kansas City, MO & Charleston, SC), 2005-present

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*Mr. White is co-author and contributor to several recent national publications on new urbanism, sustainability, and zoning and development codes.*

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“Neotraditional Development: A Legal Analysis,” 49 Land Use Law & Zoning Digest, No. 8 at 3 (August 1997).

Adequate Public Facilities Ordinances and Transportation Management (American Planning Association, Planning Advisory Service Report No. 465, August 1996).

State and Regional Roles in Transportation and Land Use (with Freilich), American Planning Association, Planning Advisory Service Report no. 462/463, March 1996).

“State and Federal Planning Legislation and Manufactured Housing: New Opportunities for Affordable, Single-Family Shelter,” 28 The Urban Lawyer 263 (Spring 1996).

Contributing Researcher and Writer, Model Subdivision Regulations, by Freilich & Schultz (American Planning Association, 1995).

Co-Author, “The Interaction of Land Use Planning and Transportation Management: Lessons from the American Experience,” Transport Policy (U.K.) (March 1994).

## ANALYSIS OF SALINA SIGN CODE | S. MARK WHITE, AICP

Affordable Housing: Decent Shelter Is a Fundamental Right (with Jim Hecimovich), in Planning and Community Equity (APA's Planners Press October 1994).

Affordable Housing: Proactive and Reactive Planning Strategies (American Planning Association, Planning Advisory Service Report No. 441, 1992).

“The Use of Zoning and Other Local Controls for Siting Solid and Hazardous Waste Facilities,” Natural Resources and Environment, 7:3-45 (with Shortlidge, N.R.).

“Using Fees and Taxes to Promote Affordable Housing,” Land Use Law & Zoning Digest (September 1991).

Co-Author, “Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America’s Major Quality of Life Crisis,” 24 Loyola Of Los Angeles Law Review 915 (June 1991).

“Development Fees and Exemptions For Affordable Housing: Tailoring Regulations To Achieve Multiple Public Objectives,” 6 J. Land Use & Env’tl. L. 25 (Winter 1990)

## SELECTED CITATIONS

Court decisions, books, agency publications, and other important resources that have cited publications authored by Mr. White include:

- *Town of Rhine v. Bizzell*, 311 Wis.2d 1, 751 N.W.2d 780 (2008)
- *Bahl v. City of Asbury*, 656 N.W.2d 336 (Ia. 2002)
- Danielle Arigoni. *Affordable Housing and Smart Growth: Making the Connection*. National Neighborhood Coalition, 2001.  
[http://www.smartgrowthamerica.org/affordable\\_housing.pdf](http://www.smartgrowthamerica.org/affordable_housing.pdf).
- Tim Iglesias & Rochelle E. Lent. *The Legal Guide to Affordable Housing Development*. American Bar Association, 2006.

## SELECTED EXPERIENCE

Client	Project	Year(s)
Albuquerque, New Mexico	Planned Growth Strategy - study and planning policies designed to encourage Smart Growth at a regional scale	1998-2002
	Mixed Use Zones – Form Based Code; Growth Management and Adequate Public Facilities Standards	2005-2007
	Volcano Heights Charrette and Planning Study	2004-2005
Aquila, Inc.	Expert witness testimony - siting of peaking and transmission facilities and testimony before Missouri Public Utility Commission	2006
Arlington, Texas	Zoning and Subdivision Regulations update (with Clarion Associates)	2008-2011
Aspen, Colorado	Land Use Code amendments	2006-2008, 2016-2017
Atlanta Regional Commission	Plan 2040 Implementation Study	2010
Boulder, Colorado	Housing excise tax	1989
Cabarrus County, North Carolina	Adequate Public Facilities Ordinance	2005-2007

## ANALYSIS OF SALINA SIGN CODE | S. MARK WHITE, AICP

<b>Client</b>	<b>Project</b>	<b>Year(s)</b>
<b>Carbondale / Roaring Fork Valley community coalition</b>	Regional housing Mitigation study, with linkage and inclusionary zoning regulations.	1999
<b>Catawba County, North Carolina</b>	Unified Development Ordinance	2004-2006
<b>Centennial, Colorado</b>	Land Development Code rewrite (with Kendig Keast Collaborative)	2008-2009
<b>Chapel Hill, North Carolina</b>	Land Management Ordinance Inclusionary Zoning Ordinance	2000-2002 2007
<b>Charlotte, North Carolina</b>	Smart Growth audit	1999-2000
<b>Charleston County, South Carolina</b>	Land Development Code update	2004-2006
<b>Cincinnati, Ohio</b>	Greenways Master Plan	2005-2006
<b>Cole County, Missouri</b>	Land Development Code	2011-2014
<b>Collier County, Florida</b>	Zoning Regulations	2011-2014
	Impact fee deferral program for affordable housing	2005
	Land Development Regulations update	2007-2013
	Master Mobility Plan	
<b>Concord / Cabarrus County, North Carolina</b>	Unified Development Ordinance	1996– 1999
<b>Cumberland Region Tomorrow (Nashville, Tennessee)</b>	Regional Plan Implementation Toolbox including economic development, affordable housing, environmental protection, transportation/land use, and rebuilding urban core with model codes	2005-2006
<b>Davidson, North Carolina</b>	Adequate Public Facilities Ordinance designed for Smart Growth regulations	1998-2000
<b>Douglas County, Colorado</b>	Concurrency Management Regulations	1995
<b>Dunedin, Florida</b>	Land Development Regulations analysis (with HDR, Inc.)	2006-2007
<b>Enid, Oklahoma</b>	Comprehensive Plan and Zoning Ordinance updates	2003-2004
<b>Frederick, Maryland</b>	Carroll Creek Overlay District (form-based code for a riverwalk district)	2004-2005
	Land Management Code	
<b>Gainesville, Florida</b>	Update of the Comprehensive Plan and Land Development Code for mixed use and community design.	2009-2010
	Study of regulatory options for homeless shelters and social services, and Religious Land Use and Institutionalized Persons Act (RLUIPA) compliance.	2010
<b>Galveston, Texas</b>	Land Development Regulations (Subconsultant to Kendig-Keast Collaborative)	2011-2013
<b>Gwinnett County, Georgia</b>	Comprehensive Plan update (Subconsultant to PB Americas)	2007-2008
<b>Hillsborough County (Tampa), Florida</b>	Community Design Regulations including Traditional Neighborhood Development, Pedestrian and Transit-Oriented Development	1999-2002
<b>Hilton Head, South Carolina</b>	Wetlands Protection, Non-Residential Growth Management and Traffic Congestion Management Ordinances	1992
<b>Huntersville, North Carolina</b>	Adequate public facilities ordinance	2006-2007
<b>Jacksonville, North Carolina</b>	Growth Plan and plan implementation	2005-2007
<b>Irving, Texas</b>	Development Ordinances rewrite (with Clarion Associates)	2008-2009
<b>Kansas City, Missouri</b>	Study of development processes	2010
<b>Lafayette, Louisiana</b>	Comprehensive Plan & Unified Development Ordinance	2012-present



## ANALYSIS OF SALINA SIGN CODE | S. MARK WHITE, AICP

Client	Project	Year(s)
	(Subconsultant to Wallace, Roberts & Todd) ( <i>PlanLafayette</i> adopted June 2014, UDO adopted May 2015)	
Lake Lotawana, Missouri	General Counsel, land use issues	2005-2011
Lebanon, Tennessee	Zoning Ordinance update (with Parsons Brinkerhoff)	2007-2010
Lee's Summit, Missouri	Sign Regulations	2011-2012
Linn County, Missouri	Health Ordinance for Concentrated Animal Feeding Operations and successfully legal defense in Missouri Western District Court of Appeals	1994-1995
Lincoln County, Nevada	Development agreement review and assistance with zoning regulations.	2008-2010
Livingston County, Missouri	Special counsel for land use issues, including various zoning updates, zoning ordinance rewrite, subdivision regulations, and legal defense	1993-present
Los Angeles, California	Zoning Code update (recode:LA) (subconsultant to Code Studio)	2013-2017
Loudoun County, Virginia	Zoning regulations, including employment and mixed-used districts, for an airport and transit-oriented corridor north of Dulles International Airport.	2012-2014
Madison, Wisconsin	Zoning Regulations update (subconsultant to Cunningham Architects)	2008-2009
Marion County (Missouri) Health Department	Health ordinance regulating concentrated animal feeding operations (CAFOs)	2006-2007
Memphis, Tennessee	Downtown Memphis Sign Code and Design Guidelines (Subconsultant to Winter & Company)	2011-2013
Missouri Advisory Commission on Regulatory Barriers to Affordable Housing	General counsel to state agency on issues dealing with zoning and land development regulations and their effect on affordable housing.	1996
Monroe County, Florida	Concurrency Management Ordinance	1992
Nashua, New Hampshire	Land Development Code	2002 - 2003
New Castle County, Delaware	Unified Development Code updates and Guiding Principles for development	2014-2019
	Sewer impact fees	2005
Nodaway County (Missouri) Health Department	Health ordinance regulating concentrated animal feeding operations (CAFOs)	2006
North Augusta, South Carolina	Development Code and transportation corridor regulations	2001-2005
Nye County, Nevada	Impact fee ordinance, land use consulting and development agreement negotiations	2005-2011
Olathe, Kansas	Unified Development Ordinance	2011-2014
Osage Beach, Missouri	Entertainment and Tavern Zoning Regulations	1995
Overland Park, Kansas	Unified Development Ordinance update	2015-present
Panama City Beach, Florida	Form Based Code study (with Planning Works, LLC)	2008-2010
Pickerington, Ohio	Sign Regulations	
	Impact fee regulations	2005-2006
Pierce County, Washington	Countywide Planning Policies and Urban Growth Areas	1991-1993
Platte County, Missouri	Health ordinance regulating concentrated animal feeding operations (CAFOs)	1998-2001
Ponce Inlet, Florida	Land Development Regulations update, including coastal waterfront urban design regulations.	2010-2011
Prince Georges County,	Zoning and Subdivision Regulations Comprehensive Amendment	2014-2016, 2009-2010
	Zoning Ordinance Study including:	2004-2005



## ANALYSIS OF SALINA SIGN CODE | S. MARK WHITE, AICP

Client	Project	Year(s)
<b>Maryland</b>	Master plan amendment procedures	
	Rural Tier study and implementing regulations including transfer of development rights, conservation subdivisions, and right to farm ordinance	
	Permit streamlining study	2006-2007
<b>Pulaski County (Little Rock), Arkansas</b>	Watershed zoning regulations	2009-2011
<b>Queen Creek, Arizona</b>	Zoning Ordinance, Adequate Public Facilities Ordinance, and Impact Fee Ordinance / Manual	1998-2000
<b>Raleigh, North Carolina</b>	Comprehensive Plan Update (subconsultant to HNTB Corporation)	2007-2009
<b>Roanoke, Virginia</b>	Zoning Ordinance with urban design standards	2002-2004
<b>San Antonio, Texas</b>	Unified Development Code including Smart Growth principles, Use Patterns, infill development incentives, maximum parking ratios, transfer of development rights, and liveable street design	1999-2001 ( <i>winner of Texas American Planning Association award</i> )
	Expert witness testimony, Borden Park v. City of San Antonio (sign regulations)	2005
<b>San Diego, California</b>	General Plan Guidelines for Future Development and Growth Management Implementation	1990
<b>Sparks, Nevada</b>	Zoning Code update (scheduled for adoption August 2015)	2013-present
<b>St. Petersburg, Florida</b>	Land Development Regulations	2002 - 2004
<b>Spokane Regional Transportation Commission</b>	Regional concurrency study	2006-2007
<b>Suffolk, Virginia</b>	Smart Growth Management/ Unified Development Ordinance	1998-1999
<b>Summit County, Utah</b>	Snyderville Basin Development Code Ordinance, Zoning Ordinance, and Administrative Regulations	1992-1994
	Housing Element to General Plan	
<b>Sunnyvale, Texas</b>	Assistance with expert witness testimony in Fair Housing Act litigation	1993-1998
<b>Topeka, Kansas</b>	Unified Development Code	2006-2009
<b>Unified Government of Kansas City-Wyandotte County, Kansas</b>	Narrow lot zoning regulations and traditional neighborhood development update (subconsultant to 180° Urban Design + Architecture)	2007
	Sign Code Update	2015-2016
	Zoning and Subdivision Regulations Update	2017-2020
<b>Union County, North Carolina</b>	Adequate public facilities ordinance	2006-2010
	Litigation defense	
<b>Washington, DC</b>	Zoning Regulations Reengineering Study (Office of Zoning)	2007-2008
	Zoning Best Practices Study (Office of Planning)	
<b>Whiteside County, Illinois</b>	Zoning Ordinance / Subdivision Regulations update (subconsultant to MSA)	2013-2014
<b>Winchester, Virginia</b>	Form-Based Code (subconsultant to PB PlaceMaking)	2011

## EXPERT WITNESS TRIALS AND DEPOSITIONS

Mr. White has not testified as an expert witness in the past four (4) years.

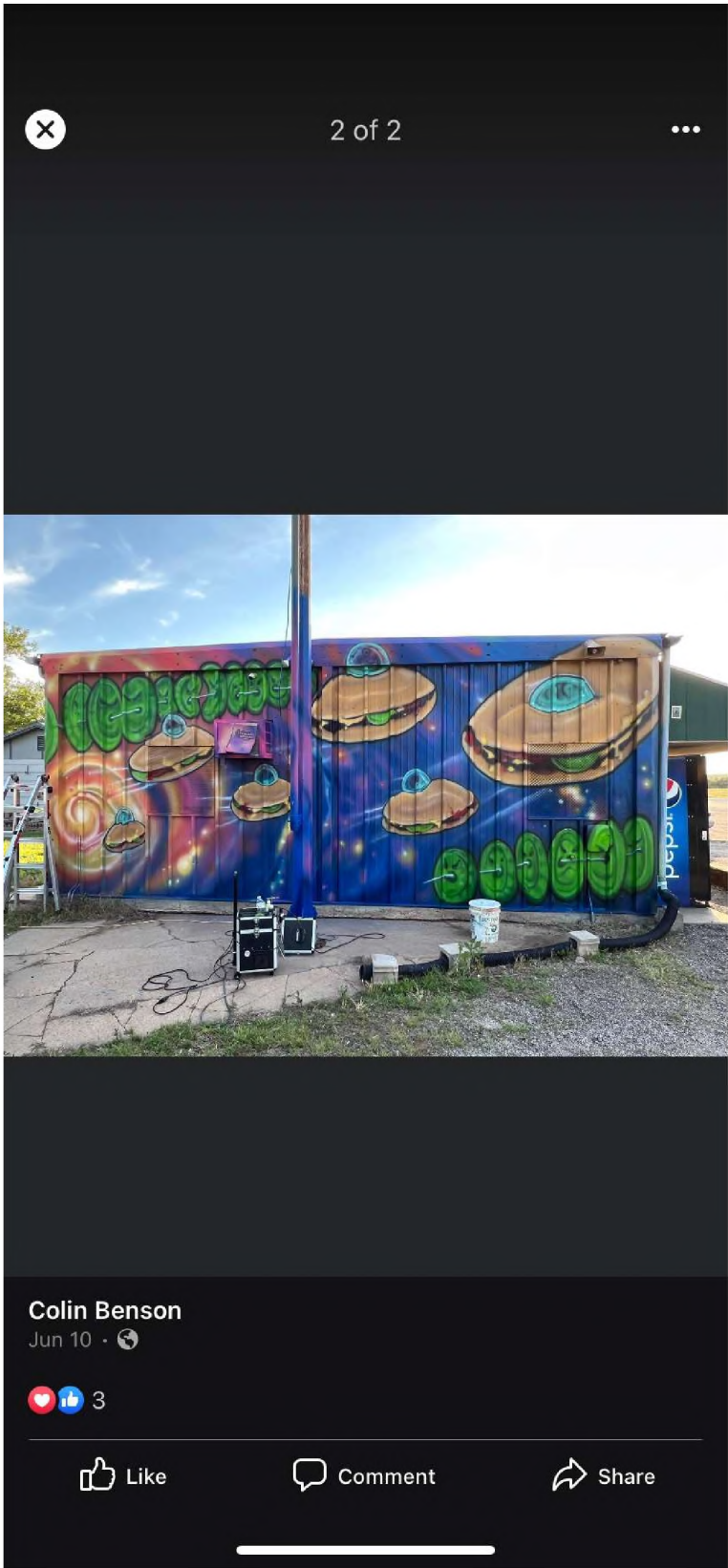


EXHIBIT  
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EXHIBIT S

Charles R Taylor PhD  
November 13, 2024

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

Cozy Inn, Incorporated,	: CIVIL ACTION
d/b/a The Cozy Inn;	: CASE NO.
Stephen Howard,	:
	: 6:24-cv-01027-TC-ADM
Plaintiffs,	:
	:
-vs.-	:
	:
City of Salina, Kansas,	:
	:
Defendants.	:

NOVEMBER 13, 2024

ZOOM VIDEOCONFERENCE DEPOSITION OF  
CHARLES R. TAYLOR, Ph.D., held via remote teleconference  
hosted by U.S. Legal Support, located at 1818 Market  
Street, Suite 1400, Philadelphia, Pennsylvania, on  
Wednesday, November 13, 2024, at 10:05 a.m., before  
Michelle Keys, a Stenographer and Notary Public of the  
Commonwealth of Pennsylvania.

Charles R Taylor PhD

November 13, 2024

Charles R Taylor PhD

November 13, 2024

1 image that is under the text that says "Don't fear  
2 the smell" and over the text that says "The fun is  
3 i-n-s" -- because the rest of that word "inside" is  
4 to the right of that image.

5 Do you see that image?

6 A. Yes.

7 Q. Can you describe to me what that image is?

8 A. Well, I mean, I read in the complaint that  
9 the -- it's -- the artist intended it to be an image  
10 of, you know, a burger in the form of a flying  
11 saucer squirting ketchup and mustard, and the owner  
12 says it's designed to get across a whimsical and fun  
13 atmosphere of Cozy Inn.

14 Q. Did it brand the site?

15 A. You know, in the sense of communicating that  
16 there's, you know, a fun and whimsical atmosphere, I  
17 do think that it helps to brand the site. And I --  
18 from -- from the quote I read from the owner, that's  
19 exactly what he wants to do with this.

20 Honestly, his -- his signs are  
21 conspicuous enough before this. So there's not much  
22 incentive to increase cons- -- conspicuity. I think  
23 it certainly meets the threshold. So what he's  
24 saying makes a lot of sense to me, that he's trying  
25 to communicate something about the store atmosphere.

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Charles R Taylor PhD  
November 13, 2024

1 it was my belief that he's using it to brand the  
2 site and enhance the store image. That's why.

3 Q. Okay. Well, the top part of that image is a  
4 top part of a bun.

5 Can we agree on that?

6 MR. SHAW: Objection to scope.

7 THE WITNESS: I -- I think this is  
8 art, and art can be abstract. And I think  
9 this is -- my interpretation is that this  
10 is -- this is an effort by the artist to  
11 create a flying saucer somewhat in the  
12 form of a hamburger.

13 BY MR. MESSENGER:

14 Q. Okay. Is that image abstract to you as it  
15 stands now today?

16 MR. SHAW: Objection to scope.

17 THE WITNESS: I would -- I would say  
18 it's -- it's kind of abstract. I don't  
19 know that I've seen a hamburger with those  
20 kind of indentations on -- on the top.  
21 And it certainly looks to me like it could  
22 be a flying saucer shape.

23 BY MR. MESSENGER:

24 Q. And why would indentations suggest flying  
25 saucer to you?