

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF PORT ORCHARD**

In the Matter of the Appeal of)) Engley Diversified Inc.) d/b/a Gotcha Covered Media)) <u>Of a City Administrative Decision</u>)	No. 2010-01 FINDINGS, CONCLUSIONS AND DECISION
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SUMMARY OF DECISION

This matter is an appeal of the City’s denial of eight sign permit applications to construct billboards. The City decided that the proposed billboards are not allowed under the sign code in effect at the time of the applications. The record developed at the open record hearing supports a conclusion that the City applied the most stringent section of the City sign code in a manner consistent with the code requirements for code interpretation. Thus, the City’s decisions were not clearly erroneous and the appeal must be denied.

SUMMARY OF PROCEEDINGS

Hearing Date:

The Hearing Examiner held an open record appeal hearing on oral arguments on the City’s Motion to Dismiss and the Appellant’s Cross Motion on Vesting on September 9, 2010. The appeal hearing was held on October 28, 2010.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

James Weaver, City Development Director
Katherine Woodside, City Planning Department, Code Enforcement Officer

Attorney William Crittenden represented the Appellant.
Attorney Jennifer Forbes represented the City.

EXHIBITS

The following exhibits were admitted into the record at the September 9, 2010 hearing:

Appellant Exhibits

A-1. City of Port Orchard business license documents

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- A-2. Documents relating to application materials and Permit rejection correspondence for 1786 Mile Hill Dr., Port Orchard, WA
- A-3. Documents relating to application materials and Permit rejection correspondence for Lot 41, SE Sedgwick Rd., Port Orchard, WA
- A-4. Documents relating to application materials and Permit rejection correspondence for Lot 39, SE Sedgwick Rd., Port Orchard, WA
- A-5. Documents relating to application materials and Permit rejection correspondence for Lot 64, SE Sedgwick Rd., Port Orchard, WA
- A-6. Documents relating to application materials and Permit rejection correspondence for 1353 Olney Ave. SE, Port Orchard, WA
- A-7. Documents relating to application materials and Permit rejection correspondence for Lot 1, Sidney Rd. SW, Port Orchard, WA
- A-8. Documents relating to application materials and Permit rejection correspondence for Lot 7, Sidney Rd. SW Port Orchard, WA
- A-9. U.S. Post Office stamp designating City of Port Orchard's delayed mail delivery to Appellant
- A-10. Correspondence from Rick Engley to City of Port Orchard Planning Department regarding billboard applications, dated April 28, 2010
- A-11. Documents relating to application materials and Permit rejection correspondence for 1460 Sedgwick Rd., Port Orchard, WA
- A-12. Sample Structural Plan
- A-13. Structural Calculations

City Exhibits

- C-1. Submittal for Application No. 10 00136, for TPN 22301-4-041-2009, located at Lot 41 SE Sedgwick Road, received March 25, 2010, and including the following documents:
 - A. Application
 - B. Narrative
 - C. Site Plans
 - D. Billboard Drawing
 - E. Billboard Structural Calculations
- C-2. Parcel Map and Property Report from Kitsap County records for Lot 41, SE Sedgwick Road
- C-3. Submittal for Application No. 10 00137, for TPN 302402-3-047-2009, located at 1353 Olney Avenue, received March 25, 2010, and including the following documents:
 - A. Application
 - B. Narrative
 - C. Site Plans
 - D. Billboard Drawing
 - E. Billboard Structural Calculations
- C-4. Parcel Map and Property Report from Kitsap County records for 1353 Olney Avenue
- C-5. Submittal for Application No. 10 00138, for TPN 362401-2-093-2009, located at 1786 Mile Hill Drive, received March 25, 2010, and including the following documents:
 - A. Application
 - B. Narrative
 - C. Site Plans
 - D. Billboard Drawing
 - E. Billboard Structural Calculations
- C-6. Parcel Map and Property Report from Kitsap County records for 1786 Mile Hill Drive

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- C-7. Submittal for Application No. 10 00139, for TPN 022301-4-039-2003, located at 1489 SE Sedgwick Road, received March 25, 2010, and including the following documents:
 - A. Application
 - B. Narrative
 - C. Site Plans
 - D. Billboard Drawing
- C-8. Parcel Map and Property Report from Kitsap County records for 1489 SE Sedgwick Road
- C-9. Submittal for Application No. 10 00141, for TPN 122301-2-064-2003, located at Lot 64 SE Sedgwick Road, received March 25, 2010, and including the following documents:
 - A. Application
 - B. Narrative
 - C. Site Plans
 - D. Billboard Drawing
- C-10. Parcel Map and Property Report from Kitsap County records for Lot 64, SE Sedgwick Road
- C-11. Submittal for Application No. 10 00162, for TPN 022301-3-007-2003, located at Lot 7 SE Sidney Road, received April 8, 2010, and including the following documents:
 - A. Application
 - B. Site Plan
 - C. Site Plan, Vicinity, and Location drawings
 - D. Billboard Drawing
 - E. Billboard Structural Calculations
 - F. Authorization letter from property owner
- C-12. Parcel Map and Property Report from Kitsap County records for Lot 7, SE Sidney Road
- C-13. Submittal for Application No. 10 00163, for TPN 022301-3-001-2009, located at 4343 Sidney Road SW, received April 8, 2010, and including the following documents:
 - A. Application
 - B. Site Plan
 - C. Vicinity Map
 - D. Billboard Drawing
 - E. Billboard Structural Calculations
 - F. Authorization letter from the property owner
- C-14. Parcel Map and Property Report from Kitsap County records for 4343 Sidney Road SW
- C-15. Notice of Incomplete Billboard Sign Applications from Katherine Woodside to Rick Engley for Application Nos. 10 00136, 10 00137, 10 00138, 10 00139, 10 00140, and 10 00141, dated March 31, 2010
- C-16. Response to Incomplete Notice from Rick Engley to Kathy Woodside, received April 5, 2010, and including the following documents:
 - A. Response cover note to incomplete notice: handwritten response on Kathy's letter
 - B. List of property owners consent for Rick Engley to act as agent
 - C. Sign property lease agreement with Engley Diversified Inc. for TPN 022301-4-041-2009 (Lot 41 SE Sedgwick Road, Application No. 10 00136)
 - D. Sign property lease agreement with Engley Diversified Inc. for TPN 302402-3-047-2009 (1353 Olney Avenue, Application No. 10 00137)
 - E. Sign property lease agreement with Engley Diversified Inc. for TPN 362401-2-093-2009 (1786 Mile Hill Drive, Application No. 10 00138)
 - F. Sign property lease agreement with Engley Diversified Inc. for TPN 022301-4-039-2003 (1489 SE Sedgwick Road, Application No. 10 00139)

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- G. Property owner consent and authorization for Engley Diversified Inc. for TPN 122301-2-064-2003 (Lot 64 SE Sedgwick Road, Application No. 10 00141)
- C-17. Letter to Applicant, dated April 7, 2010, citing code for denying Application 10 00136, Lot 41 SE Sedgwick Road, TPN 022301-4-041-2009, and providing a Variance Application
- C-18. Letter to applicant, dated April 7, 2010, citing code for denying Application 10 00137, 1353 Olney Avenue, TPN 302402-3-047-2009, and providing a Variance Application
- C-19. Letter to Applicant, dated April 7, 2010, citing code for denying Application 10 00138, 1786 Mile Hill Drive, TPN 362401-2-093-2009, and providing a Variance Application
- C-20. Letter to Applicant, dated April 7, 2010, citing code for denying Application 10 00139, 1489 SE Sedgwick Road, TPN 022301-4-039-2003, and providing a Variance Application
- C-21. Letter to Applicant, dated April 7, 2010, citing code for denying Application 10 00141, Lot 64 SE Sedgwick Road, TPN 122301-2-064-2003, and providing a Variance Application
- C-22. Letter to Applicant, dated April 13, 2010, citing code for denying Application 10 00162, Lot 7 SE Sidney Road, TPN 022301-3-007-2003, and providing a Variance Application
- C-23. Letter to Applicant, dated April 13, 2010, citing code for denying Application 10 00163, 4343 Sidney Road SW, TPN 022301-3-001-2009, and providing a Variance Application
- C-24. E-mail from Pat O'Leary stating status of six permit applications
- C-25. Appeal of Administrative Decision form
- C-26. Attached letter to Appeal form from Michael Murphy
- C-27. Letter of receipt of appeal from City Clerk Patti Kirkpatrick to Michael Murphy
- C-28. Pre-Hearing Order from Hearing Examiner, dated April 27, 2010
- C-29. Letter from Rick Engley to City, dated April 28, 2010, stating that seven complete applications for billboards were submitted
- C-30. E-mail from Pat O'Leary to Katherine Woodside re billboard permit status, dated May 10, 2010
- C-31. Revised Pre-Hearing Order from Hearing Examiner, dated May 10, 2010
- C-32. Submittal for Application No. 10 00169, for TPN 112301-1-016-2005, located at 1460 SE Sedgwick Road, received April 15, 2010, and including the following documents:
- A. Application
 - B. Site Plan
 - C. Billboard Drawings (2 sheets)
 - D. Structural Calculations
 - E. Lease Agreement
- C-33. Property Report
- C-34. Denial Letter dated May 13, 2010
- C-35. Letter from Matthew Wambold and Kraig Quisenberry rescinding Property Owner Consent Authorization (*Appellant objection. Not admitted.*)

Pleadings and Motions

- * Appeal of the City's denial of seven sign permit applications, received April 19, 2010
- * Stipulation of Parties as part of pre-hearing telephone conference call to reschedule hearing, email dated May 6, 2010
- * City's Witness List, dated June 18, 2010
- * Stipulation of Parties to add an additional sign permit application denial, dated May 25, 2010
- * Appellant's Exhibit List, dated May 26, 2010

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- * Appellant's Witness List, dated May 26, 2010¹
- * City Notice of Appearance, Jennifer A. Forbes, Attorney, dated June 10, 2010
- * City's Document List, dated June 18, 2010
- * Brief of Appellant, dated June 21, 2010²
- * City's Motion to Dismiss, dated June 23, 2010; with Declaration of James Weaver
- * City's Document List, dated June 24, 2010
- * Stipulation of Parties to reschedule hearing, email dated July 1, 2010
- * Appellant's Response to City's Motion to Dismiss; Cross Motion on Vesting of Permit Applications; with Declaration of Beth A. Russo, dated July 22, 2010
- * City's Reply Memorandum in Support of Motion to Dismiss, dated August 6, 2010; with Second Declaration of James Weaver
- * City's Memorandum of Authorities in Response to Brief of Appellant Filed 06/21/10, dated August 6, 2010
- * Reply Brief of Appellant, dated August 13, 2010
- * Appellant's Reply on Cross Motion on Vesting of Permit Applications, dated August 13, 2010; with Declaration of Rick Engley³
- * Joint Request for Continuance of Hearing Date, dated August 26, 2010
- * City's Memorandum and Motion to Dismiss, Rules of Procedure – Rule 2.3.2, and for a Briefing Schedule to be established, dated October 11, 2010⁴
- * Appellant's Supplemental Brief (in response to PHO revised September 23, 2010), dated October 21, 2010
- * Appellant's Response to City's (Second) Motion to Dismiss, dated October 18, 2010; with Second Declaration of Beth A. Russo and documents marked as Exhibit A through Exhibit K
- * City Reply in Support of Motion to Dismiss, dated October 21, 2010; with Third Declaration of James Weaver and documents marked as Exhibit A through Exhibit C
- * City's Response to Issue Identified in Pre-Hearing Order dated 09/29/2010, dated October 21, 2010

¹ The Hearing Examiner received a letter from Attorney Murphy, with a copy to the Appellant, noting that the Appellant may be requesting leave to supplement their exhibit and witness list, dated June 14, 2010.

² The City notified the Appellant and the Hearing Examiner by letter dated July 23, 2010, that the City would not file a Brief on the Merits. The City stated that it would address the City's position in the City's response to Appellant's brief and the City's reply brief on its own Motion to Dismiss. *Letter from Jennifer A. Forbes to Hearing Examiner and Appellant, dated July 23, 2010.*

³ The Hearing Examiner received a letter from Attorney Forbes, dated August 16, 2010, with a copy to the Appellant, asking the Hearing Examiner to strike the Appellant's Reply on Cross Motion on Vesting of Permit Applications or provide the City an opportunity to provide a written response. In the alternative, the City requested that the Hearing Examiner schedule a telephonic hearing for oral arguments by the parties. The Hearing Examiner received a letter in response from Attorney Crittenden, with a copy to the Appellant, dated August 17, 2010, objecting to the City's request to strike and concurring that oral argument be held. The oral argument was held September 9, 2010.

⁴ The Hearing Examiner received a letter from Attorney Murphy, with a copy to the Appellant, objecting to the City's (Second) Motion to Dismiss, dated October 12, 2010. The Hearing Examiner received a letter from Attorney Forbes, with a copy to the Appellant, responding to Mr. Murphy's letter, dated October 12, 2010.

Hearing Examiner Orders

- * Pre-Hearing Order, dated April 27, 2010
- * Pre-Hearing Order, revised May 10, 2010
- * Order on Request to Amend Appeal, dated June 8, 2010
- * Notice of City's Motion to Dismiss, dated June 24, 2010
- * Order of Continuance, dated July 5, 2010
- * Response to Appellant's Request, dated July 29, 2010
- * Response to Joint Request for Oral Argument and Continuance of Hearing Date, dated August 27, 2010
- * Decision in Response to Motions, dated September 23, 2010
- * Pre-Hearing Order, revised September 23, 2010, with opportunity to submit additional briefs⁵
- * Pre-Hearing Order, clarification dated September 29, 2010
- * Notice of City's Second Motion to Dismiss, dated October 13, 2010
- * Decision on City's Second Motion to Dismiss, dated October 25, 2010

ISSUES ON APPEAL

Did the City err in denying the sign applications by making an Administrative Decision that off premise billboards within areas zoned for commercial purposes are not allowed?

Is the City's sign ordinance in effect at the time of application a violation of the Appellant's state and federal due process rights, a prior restraint on free speech or constitute a taking of property rights?

PREHEARING MOTIONS

On June 23, the City submitted its first motion to dismiss the appeal, asserting that the City's adoption of City Ordinance 011-10 on June 22, 2010, rendered the appeal moot. The Appellant filed a cross-motion arguing that the appeal was not moot because the sign permit applications vested prior to adoption of the ordinance. The Hearing Examiner issued a decision in response to the motions holding that the sign permit applications were complete by law and vested prior to the City's adoption of Ordinance 011-10. Therefore the appeal is not moot. *See Hearing Examiner's Response to Motions (September 23, 2010).*

On October 11, the City filed a second motion to dismiss the appeal asserting that the Hearing Examiner does not have jurisdiction to hear an appeal of a building permit. The Hearing Examiner issued a decision in response to the City's motion holding that the Hearing Examiner has jurisdiction to hold the appeal. *See Hearing Examiner's Response to City's (Second) Motion to Dismiss (October 25, 2010).*

⁵ The Hearing Examiner received a letter from Attorney Murphy requesting withdrawal of Hearing Examiner's request for additional briefs, dated September 27, 2010. The Hearing Examiner issued a PHO clarification on September 29, 2010.

FINDINGS

1. Gotcha Covered Media (Appellant) submitted five applications relevant to this appeal to the City of Port Orchard (City) for billboard construction dated March 24, 2010. The Appellant filled out a City "Construction Permit Application" form for each proposed billboard which contained a number of different boxes that could be checked, depending on the type of application sought.⁶ The Appellant checked the "Sign" box.⁷ The Appellant also sent a cover letter to the Port Orchard Building Department dated March 24, 2010, enclosing "6 written building permit applications for the erection of (6) back to back double sided, single pole billboards."⁸ *Exhibits A-2 through A-6; Exhibit C-1; Exhibit C-3; Exhibit C-5; Exhibit C-7; Exhibit C-9.*
2. The applications were marked received by the City of Port Orchard Planning Department. *Exhibits A-2 through A-6; Exhibit C-1; Exhibit C-3; Exhibit C-5; Exhibit C-7; Exhibit C-9.* Two applications for the construction of billboards were submitted on April 8, 2010, and an eighth application was submitted on April 15, 2010.⁹ These were also marked received by the City Planning Department. *Exhibit A-7; Exhibit A-8; Exhibit A-11; Exhibit C-11; Exhibit C-13; Exhibit C-32.*

⁶ The Appellant submitted Construction Permit Application forms with four different form revision dates: #10-00163 (Rev. 6/09, 3 pages); #10-00138, #10-00139, #10-00162 (Rev. 1/10, 3 pages); #10-00136, #10-00137, #10-00141 (Rev. 2/3/10, 2 pages); #10-00169 (Rev. 2/10/10, 2 pages). *Exhibit C-1.A; Exhibit C-3.A; Exhibit C-5.A; Exhibit C-7.A; Exhibit C-9.A; Exhibit C-11.A; Exhibit C-13.A; Exhibit C-32.A.*

⁷ The other options on the City's Construction Permit Application form to check were: Building, Plumbing, Mechanical, Excavation/Grading, Demolition, SDAP, and Other. *Exhibit A-2.*

⁸ The Appellant's initial March 24, 2010, letter references six building permit applications. However, only five of the six applications are relevant to this appeal.

⁹ The eight applications are referenced as follows:

- a) #10 00138; @1786 Mile Hill Drive; TPN 362401-2-093-2009. Application received March 25, 2010, and denied on April 7, 2010. *Exhibit C-5.A; Exhibit C-5.B; Exhibit C-19; Exhibit A-2.*
- b) #10 00136; @Lot 41, SE Sedgwick Road; TPN: 022301-4-041-2009. Application received March 25, 2010, and denied on April 7, 2010. *Exhibit C-1.A; Exhibit C-1.B; Exhibit C-17; Exhibit A-3.*
- c) #10 00139; @Lot 39, SE Sedgwick Road; TPN: 022301-4-039-2003. Application received March 25, 2010, and denied on April 7, 2010. *Exhibit C-7.A; Exhibit C-7.B; Exhibit C-20; Exhibit A-4.*
- d) #10 00141; @Lot 64, SE Sedgwick Road; TPN: 122301-2-064-2003. Application received March 25, 2010, and denied on April 7, 2010. *Exhibit C-9.A; Exhibit C-9.B; Exhibit C-21; Exhibit A-5.*
- e) #10 00137; @1353 Olney Ave., SE; TPN: 302402-3-047-2009. Application received March 25, 2010, and denied on April 7, 2010. *Exhibit C-3.A; Exhibit C-3.B; Exhibit C-18; Exhibit A-6.*
- f) #10 00163; @Lot 1, Sidney Road SW; TPN: 022301-3-001-2009. Application received April 8, 2010, and denied on April 13, 2010. *Exhibit C-13.A; Exhibit C-23; Exhibit A-7.*
- g) #10 00162; @Lot 7, Sidney Road SW; TPN 022301-3-007-2003. Application received April 8, 2010, and denied on April 13, 2010. *Exhibit C-11.A; Exhibit C-22; Exhibit A-8.*
- h) #10 00169; @1460 Sedgwick Road; TPN 11301-1-016-2005. Application received April 15, 2010, and denied on April 20, 2010. *Exhibit C-32.A; Exhibit C-34; Exhibit A-11.*

3. The City sent five letters to the Appellant, dated April 7, 2010, stating that “the submitted application is lacking additional site and building specification information that would be required for approve [sic] of such a structure at this site, if this application were allowed by Port Orchard Municipal Code. At this time, the allowance of the proposed Billboard Sign providing general advertising is not supported within the current sign code within the City limits.”¹⁰ The Construction Permit Application forms were hand noted: “Denied 4/7/10 KW see Attached” or “Denied 4/7/10 KW See Attached Letter.” See *Exhibits A-2 through A-6; Exhibits C-17 through C-21*.
4. The City’s initial March 31 response to the applications requested paperwork authorizing submittal on behalf of each property owner. This letter specifically referred to “Six Incomplete Billboard Sign Applications.” The City’s April 7 responses denying the applications state that additional site and building specification information was necessary. The City did not specify what site and building information was required. The City’s April letters did not use the term “incomplete” either in the letter title or in the body of the letters. Instead, the letters state the City’s determination that the proposed signs are not allowed under the code. The City’s April 7 letters were letters of denial, as were the identical City letters of April 13 and May 13, 2010. *Exhibits C-17 through C-23; Exhibit C-33*.
5. James Weaver, City Development Director, testified concerning his authority and interpretation of the City Sign Code in effect at the time of the applications. He testified that POMC 16.01.021(5) gives him code interpretation authority.¹¹ He testified that he does not agree with the Appellant’s argument that POMC 16.01.040(1), which allows billboards, requires him to ignore subsection (12), which prohibits off-premise signs. His interpretation of the code required him to deny the applications because the more stringent regulation applies. He testified that off-premise signs include outdoor advertising, by stating:

The definition of outdoor advertising is identical to billboards in 16.08.068. Thus, all billboards are outdoor advertising and off-premise signs which includes outdoor advertising. Therefore, off-premise signs by

¹⁰ All discussions of the Code refer to the Port Orchard Municipal Code revised in February of 2010. After the filing of the appeal, the City passed a moratorium on sign permits (Ordinance No. 010-10, adopted May 25, 2010), and subsequently revised the Code to create further restrictions on billboards within the City (Ordinance 011-10, adopted June 22, 2010). In response to pre-hearing motions, the Hearing Examiner ruled that the applications vested prior to the moratorium ordinance and subsequent code revision.

¹¹ The Hearing Examiner received a letter dated September 14, 2010, from Attorney Forbes stating that the City does not have a formal Code Interpretation process within its adopted code. She explained that POMC 16.01.021(5) vests the Development Director with the “responsibility of carrying out an official interpretation of the provisions of the shorelines regulations, comprehensive plans, and zoning code.”

definition and in my decisions include billboards and are expressly prohibited wherever off-premise signs are not permitted.

He testified that he had no alternative but to deny the applications and that the City Council confirmed his interpretation by revising the sign code (Ordinance 011-10).
Testimony of Mr. Weaver.

6. Katherine Woodside, Code Enforcement Official in the City Planning Department, testified about the application process. She testified that the applications could not be reviewed on their merits and were denied because the most restrictive code section did not allow off-premise signs. She testified that she sequentially numbers all applications. She testified that she assigned an application number in the application form under “BLDG PERMIT #” because there was no other place on the form. She testified that she assigned the Appellant a sign permit fee of \$50.00, not a building permit fee, and entered the fee on the application form under “BUILDING PERMIT FEE” because it was the best place to put it. She testified that the City did not assess the Appellant a building permit fee. *Exhibit C-13.A; Testimony of Ms. Woodside.*

CONCLUSIONS

Review Authority

The Hearing Examiner reviews the City’s decision to determine if it is clearly erroneous, after allowing for such deference as is due for the interpretation of a law by the agency with expertise. Under the clearly erroneous standard of review, the Hearing Examiner reviews the entire record in light of the policy set forth in the ordinance and reverses the decision only if he has definite and firm evidence that the City has improperly applied the law. *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751 (2002). When applying the clearly erroneous standard, the Hearing Examiner may not substitute his own judgment for the judgment of the City. *See Buechel v. Dept. of Ecology*, 125 Wn.2d 196, 202 (1994). The City’s interpretation of the code resulted in denial of the sign permit applications. The responsibility of the Hearing Examiner is to review the interpretation of the City to determine if an error was made.

The Appellant has the burden of proof to show that the City erred in its interpretation of the Code. The party appealing the decision bears the burden of demonstrating the invalidity of the City’s actions. The Hearing Examiner’s duty is to review the entire record before him and determine whether the Appellant has met this burden. *May v. Robertson*, 153 Wn. App. 57 (2009) (citing *Preserve Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 515 (2006)). *Id.*; *see also* RCW 34.05.570(3)(e).

Where ordinances are subject to more than one interpretation, there is ambiguity. Ambiguity may be resolved by looking to guidance from the ordinance or by reference to rules of construction. . *See, e.g., Estate of Haselwood v. Bremerton Ice Arena, In.*, 166 Wn.2d 489 (2009). Where ordinances are subject to conflicting interpretations, one must first look to

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definitions and rules of interpretation within the code. *HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wn.2d 451, 472 (2003). However, where an agency is charged with the administration and enforcement of a statute, the agency's interpretation of an ambiguous statute is accorded great weight in determining intent. *Waste Management v. WUMC*, 123 Wn.2d 621 (1994) (citing *Pasco v. Public Empl. Relations Comm'n*, 119 Wn.2d 504, 507 (1992)).

The Hearing Examiner must accord great weight to the City's interpretation of its own ordinances, especially when the administrator interpreting the code is the individual charged with this duty by the City Council. *Id.*; *see also*, RCW 36.70C.130 (1)(b). To properly review the City's interpretation, the Hearing Examiner must decide what facts are important to make a decision, determine those facts with reference to specific exhibits or testimony, draw conclusions from those facts, and make a decision based on those conclusions. *See Weyerhaeuser v. Pierce County*, 124 Wn.2d 26 (1994). The Hearing Examiner has stated the facts above with reference to exhibits and testimony, and draws conclusions from those facts as stated below.

Conclusions Based on Findings

- 1. The City's Code Interpretation was not clearly erroneous.** The City was tasked with deciphering conflicting and ambiguous sections of the municipal code. While different conclusions could have been reached, an analysis of the interpretation reveals that the City considered the entire ordinance to reach the conclusion that the signs are prohibited. The conclusions are based on a defensible analytical rationale. Therefore, the City's interpretation was not clearly erroneous.

When tasked with interpreting the regulations regarding signage within the City, the City first looked to POMC 16.65.110, the section of the Code regulating all commercial signs. It states that "In all commercial districts, the following regulations shall apply: (1) Billboards: See POMC 16.65.170 . . . (12) Off-premises signs: Not allowed."¹² As written, the language makes clear that billboards are governed by a separate provision of the code, whereas off-premise signs will not be permitted under any circumstances. Consequently, it was necessary for the City to determine whether the signs were "billboards" or "off-premise signs" by looking at the Code's definition of those terms. "Billboard" is defined as:

An outdoor advertising sign or poster panel which advertises products, businesses, and/or services not connected with the site on which the sign is located, and which sign is a substantial permanent structure with display services of a type which are customarily leased for commercial purposes. *POMC 16.08.528*.

¹² POMC 16.65.170, the section governing billboards, contains lengthy rules regarding billboard placement, size, material, and other restrictions.

“Off-premise sign” is defined as:

an outdoor advertising, informational, directional, or identification sign which relates to products, businesses, services, or premises not located on or otherwise directly associated with the site on which the sign is erected. *POMC 16.08.512.*

The City determined that both definitions could encompass the proposed signs. The City thus sought interpretation guidance from within the Code itself. There are two relevant provisions within the POMC that guide the City’s interpretation. POMC 16.01.040(1) states that “regulations, conditions or procedural requirements that are specific to an individual land use shall supersede regulations, conditions, or procedural requirements of general application.” POMC 16.01.040(5) states that, “If two or more code sections dealing with the same subject matter pertain to a specific parcel of property, then the most stringent or specific provisions shall control...” The City concluded that, because the “off-premise sign” restrictions were more stringent, they should control under the directive of POMC 16.01.040(5). Thus, the City denied the applications citing to the more stringent restrictions of POMC 16.65.170(12). *Findings 5, 6.*

Attorney Crittenden, representing the Appellant, argued that the City erroneously interpreted the sign code. He notes that the interpretation renders the billboard section of the sign code superfluous. Under the City’s interpretation of the Code, billboards are effectively banned in the City and thus there would be no need for a section on billboards. He argued that the City’s interpretation of “off-premise sign” to include billboards is unreasonable because the definition does not need to be read to include billboards but could be given a less encompassing interpretation, such that billboards could be allowed.

In response, City Attorney Forbes argued that the only issue in the case is whether or not a billboard is an “off-premise sign” under the definitions contained within the Code. The City interpreted the code to determine that it is, and therefore denied the applications. The City argued that even if a billboard could fall under a different definition of the code, the City must apply the most stringent or specific provisions of the Code as directed in POMC 16.01.040(5). Therefore, the City’s only option was to determine that the proposed signs were “off-premise signs.”

While other conclusions could have been reached, the City’s interpretation is based upon a defensible analytical rationale and therefore is not clearly erroneous. Although reasonable minds may differ as to the appropriate interpretation, it is not the role of the Hearing Examiner to substitute his interpretation for that of the City when the City’s interpretation is not clearly erroneous. *Citizens For A Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 442, *review denied*, 120 Wn.2d 1020 (1992).

2. **Constitutional issues need not be addressed.** Throughout the appeal, the Appellant argued that because the City's interpretation of its code effectively bans billboards it is unconstitutional as a violation of the First Amendment. In his first Pre-Hearing Order, the Hearing Examiner responded to this constitutional argument by noting that that the City Council does not authorize the Hearing Examiner to hear or decide First Amendment issues¹³ and that the sole issue of the open record appeal hearing is whether the City's denials were valid under the law in effect at the time of the sign permit applications. The Appellant has reserved his constitutional issues for appeal should he choose to do so. In an appeal of an administrative decision, rules of jurisprudence dictate that the Hearing Examiner avoid reaching any constitutional issues when he is able to decide on non-constitutional grounds. *HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wn.2d 451, 469 (2003); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, (2002); *Brunson v. Pierce County*, 149 Wn. App. 855, 862 (2009).¹⁴ The issue before the Hearing Examiner is whether the City Planner properly interpreted the municipal code when deciding to deny the Appellant's applications for new signs within the City. The Hearing Examiner concludes that the City did not act in a clearly erroneous manner, and the City's decision is therefore upheld.

DECISION

The appeal of the denial of eight sign applications is **DENIED**. The City's interpretation of its code is upheld, as it was not clearly erroneous but relied upon a defensible analytical rationale.

Decided this 9th day of November 2010



THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center

¹³ POMC 2.76.080 (1).

¹⁴ While the Hearing Examiner will not address constitutional issues, it should be noted that a heavy burden rests upon the party challenging the constitutionality of an ordinance, and "every presumption will be in favor of constitutionality." *HJS Development*, 148 Wn.2d at 477 (2003) (citing *Winkenwerder v. City of Yakima*, 52 Wn.2d 617 (1958)). An appellant who challenges the constitutionality of a legislative enactment must establish invalidity of the statute. *In re Recall of Telford*, 166 Wn.2d 148,159 (2009) (citing *Hontz v. State*, 105 Wn.2d 302, 306, 714 P.2d 1176 (1986)).