

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672

11189 SENATE JUDICIARY



U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
ALASKA DIVISION
709 West Ninth Street, Room 851
P.O. Box 21648
Juneau, Alaska 99802
907-586-7418 | 907-586-7420 FAX

April 21, 2003

REFER TO
HDA-AK
File #: ROW 12

Representative Jim Holm
District 9
State Capitol Building
Juneau, Alaska 99801

SUBJECT: Alaska House Bill 230 on Political Signs on Private Property

Dear Representative Holm:

In your letter of April 5, 2003, you asked if the new Alaska law amending Section 19.25.105(a) of the Alaska Statute would be considered by the Federal Highway Administration (FHWA) as a violation of the Highway Beautification Act (HBA) and subject to the penalty provision for lack of "effective control." In response to your question, the U.S. Department of Transportation does have the authority to impose a 10% penalty on Federal-aid funding if we determine that the State was in noncompliance with the HBA. The amendment you have proposed to the Alaska Statute provides an exemption from the general prohibition against signs along the Interstate, Primary or Secondary highways in Alaska. The exemption would apply only to "political signs on private property" if: "(1) individual signs do not exceed 32 square feet; (2) signs are not on a permanent base; and (3) no person receives compensation for displaying the signs."

The FHWA does not believe that such signs violate the HBA as long as the signs covered by this exemption would be temporary, relatively small, do not create a hazard to the traveling public, and are related to public elections. The First Amendment of the Constitution of the United States protects the right of landowners to free speech through signs. The most recent Supreme Court case on residential signs, City Ladue v. Gilleo, 114 S.Ct. 2038 (1994), held that residential signs expressing political, religious, or personal messages, were an important and distinct medium of expression that deserved protection. The Supreme Court did note that signs displayed for a fee or off-site commercial advertisements could probably be treated differently. The proposed change to Alaska law does not limit election signs to residences, only to private property, and does not specifically state that the signs must be temporary in nature. In addition, the signs must only relate to a public election and should not pose an opportunity for indirect commercial advertising. Despite these concerns, the FHWA does not believe that the proposed changes to Alaska law would violate the HBA. However, we would encourage that you coordinate with the Alaska Department of Transportation and Public Facilities (ADOT&PF) to ensure that if any problems arise as a result of changes to existing State Statute that the ADOT&PF's implementing sign regulations can resolve the issue.

I hope that this addresses the issues you raised in your letter of April 5, 2003. If you have any other inquiries regarding the HBA please contact Mr. Tim Haugh of the FHWA Alaska Division at (907) 586-7418.

Sincerely,

A handwritten signature in black ink that reads "D.C. Miller". The signature is written in a cursive style with a large, looped initial "D".

David C. Miller
Division Administrator

cc: Mike Barton, Commissioner, ADOT&PF
Mike Downing, Chief Engineer, ADOT&PF
Dennis Poshard, ADOT&PF
Rick Kauzlarich, ADOT&PF
Kurt Smith, ADOT&PF
Lance Hanf, Attorney-Advisor, FHWA, HCC-WE

COURT CASES ATTACHED

1. U.S. Supreme Court (for free speech)
2. Missouri (U.S. District Court) Whitton v. City of Gladstone, Missouri (for free speech)
3. Michigan (U.S. District Court) Dimas v. City of Warren (for free speech)
4. Oregon, Van v. Travel Information Council (for free speech)
5. California (U.S. District Court) City of Antioch v. Candidates' outdoor Graphics Service (for free speech)
6. Washington, Collier v. The City of Tacoma (for free speech)
7. Colorado, Pigg v. State Department of Highways (against free speech)



Supreme Court Files

Freedom of Speech ♦ 93-94 Term

CASE SUMMARY

Case Name: *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994)

Date Decided: June 13, 1994

Issue: Freedom of Speech -- Whether the government may constitutionally prohibit homeowners from displaying virtually all signs on their property.

Vote: No, 9-0

Facts: An ordinance in Ladue, Missouri, prohibited homeowners from displaying all signs on their property except residence identification signs, "for sale" signs, and signs warning of safety hazards. A homeowner displayed a letter-sized sign stating "For Peace in the Gulf" and challenged the constitutionality of the ordinance. The district and appellate courts held that the ordinance violated the First Amendment.

Legal Principles at Issue: While governments may regulate the physical characteristics of signs, they may not allow some signs and ban others based upon their content. Nor may governments ban all signs and foreclose an important form of communication. *Metromedia v. San Diego*, 453 U.S. 490 (1981).

Legal Basis for Decision: The Court agreed, holding that although the government may regulate the physical characteristics of signs, the First Amendment prohibits content-based regulation. Ladue's ordinance was simply too broad and it effectively eliminated one avenue of speech.

This Case is Important Because: The Court refused to accept the aesthetic justifications for the ordinance offered by Ladue and reaffirmed an individual's right to speak freely in his home.

Quotable: "Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."

Writing for the Majority: Justice Stevens

Voting with the Majority: Chief Justice Rehnquist, Justices Blackmun, Scalia, Kennedy, Souter, Thomas, and Ginsburg (Justice O'Connor concurring)

LEXSEE 832 f supp 1329

LARRY WHITTON, Plaintiff v. THE CITY OF GLADSTONE, MISSOURI,
Defendant

No. 92-0848-CV-W-1

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
MISSOURI, WESTERN DIVISION

832 F. Supp. 1329; 1993 U.S. Dist. LEXIS 13026

September 17, 1993, Decided

September 17, 1993, Filed

SUBSEQUENT HISTORY:

As Corrected September 21, 1993.

COUNSEL:

[**1] For plaintiff: W. Joseph Hatley, Cooperating Attorney, ACLU of Kansas and Western MO, Overland Park, KS. William C. Odle, Cooperating Attorney, ACLU of Kansas and Western MO, Kansas City, Missouri.

For defendant: Linda Salfrank, Swanson, Midgley, Kansas City, MO.

JUDGES:

WHIPPLE

OPINIONBY:

DEAN WHIPPLE

OPINION:

[*1330] ORDER

There are cross motions for summary judgment before the court. The court will grant plaintiff's motion and deny defendant's motion for the reasons stated below.

I. Background

Plaintiff Larry Whitton asks this court to hold that certain provisions of the City of Gladstone's (Gladstone) Sign Ordinance violate the United States Constitution's First and Fourteenth Amendments. Whitton lives in Gladstone and also owns a business there. Whitton

contends that the Sign Ordinance unconstitutionally hampers his ability to use his residential and commercial property in running and assisting others in running for political office.

Whitton's original complaint challenged the constitutionality of the Sign Ordinance's (1) fifteen-day durational limitation [**2] on the posting of political signs prior to an election; (2) five-day removal requirement of political signs after an election; (3) regulation of the number of political signs that could be placed in each residential or commercial lot and (4) regulation of external illumination of political signs. Whitton, at the same time he filed the complaint, also asked the court for a Temporary [*1331] Restraining Order (TRO) and a Preliminary Injunction to allow him to post political signs that promote his candidacy for sheriff of Gladstone in violation of the Sign Ordinance.

The day before the court held a hearing on the TRO and the Preliminary Injunction, Gladstone repealed the Sign Ordinance and enacted a new one. The New Sign Ordinance removes the provision which limited the placement of all political signs to one sign per candidate or issue per residential or commercial lot, restricts the total allowable square footage sign space per lot, extends the pre-election posting of signs from fifteen days to thirty days, extends the removal requirement from five to seven days and adds a section explaining the legislative purpose of the New Sign Ordinance. The New Sign Ordinance does not differ from the [**3] previous ordinance in any other respect. The court, at the TRO and Preliminary Injunction hearing, ruled in Gladstone's favor finding that Whitton failed to show he would suffer

irreparable harm if the city enforced the New Sign Ordinance.

n1 Section 25-8 of the New Sign Ordinance defines political signs as: "Any sign promoting, supporting, or opposing any candidate, office, issue or proposition to be voted upon at any public election."

Whitton now challenges the constitutionality of § 25-45, 25-46 and 25-47(b) of the New Sign Ordinance. Although the election is over, Whitton states that he plans to run for other offices in the future. n2 The relevant part of § 25-45 prohibits a residential or commercial owner from placing a political sign on his or her property more than thirty days before an election to which the sign pertains. n3 The section also requires that the sign be removed within seven days after the election. Section 25-47(b) makes the owner of the property, the candidate and the chairperson of a political [**4] committee responsible for removing the signs. Section 25-46 prohibits the illumination of all political signs.

n2 Thus, the case is not moot because it involves issues "capable of repetition, yet evading review." *Moore v. Ogilvie* 394 U.S. 814, 816, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969) (citation omitted).

n3 Section 25-45 entitled, "Restriction of political signs within zones," reads:

A. Political signs located in an area zoned for residential use shall not exceed two (2) feet by two (2) feet on each side. In residential areas exposed political sign face shall not exceed an aggregate gross surface area of sixty-four (64) square feet per lot. No sign within such area shall be placed or erected more than thirty (30) days prior to the election to which such sign pertains and such sign shall be removed within seven (7) days after such election.

B. Political signs located in an area zoned for industrial or commercial use shall not exceed thirty-two (32) square feet in total and shall not have any side greater than eight (8) linear feet. In industrial and commercial areas exposed political sign face shall not exceed an aggregate gross surface area of five hundred twelve (512) square feet per lot. No sign within such area shall be placed or erected more than thirty (30) days prior

to the election to which such sign pertains and such sign shall be removed within seven (7) days after such election.

[**5]

III. Motion for Summary Judgment

A. Summary Judgment Standard

A movant is entitled to summary judgment under Fed. R. Civ. P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Thus, the moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great Nat'l Corp.*, 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party and the non-moving party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991) (citation omitted). If the moving party meets its burden of proof, the burden shifts to the non-moving party who must set forth specific facts showing that there is a genuine issue for trial to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) [**6]

[*1332] The two requirements of Rule 56(c) are that there be (1) no genuine issue of (2) material fact. The United States Supreme Court explains that to establish a genuine issue of fact sufficient to warrant trial, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). If a rational trier of fact considering the record as a whole could not find in favor of the non-moving party, then a trial is unnecessary. *Id.* Substantive law identifies which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. In assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a). *Id.* at 250. [**7]

Finally, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986), the Supreme Court concluded by encouraging the use of summary judgment in appropriate cases: "Summary judgment

procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Id.* at 327 (citations omitted). See also, *City of Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988) ("The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, free courts' trial time for those cases that really do raise genuine issues of material fact."). However, a court should always be mindful that summary judgment is an extreme remedy. *Inland Oil & Transp. Co. v. United States*, 600 F.2d 725, 727 (8th Cir.), cert. denied, 444 U.S. 991 (1979).

The parties agree that there are no genuine issues of material fact for a trier of fact to resolve. [**8] The present case is thus an appropriate one for the court to decide on a motion for summary judgment.

B. Durational Limitations and Removal Requirements

"Congress shall make no law ... abridging the freedom of speech " U.S. Const. amend. I. The Fourteenth Amendment, of course, secures the freedom of speech against states as well. *Burson v. Freeman*, 504 U.S. , 112 S. Ct. 1846, 119 L. Ed. 2d 5, 12 (1992)

Section 25-45 of the New Sign Ordinance prohibits a residential or commercial owner from placing a political sign on his or her property more than thirty days before an election to which the sign pertains and requires the sign be removed within seven days of the election. Section 25-45, in essence, constitutes a complete ban on posting political signs which is temporarily lifted thirty days before an election and reinstated after an election takes place. *City of Antioch v. Candidates' Outdoor Graphic Serv.*, 557 F. Supp. 52, 55 (ND. Cal. 1982). The posting of political signs constitutes speech. *Arlington County Republican Comm. v. Arlington County*, 983 F.2d 587, 593-94 (4th Cir. 1993); [**9] *Baldwin v. Redwood City*, 540 F.2d 1360, 1366 (9th Cir. 1976), cert. denied, 431 U.S. 913, 97 S. Ct. 2173, 53 L. Ed. 2d 223 (1977). Section 25-45 burdens speech, thus the next issue is which test the court should use in analyzing the constitutionality of § 25-45.

1. The Appropriate Test for Analyzing Section 25-45

Gladstone argues that the appropriate test for analyzing the constitutionality of § 25-45 is the time, place and manner test. A time, place or manner test is appropriate if the restrictions are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental

interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-violence*, [**1333] 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)

The court cannot use the time, place and manner test in analyzing the thirty-day durational limitation and the seven-day removal requirement if Gladstone regulates speech on the basis of its [**10] content. A plurality of the Supreme Court in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), articulated two tests it uses to determine if a restriction is content-based. Although the Supreme Court was sharply divided, it did not divide on the issue of what constitutes a content-based regulation. The first test is whether Gladstone gives commercial speech a greater degree of protection than noncommercial speech. If it does then the New Sign Ordinance is content-based and the court cannot analyze the thirty-day durational limitation and the seven-day removal requirement under a time, place and manner standard. *Id.* at 513. The second test is whether the section "distinguishes ... between permissible and impermissible signs ... by reference to their content." *Id.* at 516.

Section 25-45 fails both tests and is thus, not content-neutral. First, Gladstone favors commercial speech over noncommercial speech. Gladstone argues that it favors noncommercial speech [**11] over commercial speech because some commercial signs are subject to application, permit, fee or insurance requirements, but political signs are not. Gladstone does require some commercial signs to undergo several requirements that political signs do not. However, in residential areas, a homeowner may post a "For Sale" or "For Rent" sign indefinitely and post a construction sign for up to ninety days prior to construction without having to meet the application, permit, fee or insurance requirements. A homeowner may also post a sign advertising a garage sale although the parties have not provided the court with information as to whether such signs must meet any administrative requirements. Further, as discussed earlier, § 25-45 imposes a ban on political speech except during the thirty-day period before the election while allowing commercial owners to post permanent signs indefinitely. The New Sign Ordinance, thus does treat some commercial signs more favorably than political signs. In regards to removal, the political sign must be removed within seven days of the election, but a construction sign may remain standing an additional three days, or a total of ten days.

Second, assuming [**12] that the New Sign Ordinance does not treat commercial signs more favorably than noncommercial signs, § 25-45 distinguishes between permissible and impermissible signs on the basis of the signs' content. The Supreme

Court recently determined that prohibiting newsracks that distribute handbills, but not newspapers regulates on the basis of content. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. , 113 S. Ct. 1505, 123 L. Ed. 2d 99, 115-17 (1993). There the Supreme Court found that the city did not regulate on the basis of any hostility toward a particular viewpoint, but recognized that "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.'" *Id.* at 116. Similarly, in the present case, a sign that reads "For Sale" thirty days before an election is permissible, but one that reads "Vote for Whitton" is not. What distinguishes between a permissible and an impermissible sign rests upon the content of the sign. Section 25-45, [**13] is content-based under any "commonsense understanding of the term." *Id.*

Further, a political sign that states "Whitton is Honest" or "Pro-Choice" is impermissible if an election on the candidate or issue is not pending, n4 but is permissible if an election [**1334] is pending within thirty-days from the posting of the signs. Again, what distinguishes between an impermissible and a permissible sign rests upon the content of the sign. See, *Burson*, 119 L. Ed. 2d at 13 ("Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign.).

n4 There is some confusion as to whether the ordinance prohibits a homeowner or a business from posting a sign advocating, for example, a position on abortion. Whether the New Sign Ordinance bans such speech does not change the court's analysis, the court discusses this issue only to discuss a possible contradiction within the ordinance.

Stuart Borders, who interprets and enforces the New Sign Ordinance for Gladstone, testified in deposition that the New Sign Ordinance allows a homeowner to post a sign advocating a position on abortion even though it is not an issue to be voted on within thirty days. If Mr. Border's reading of the New Sign Ordinance is correct, Whitton could post a sign advocating a position on abortion all year long, regardless of whether abortion is an issue the voters will decide in an upcoming election or not. This reading conflicts with § 25-45, because if abortion is an issue the voters will decide in an election, Whitton may not post a sign advocating a position on abortion until

thirty days before the election and he must remove the sign within seven-days after the election. Mr. Borders' reading would make the New Sign Ordinance impermissibly vague. E.g., *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)

This reading also conflicts with the language of the New Sign Ordinance. The only permanent signs allowed in residential areas are name plate signs, real estate signs, church signs, construction signs, subdivision development signs, subdivision entrance signs and in some residential areas, ground signs. § 25-28. Gladstone also prohibits temporary signs in residential areas. § 25-39. The city does allow political signs as discussed in this Order, but political signs do not include general ideological speech under the New Sign Ordinance. Political signs include only signs that promote a "candidate, office, issue or proposition to be voted upon at any public election." § 25-8.

[**14]

Gladstone points to language in *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989), for its argument that § 25-45 is content-neutral. The Ward Court stated that the "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 791. Gladstone argues it did not adopt § 25-45 because of any disagreement with the message the political signs convey thus, § 25-45 is content-neutral. In short, Gladstone argues that because it did not adopt the section to suppress a particular viewpoint, § 25-45 is content-neutral. The court accepts that Gladstone did not adopt § 25-45 because of a dislike of a particular viewpoint, but § 25-45 still prohibits the posting of political signs that pertain to an election more than thirty days before the election. Recently, the Supreme Court held that "content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of [**15] an entire topic." *Burson*, 119 L. Ed. 2d at 13. Likewise, the Supreme Court held that a ban on utility bill inserts discussing controversial issues of public policy such as nuclear power is not content-neutral even though the ban suppressed all points of view of an issue. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537-44, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980)

The Supreme Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), also does not help Gladstone. There, the ordinance prohibited adult movie theaters from locating

n5 The city recognizes this because § 25-45 limits the square footage of signs in residential areas to 64 square feet per lot and in commercial areas to 512 square feet per lot.

[**21]

Regarding the seven-day removal requirement, Whitton's interest in maintaining signs promoting his candidacy declines greatly after the election. *Baldwin*, 540 F.2d at 1374-75 (dicta). As discussed above, however, Gladstone does not have a content-neutral, post-event removal restriction. Instead, Gladstone allows signs such as construction signs to remain longer than political signs. Gladstone does not offer any justification for such a distinction. Again, the Supreme Court agrees that aesthetics and traffic safety are significant interests, but they are not compelling even though Whitton has less an interest in maintaining the signs after the election. Further, Gladstone did not narrowly tailor the restriction. Without offering any justification for treating the signs differently, Gladstone allows construction signs to remain ten days after the construction is completed and real estate signs to remain indefinitely while allowing political signs to remain only seven days after the election. While a content-neutral restriction on post-event removal of signs might survive constitutional scrutiny, n6 the present content-based restriction on speech does [**22] not.

n6 Theodore Y. Blumoff, *After Metromedia: Sign Controls and the First Amendment*, 28 *St. Louis U. L. J.* 171, 195 (1984).

The facts in the present case are not those that can support content-based restrictions. In *Burson*, the Supreme Court upheld a statute that prohibited the solicitation of votes within 100 feet of a polling place even though the statute regulated on the basis of the content of the speech. *Burson*, 119 L. Ed. 2d at 22. The Supreme Court recognized that rarely will a content-based restriction on freedom of speech survive, but held that given the compelling interest in protecting the political process, the restriction on the freedom of speech was narrowly tailored. *Id.* at 14-22. The present case differs fundamentally from *Burson*. In the present case, the interests in traffic safety and aesthetics are significant, but they pale in comparison to an interest in protecting the political process which is one of the [**23] most vital rights an individual has in a democratic society. *Id.* at 14. The 100-foot restriction on soliciting votes on the day of an election also differs

considerably from Gladstone's ban on political speech that is lifted only for thirty days before an election and is reinstated seven days after the election. In short, the present case is not one of those rare cases that survives strict scrutiny.

2. Section 25-45 Fails Time, Place and Manner

Even assuming § 25-45 does not regulate speech on the basis of content, the thirty-day durational requirement would still fail the time, place and manner test. Again, a time, place or manner test requires that Gladstone narrowly tailor significant interests and that the restrictions "leave open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293. Gladstone's interests in traffic safety and aesthetics are significant thus, the only remaining issues are whether Gladstone narrowly tailored its restrictions to achieve these interests and whether Gladstone left alternative channels for communicating the information.

Gladstone did not narrowly [**24] tailor the thirty-day durational requirement to achieve its interests in traffic safety and aesthetics. The court does not require Gladstone to follow the least restrictive approach to meet its interests, rather, Gladstone must make sure its restrictions are narrowly tailored. The court in *Antioch* held that an ordinance [**1337] which prohibited political signs except for a sixty-day period before the election to which the signs pertain is unconstitutional. *Antioch*, 557 F. Supp. at 61. There, the court noted that "Instead of a general ban, the City might regulate the size, design, and construction of the posters" *Id.* at 60-61. Gladstone could do the same. First, the city could regulate the construction and design of the signs. Second, the city could limit the square feet of signs on any one lot. Third, if Gladstone does not believe that its existing ordinances regulating the condition of signs is sufficient, it could limit the duration of time a temporary political sign can remain before the candidate or committee must remove or replace the sign.

Gladstone also does not leave open adequate channels of communication. [**25] Even ignoring the importance of permanent political signs, temporary political signs offer:

special advantages to the candidate seeking public office and to the advocate promoting a particular position on a state ballot measure. These signs are relatively inexpensive means of campaigning. Their use can be localized so that certain areas which the advocate wishes especially to reach may be targeted. A candidate or partisan can use the temporary sign to place a name or an issue before the public.

City of Antioch, 557 F. Supp. at 59. n7 Thus, the restrictions do not leave open ample alternatives to Whitton the candidate or to the committee advocating an issue for vote. Further, the restrictions do not leave open ample alternative to Whitton the homeowner to post signs promoting the candidates or issues he favors. The Vincent Court held the ban on posting political signs on public property was constitutional partly because one could still "exercise the right to speech and to distribute literature in the same place where the posting of signs on public property is prohibited." *Vincent*, 466 U.S. at 812. [**26] In the present case, Whitton the homeowner does not have such an alternative on his property. Thus, not only does § 25-45 fail to leave open other alternatives to Whitton the candidate, it also fails to do so for Whitton the homeowner.

n7 Gladstone offers an affidavit that questions the effectiveness of temporary political signs, however, courts generally recognize the unique advantages that temporary political signs have over other alternatives such as canvassing, radio and television. E.g., *Baldwin*, 540 F.2d at 1368 (Political posters have unique advantages and are less expensive than most other alternatives.); *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 16 (1st Cir. 1980) (same), aff'd, 453 U.S. 916, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981).

The thirty-day durational requirement and seven-day removal requirements of § 25-45 do not pass strict scrutiny and to that extent, § 25-45 is unconstitutional. [**27] The thirty-day durational requirement of § 25-45 also does not pass time, place and manner scrutiny and is therefore unconstitutional for that reason as well. The only remaining provision of the New Sign Ordinance in dispute concerns illumination.

C. Illumination

Whitton wishes to erect a permanent ground sign to advertise his business and to also use the sign to promote political candidates. Reading § 25-17 and 25-38 together, one may externally illuminate a permanent sign thirty square feet in area or less unless another section states otherwise. Section 25-46 states that "no political sign in any area of any zoned use may be lit by external sources with the sole purpose to light said sign." Thus, Whitton may erect an externally illuminated commercial sign no greater than thirty square feet in area or less on his commercial property, but not one that promotes his candidacy for office. As the court discussed earlier, such

a restriction regulates speech on the basis of its content and will not withstand constitutional scrutiny in the present case. Thus, to the extent that Gladstone allows a business to externally illuminate commercial signs on its property, Gladstone must also [**28] allow the business to externally illuminate political signs.

The New Sign Ordinance does not provide for external illumination of any sign on residential property, thus prohibiting external illumination of political signs on residential property does not regulate on the basis of content. The ban on external illumination, but still allowing internal illumination, is narrowly [*1338] tailored to meet Gladstone's interests in traffic safety and aesthetics. Also, a ban on external illumination in residential areas still leaves open ample alternative channels for communicating Whitton's political messages. The court refuses to strike any provision that prohibits the external illumination of signs in residential property.

III. Conclusion

It is therefore ORDERED that § 25-45 of the New Sign Ordinance is UNCONSTITUTIONAL to the extent that it prohibits political signs more than thirty days before an election. It is further

ORDERED that § 25-45 of the New Sign Ordinance is UNCONSTITUTIONAL to the extent that it requires removal of political signs within seven days after an election. It is further

ORDERED that the City of Gladstone is ENJOINED from enforcing the seven-day removal requirement in [**29] § 25-45 of the New Sign Ordinance. It is further

ORDERED that § 25-46 of the New Sign Ordinance is UNCONSTITUTIONAL to the extent that it allows a business to externally illuminate signs on its property promoting its business, but does not allow a business to externally illuminate similar signs that promote a political candidate or political issue. It is further

ORDERED that the City of Gladstone is ENJOINED from enforcing § 25-46 to the extent that it allows a business to externally illuminate signs on its property promoting its business, but does not allow a business to externally illuminate similar signs that promote a political candidate or political issue

DEAN WHIPPLE

UNITED STATES DISTRICT JUDGE

DATED: September 17, 1993

LEXSEE 939 f supp 554

GEORGE DIMAS, et al., Plaintiffs, -vs- CITY OF WARREN, Defendant.

Civil Action No.: 95-73396

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

939 F. Supp. 554; 1996 U.S. Dist. LEXIS 13899

August 15, 1996, FILED

DISPOSITION:

[**1] Plaintiff's motion for summary judgment is GRANTED.

COUNSEL:

For GEORGE L. DIMAS, Council Secretary for the City of Warren, RON ROBINSON, JOAN GREIF, CECELLA A. STEVENS, DENNIS BUCHHOLTZ, DOUGLAS A. COX, MARGARET ERMILER, ROBERT RUDDER, plaintiffs: Michael J. Haddad, Goodman, Eden, Detroit, MI. Paul J. Denefeld, ACLU Fund of Michigan, Detroit, MI.

For WARREN, CITY OF, defendant: Matthew A. Seward, Rosalind H. Rochkind, Robert J. Squiers, Jr., Garan, Lucow, Detroit, MI. John J. Gillooly, Garan, Lucow, Detroit, MI. George G. Constance, Warren City Legal Department, Warren, MI.

JUDGES:

ANNA DIGGS TAYLOR, UNITED STATES DISTRICT JUDGE

OPINION BY:

ANNA DIGGS TAYLOR

OPINION:

[*555] MEMORANDUM OPINION AND ORDER

This matter is before the Court on Plaintiffs' motion for summary judgment pursuant to Fed.R.Civ.P. 56. The Court, having heard oral arguments and considered the memoranda submitted by the parties, finds that the City of Warren's ordinance regulating political election signs violates the First and Fourteenth Amendments of the United States Constitution. For the following reasons, Plaintiffs' motion for summary judgment is GRANTED.

BACKGROUND

In 1991, the City of Warren enacted a "Political [**2] Signs" ordinance which prohibited property owners from posting political election signs in their yard "before fifteen (15) days prior to any primary, school or special election." Violators of the ordinance were to be punished with fines "not to exceed one hundred dollars." n1

n1 Chapter 31, § 31-20, Political Signs, states, in relevant part:

(a) No candidate for political office shall allow any of his or her political signs to be erected or posted before fifteen (15) days prior to any primary, school or special election.

(b) All candidates for political office shall remove their political sign within one (1) week after the primary, school or special election. If any candidate for an office is nominated in the primary election, he or she shall be allowed to have his or her political signs remain until one (1) week after the general election.

(j) A violation of this section shall be punishable as a civil infraction with fines not to exceed one hundred dollars (\$ 100.00).

In August 1995, after [**3] absentee ballots had been distributed, but before the permissible time in which to post election signs commenced, residents began displaying their support for various candidates by posting such law signs. The City of Warren responded by sending "warning notice[s]" to the residents informing them of the ordinance and telling them to remove the signs within 72 hours or further court action would be taken. Plaintiffs herein complied with the notice and subsequently filed this lawsuit pursuant 42 § 1883, alleging that such an ordinance violates their constitutional rights under the First and Fourteenth Amendments of the United States Constitution.

On the same day that the lawsuit was filed, the City of Warren amended the ordinance to permit posting of

election signs up to forty-five days prior to an election, replacing the original fifteen day provision. n2

n2 The amended provision states,

(a) No candidate for a political office shall allow any of his or her political signs to be erected or posted before forty-five (45) days prior to any primary, school, or special election.

[**4]

On March 26, 1996, the City of Warren enacted an "Ordinance amending Appendix A of the Code of Ordinances of the City of [*556] Warren relating to Zoning." n3 The new appendix, like the previously amended ordinance, also provides that election signs may only be posted forty-five days prior to an election. Moreover, the appendix also states that only one sign per candidate, and per issue may be posted for each residential property. Violators were subjected to potential sentences including a fine of up to \$500.00, imprisonment for a term not to exceed 90 days, or both. n4

n3 Sec. 4A-13 of the amended appendix states, in relevant part:

Election signs. Temporary election signs may be erected forty-five (45) days prior to the primary election date and shall be removed in accordance with section 4A-26(c). Temporary election signs shall be allowed as follows:

one non-illuminated election sign per candidate and per issue is allowed for each lot frontage; those located along a major thoroughfare or collector road shall not exceed sixteen (16) square feet per sign; and if located along a local residential street shall not exceed for (4) square feet per sign.

i) Opinion signs. One opinion sign per residence shall be allowed in residential areas, excluding election signs which are otherwise regulated in this ordinance. The sign shall be located in the front yard set back and shall not exceed four (4) square feet in sign area.

[**5]

n4 Section 4A-66 states:

The violation of any provision of this Article by any person shall, upon conviction, be punished by a fine not exceeding five hundred dollars (\$ 500.00) or imprisonment for a term not exceeding ninety (90) days, or both.

STANDARD OF REVIEW

Summary judgment must be granted when the moving party demonstrates that there is no genuine dispute as to

any material fact, and that the undisputed facts of record require that judgment enter, as a matter of law, for the movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A party opposing a summary judgment motion must show more than "metaphysical doubt" as to the material facts. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1990). "A dispute about a material fact is 'genuine' only if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Elvis Presley Enterprises v. Elvisly Yours, Inc.*, 936 F.2d 889 (6th Cir. 1991) (quoting *Anderson*, 477 U.S. at 248.) To survive a motion for summary judgment, [**6] the non-movant must demonstrate that there is some dispute of fact as to "an element essential to that party's case, and on which that party will bear the burden of proof at trial" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The "burden on the moving party may be discharged by ... pointing out to the district court ... that there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In making such a determination, this court will examine any evidence in a light most favorable to the non-moving party. *Boyd v. Ford Motor Company*, 948 F.2d 283, 285 (6th Cir. 1991).

The elements of a claim under 42 U.S.C. § 1983 are that the conduct complained of (1) was committed by a person acting under color of state law and (2) such person deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parrish v. Taylor*, 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981). "Absent either element, a section 1983 claim will not lie." *Christy v. Randlett*, 932 F.2d 502, 504 (6th Cir. [**7] 1991).

ANALYSIS

Plaintiffs maintain that the City of Warren's ordinance is unconstitutional because it 1) limits the number of election and opinion signs a resident may place on his or her property, and 2) restricts the time within which such signs may be displayed. Plaintiffs argue that the ordinance burdens free speech and is an unconstitutional restriction on the time, place, and manner of speech.

This Court agrees. The Political Signs ordinance, in effect, imposes a year-round [*557] ban on political sign posting. The ban is temporarily suspended for forty-five days prior to an election and is reinstated one week after the election has taken place. The ordinance, in essence, provides candidates and their supporters with forty-five days to reach potential voters via temporary political sign posting. Clearly, such an ordinance imposes a significant burden on free speech.

While it is true that the Supreme Court has held that signs are a form of expression which is subject to municipal police powers, because such regulations inevitably burden communication itself, any regulation on the time, place, and manner of speech is permissible only if it advances a significant government **[**8]** interest, is justified without reference to the content of the speech, and leaves open ample alternative channels for communication of the information. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981). In the case at bar, the Court is not persuaded that the ordinance meets those criteria.

As an initial matter, the ordinance is not content-neutral. While the ordinance may appear to be content-neutral in the sense that it does not discriminate among political messages, it does impose restrictive time limitations upon political signs that are not imposed on commercial signs. For instance, the ordinance allows the posting of all other types of signs at any time although election signs are subjected to a forty-five day limitation. No other sign is subject to the same or similar time limitation. Such restrictive treatment unconstitutionally discriminates in the exercise of First Amendment rights where they have their "most urgent application . . . [in the] conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971).

Defendants maintain that the ordinance serves a **[**9]** significant government interest in the preservation of neighborhood aesthetics, property value, and traffic safety. Such laws, however, must regulate evenhandedly. See generally, *Linmark Associates v. Willingboro*, 431 U.S. 85, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977). Moreover, although the purpose may be a legitimate one, the city has failed to show that this interest "justifies placing time limits on the posting of political signs, but not on temporary signs that convey commercial messages or ideological messages unrelated to an upcoming election. In addition, it has not been shown that this particular time period of [forty-five] days, even if evenhandedly applied to all temporary signs, reasonably and adequately provides for the exercise of First Amendment rights." *City of Antioch v. Candidates' Outdoor Graphic Service*, 557 F. Supp. 52, 60 (N.D. Cal. 1982). The city may not impose durational limits or other restrictions on political advertising in order to advance aesthetic goals until it shows that it is "seriously and comprehensively addressing aesthetic concerns with respect to its environment." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 531, 69 L. Ed. 2d 800, **[**10]** 101 S. Ct. 2882 (1981) (Brennan, J., concurring). As such a showing has not been made, this interest, although legitimate, is not so well served by this measure that the resultant infringement upon constitutional rights can be justified.

In addition, Defendant's one election sign per candidate, per issue, and per opinion limitation "severely infringes on speech by preventing homeowners from expressing [their] support for more than one candidate when there [may be] numerous contested elections. [Moreover], if two voters living within the same household support opposing candidates, the sign limitation significantly restricts their ability to express support through sign posting." *Arlington County Republican Committee v. Arlington County, Virginia*, 983 F.2d 587, 594 (4th Cir. 1993). The enthusiastic support of the homeowner's candidate by more than one sign is, of course, flatly prohibited.

Lastly, the ordinance fails to leave open valid alternative channels for communication for the homeowner. Although the city maintained at oral argument that political signs may be posted inside a home window at any time throughout the course of the year, the ordinance does not **[**11]** so state, and the Court is not persuaded that this would be an adequate substitute for the important medium **[*558]** of speech that the city has foreclosed. The Supreme Court has clearly stated that "displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the 'speaker.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038, 2046, 129 L. Ed. 2d 36 (1994); See also, *Cleveland Area Board of Realtors v. City of Euclid*, 88 F.3d 382, 1996 WL 376320 (6th Cir. 1996). Furthermore, "a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means." *Ladue*, at 2046.

It should further be noted that residents have the same string incentive to keep their property values up and to prevent visual clutter in their yards and neighborhoods as does the city. The private interests of owners in the market value of their property should very substantially diminish the city's concerns regarding the unlimited **[**12]** proliferation of signs. *Id.* at 2047.

As a result, this Court finds that the city's ordinance limiting the number and duration of election and opinion signs violates Plaintiffs' civil rights pursuant to 42 U.S.C. 1983, and unconstitutionally infringes upon the First and Fourteenth Amendment of the United States Constitution.

Accordingly,

IT IS ORDERED that Plaintiff's motion for summary judgment be and hereby is GRANTED.

IT IS SO ORDERED.

ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE
JUDGMENT

This matter has come before the Court, and the Court has entered its memorandum opinion and order. Now, therefore;

IT IS ORDERED AND ADJUDGED that Plaintiffs'

motion for summary judgment is GRANTED, and the above-captioned civil case is DISMISSED.

IT IS SO ORDERED.

ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

Date: AUG 15, 1996

LENSEE 628 p2d 1217

VAN et al, Petitioners, v. TRAVEL INFORMATION COUNCIL, Respondent

CA No. 18553

COURT OF APPEALS OF OREGON

52 Ore. App. 399; 628 P.2d 1217; 1981 Ore. App. LEXIS 2555; 7 Media L. Rep. 1772

November 12, 1980, Argued and submitted

May 26, 1981

PRIOR HISTORY:

[***1]

Judicial Review from Oregon Administrative Rules.

rule violates the First Amendment and the equal protection clauses of both the Oregon and United States Constitutions. We agree and therefore declare the rule invalid. *ORS 183.400(4)*. n3

DISPOSITION:

Rule held invalid.

n1 *ORS 183.400(1)* provides, in pertinent part:

COUNSEL:

Steven L. Philpott, Eugene, argued the cause for petitioners. On the brief were Mary A. Marshall and Armstrong & Philpott, P. C., Eugene.

"(1) The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases * * *."

[***2]

William F. Gary, Deputy Solicitor General, Salem, argued the cause for respondent. With him on the brief were James M. Brown, Attorney General, and John R. McCulloch, Jr., Solicitor General, Salem.

n2 The interest of these particular petitioners is not part of the record before us. We note petitioners' claimed interest as set forth in the brief. Petitioner Van claims an interest by virtue of his ownership of real property located adjacent to state Highway 99. Petitioner Fitzgerald was, at the time of the petition, seeking election as a representative from the State of Oregon to the United States Congress. He was unsuccessful.

JUDGES:

Gillette, Presiding Judge, Roberts, Judge, and Campbell, Judge Pro Tempore.

n3 *ORS 183.400(4)* provides that this court is to declare a rule invalid if we find that the rule:

OPINIONBY:

GILLETTE

"(4) Violates constitutional provisions, exceeds the statutory authority of the agency or was adopted without compliance with applicable rulemaking procedures."

OPINION:

[*401] [**1219] This is a proceeding pursuant to *ORS 183.400(1)*. n1 Petitioners n2 challenge that portion of an administrative rule adopted by the Travel Information Council which limits the right to erect temporary political signs on land adjacent to a state highway to a period of sixty days preceding an election. OAR 733-20-050(3)(a), *infra*. Petitioners claim that the

Before turning to an examination of petitioners' specific claims, it is necessary to understand the federal and state statutory scheme of which the challenged regulation is a part. OAR 733-20-050 was promulgated

52 Ore. App. 399, *, 628 P.2d 1217, **;
1981 Ore. App. LEXIS 2555, ***; 7 Media L. Rep. 1772

by the Oregon Travel Information Council pursuant to authority granted by the Oregon Motorist Information Act of 1971. *ORS 377.700 to 377.840 and 377.992*. That Act was enacted in [***3] response to the 1965 federal Highway Beautification Act. *23 USC § 131*.

The federal Act is designed to persuade the states, by means of financial incentives, to use their police power to control the erection and maintenance of outdoor advertising structures adjacent to the Interstate and primary highway systems. Its purpose is "to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural [*402] beauty." *23 USC § 131(a)*. The Act provides for the reduction of federal aid highway funds by an amount equal to 10 percent of the sum which would otherwise be apportioned on or after January 1, 1968, to any state which the Secretary of Transportation determines has not made provision for "effective control" of the erection and maintenance of outdoor advertising structures. *23 USC § 131(b)*. n4 "Effective control" means that signs, displays, or devices within the prescribed area shall be limited to

"(1) *** directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to: natural wonders, scenic and historical attractions, which [***4] are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section. (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be [**1220] changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution of nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term 'free coffee' [***5] shall include coffee for which a donation may be made but is not required." *23 USC § 131(c)*, as amended.

n4 Originally, each state was to provide for "effective control" of advertising structures which

were within 660 feet of the nearest edge of the right-of-way and visible from the main traveled portion of the Interstate and primary highway systems. In 1975, the area to be controlled was expanded to include signs beyond 660 feet and visible from the highway. *23 USC § 131(b)*, as amended.

The Act further provides that, pursuant to an agreement between a state and the Secretary of Transportation, advertising structures may be erected and maintained within the proscribed distance in areas which are zoned industrial or commercial under authority of state law [*403] or within unzoned commercial or industrial areas. States retain the full authority to zone areas for commercial or industrial purposes, and the actions of the states in this regard are to be accepted for purposes of the Act. Advertising [***6] structures erected pursuant to this section are subject to certain size, lighting and spacing requirements, which are to be determined by agreement between the states and the Secretary. *23 USC § 131(d)*, as amended.

The Act also provides for payment of just compensation to owners of outdoor advertising signs along the Interstate and primary system upon the removal of certain kinds of advertising structures, with the federal government providing 75 percent of the compensation. *23 USC § 131(g)*. There is a grace period of 5 years for the removal of structures previously lawfully erected. *23 USC § 131(e)*.

In compliance with the federal Act, the Oregon Motorist Information Act provides:

"A person may not erect or maintain an outdoor advertising, direction or on-premises sign visible to the traveling public from a state highway, except where permitted outside the right-of-way of a state highway, * **," *ORS 377.715*.

In order to erect, maintain or replace an outdoor advertising sign, an annual permit must first be obtained. *ORS 377.725(1)*. An annual fee, dependent upon the size of the sign, must accompany each application for a permit. *ORS 377.725(5)*. The Oregon [***7] Act, as mandated by the federal statutes, is designed to phase out outdoor advertising structures. Thus, no permit for the erection of any new outdoor advertising sign could be issued after June 12, 1975. *ORS 377.725(4)*. All signs must comply with certain size, spacing, lighting, form, and other like requirements. See *ORS 377.720, 377.727, 377.745, 377.750, 377.755*. Signs must not interfere with a driver's view of official traffic signs or his or her view of traffic. *ORS 377.720(b)*. The express purposes

of the Oregon Act, insofar as relevant, are "to promote the public safety, to preserve the recreational value of public travel on state's highways, and to preserve the natural beauty and aesthetic features of such highways and adjacent areas ***" *ORS 377.705*.

[*404] Certain signs are exempted by statute from the Oregon Act's permit and location requirements. These include signs permitted by the federal Act, such as directional and official traffic signs and signs advertising the sale or lease of property upon which they are located. Certain other temporary signs are also allowed, e.g., temporary signs providing directions to places of business offering for [***8] sale agricultural products produced on the premises; a question, signs maintained for not more than two weeks announcing an auction or a campaign, drive or event of a civic, philanthropic or educational organization; signs maintained for not more than six weeks by state and county fairs, rodeos, roundups and expositions; and temporary political signs erected or maintained by candidates or political committees on private property if the sign is removed within 30 days after the date of the election for which erected. The full [**1221] text of the exemptions, *ORS 377.735(1)*, is set out in the margin. n5

[*405] "(2) The signs referred to in paragraphs (b), (c), (e), (g) to (L), (n) and (o) of subsection (1) of this section shall be subject to regulations adopted by the council as to the size, number and general location and as to time and procedure for erection and removal of temporary signs."

n5 *ORS 377.735(1)* provides:

"(1) If applicable federal regulations are met, the permit requirements of *ORS 377.700* to *377.840* do not apply to:

"(a) Signs with an area of not more than 260 square inches identifying motor bus stops at fare zone limits of common carriers.

"(b) Signs erected and maintained by a city showing the place and time of services or meetings of churches and civic organizations in the city; however, not more than two such signs may be erected and maintained that are readable by the traveling public proceeding in any one direction on any one highway.

"(c) Residential directional signs along highways other than fully controlled access highways; however, this paragraph does not apply if a professional, commercial or business activity is maintained at the location and the sign indicates its existence.

"(d) Official traffic control signs.

"(e) Signs of a governmental unit including but not limited to regulatory devices, legal notices or warnings.

"(f) Small signs displayed for the direction, instruction or convenience of the public, including signs which identify restrooms, freight entrances, posted areas or the like, with total surface area not exceeding four square feet.

"(g) Signs maintained for not more than two weeks announcing an auction or a campaign, drive or event of a civic, philanthropic or educational organization.

"(h) Memorial signs or tablets.

"(i) Signs maintained for not more than six weeks by state and county fairs, rodeos, roundups and expositions.

"(j) Directional signs maintained temporarily to provide directions to places of business offering for sale agricultural products harvested or produced on the premises where the sale is taking place.

"(k) A sign advertising the sale of real estate by the owner or his agent and erected on the advertised premises.

"(L) Signs warning of hazards or danger on the property upon which they are located, or warning against hunting, fishing or trespassing upon such property.

"(m) Signs approved by the engineer and erected by a utility or common carrier for the purpose of notices necessary for the information, safety or direction of the public.

"(n) Church directional signs not to exceed six square feet in size, installed on private property.

"(o) Temporary political signs erected or maintained by candidates or political committees on private property, if the sign area does not exceed 32 square feet and if the sign is removed within 30 days after the date of the election for which erected."

[***9]

ORS 377.735(2) permits the Travel Information Council to adopt regulations as to the size, number and general location and as to the time and procedure for erection and removal of temporary signs. n6 Signs

52 Ore. App. 399, *; 628 P.2d 1217, **;
1981 Ore. App. LEXIS 2555, ***; 7 Media L. Rep. 1772

erected or maintained within a city more than 600 feet from the nearest edge of the right-of-way of a state highway are also exempt signs unless the sign is designed to be viewed primarily from the state highway. ORS 377.735(3). All exempted signs must still comply with any applicable federal regulations. ORS 377.735(1).

n6 ORS 371.735(2) provides:

Pursuant to ORS 377.735(2), the Council has adopted regulations, including the one before us, relating to the erection and maintenance of exempt signs. These regulations vary according to the type of sign and pertain to location, size, form and, in some instances, number and time limit. See OAR 733-20-045 to 733-20-050. The following signs have no durational limits: church and civic organization signs, residential directional signs, signs of a governmental [***10] unit, memorial signs and tablets and church [***406] directional signs. Signs advertising the sale of property on which they are located and temporary directional signs advertising the sale of agricultural products are not limited as to time of erection but must be removed upon completion of the sale of the product. Other signs have more specific limitations: temporary civic signs must be removed within two weeks of installation, but not later than 24 hours after completion of the advertised event; exposition, fair and rodeo signs must be removed six weeks after erected but, not later than 24 hours after closing of the event; and temporary political signs may not be erected prior to 60 days preceding the date of the election to which they pertain and must [***1222] be removed within 30 days after the election.

Petitioners challenge the 60 day limitation on temporary political signs as set forth in OAR 733-20-050(3)(a), n7 arguing that it violates their right to freedom of speech. n8 In this regard, petitioners argue that, because political speech is involved, erection of signs of this type is entitled to absolute protection, i.e., it cannot be regulated at all. Secondly [***11] they argue that, assuming some regulation is permissible, the regulatory limit in question here does not qualify as a valid "time, place and manner" restriction. Alternatively, they argue that, even if the rule is construed as a valid time, place and manner regulation, it cannot be sustained because the state has failed to demonstrate a sufficiently compelling state interest to justify it. Petitioners also claim that the rule in question violates equal protection principles, because it impermissibly discriminates between temporary political signs and other types of temporary signs with respect to time limitations.

n7 OAR 733-20-045 provides, in pertinent part:

"(3) Erection and Removal: Signs erected under this rule are subject to the following conditions:

"(a) Signs may not be erected prior to 60 days preceding the election date;

"(b) Signs must be removed within 30 days after election date;

n8 Contrary to the state's suggestion, petitioners do not also challenge the requirement that signs must be removed 30 days after the election.

[***12]

[*407] The Council argues that its rule is not a prior restraint on speech which must be justified by a compelling state interest but is, rather, a reasonable regulation on the time, place and manner of speech. It argues that the governmental interest, along with other factors, can be weighed against the individual interest. It points to the state's interest in promoting highway safety and beauty and in receiving its full share of federal aid for highways. It notes that the rule is limited in application and argues that there are ample alternatives for communication by political candidates; thus, it argues, the rule does not impose an undue burden on First Amendment rights. It contends that petitioners' equal protection claim is unfounded because the time limits on political signs are reasonably calculated to further the general purposes of state and federal sign legislation and the difference in time restrictions for the different types of signs is a reasonable response to the practical requirements of the various forms of communications.

1. Petitioners' Claim of Absolute Protection for Political Speech

Initially, we reject petitioners' claim that political [***13] speech enjoys absolute protection and cannot be regulated. It is true that political speech, as opposed to other types of speech, is afforded maximum protection under the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 845 S Ct 710, 11 L Ed 2d 686 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S Ct 209, 13 L Ed 2d 125 (1964); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S Ct 621, 28 L Ed 2d 35 (1971); *John Donnelly & Sons v. Campbell*, 639 F2d 6 (1st Cir

12 Ore. App. 399, *; 628 P.2d 1217, **;
1981 Ore. App. LEMIS 2555, ***; 7 Media L. Rep. 1772

1980); *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976), cert den 431 U.S. 913 (1977). However, not even the right of political expression is completely unfettered. The Supreme court has repeatedly recognized the constitutionality of reasonable "time, place and manner" restrictions on the exercise of free speech rights. See e.g., *Police Department of Chicago v. Mosley*, 408 U.S. 92, 92 S Ct 2236, 33 L Ed 2d 212 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S Ct 2294, 33 L Ed 2d 222 (1972); *Cox v. Louisiana*, 379 U.S. 536, 85 S Ct 453, 13 L Ed 2d 471 (1965); *Kovacs v. Cooper*, 336 U.S. 77, 69 S Ct 448, 93 L Ed 513 (1949); *Cox v. New Hampshire*, 312 [***14] U.S. 569, 61 S Ct [***408] 762, 85 L Ed 1049 (1941). The statutory and regulatory scheme before us does not absolutely prohibit the erection and maintenance of political campaign signs; it regulates the time, place and manner of their erection and maintenance. Therefore, we examine the regulation in [***1223] question not as an absolute ban but as a time, place and manner restriction.

2. Time, Place and Manner Restriction

"Laws regulating time, place or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S Ct 1614, 52 L Ed 2d 155 (1977). Reasonable restrictions relating to the time, place and manner in which the right to free speech is exercised are permissible if

"*** they are justified without reference to the content of the regulated speech, they serve a significant governmental interest, and *** in so doing, they leave open ample alternative channels for communication of information." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 771, 96 S Ct 1817, 48 L Ed 2d 346 (1976).

In measuring the effect of the statute [***15] or regulation on free expression, "careful consideration must also be given to whether the challenged regulation is more inclusive or more burdensome than necessary to further the legitimate governmental purposes (it is designed to foster)." *Baldwin v. Redwood City*, supra, 540 F.2d at 1367; see also *United States v. O'Brien*, 391 U.S. 367, 377, 88 S Ct 1673, 20 L Ed 2d 672 (1968). First Amendment freedoms must be kept in a preferred position; a regulation can be no more restrictive than reasonably necessary to serve the governmental interest involved. *Brown v. Glines*, 444 U.S. 348, 355, 100 S Ct 594, 62 L Ed 2d 540 (1980); *John Donnelly & Sons v. Campbell*, supra, 639 F.2d at 8. Where First Amendment rights are involved, restrictions must be "narrowly drawn." *Central Hudson Gas v. Public Service Comm'n*,

447 U.S. 557, 100 S Ct 2343, 65 L Ed 2d 341, 350 (1980); *Baldwin v. Redwood City*, supra, 540 F.2d at 1567.

With these constitutional principles in mind, we turn to the regulation before us. We note first that the Oregon statute as a whole is not directed to content. Billboards are regulated, and in some cases banned altogether, [***409] not because of the [***16] messages they convey but because the medium of communication is itself objectionable. See *John Donnelly & Sons v. Campbell*, supra, 639 F.2d at 8; *Metromedia, Inc. v. City of San Diego*, 26 C3d 848, 164 Cal Rptr 510, 610 P.2d 407 (1980), prob juris noted, 449 U.S. 897, 101 S Ct 265 (1980). On the other hand, the exemptions from the erection, location and permit requirements are based on content, and political campaign signs are treated as exemptions. To the extent that such signs are treated better than other signs, however, the statute cannot be faulted on this ground. Moreover, as one court has noted in its examination of a similar state statute, each of these exceptions reflects "an appropriate governmental interest." *John Donnelly & Sons v. Campbell*, supra, 539 F.2d at 9.

n9 The fact is, however, that temporary political signs do not enjoy a preferred position. See the equal protection discussion, post.

Like the exemptions, the regulations which implement the exemptions appear [***17] to be based upon content: how long an exempt sign may be maintained depends upon the message that sign seeks to convey. However, we need not decide if this distinction in the regulations based upon content is impermissible. Even if we assume that the regulation before us is a valid time, place and manner regulation and not an improper restriction on content, it cannot stand. Although the regulation seeks to further legitimate state interests, we conclude that these interests are insufficient to justify the significant restriction on political speech it imposes. Before outlining the reasons for our conclusion, we think an examination of the case law in this area and a closer look at the effect of the Oregon Act is helpful.

There are innumerable decisions examining state statutes and city ordinances regulating the erection and maintenance of billboards. A number of court decisions [***1224] have upheld local and state regulations which prohibit the posting of off-premise signs and which have limited exceptions such as those in the statute before us. The stated interests justifying such broad bans on outdoor advertising structures are most often identified as traffic safety [***18] and aesthetics. Some courts

52 Ore. App. 399, *; 628 P.2d 1217, **;
1981 Ore. App. LEXIS 2555, ***; 7 Media L. Rep. 1772

have found aesthetics alone to be a sufficient basis for the restrictions. See e.g., *Metromedia, Inc. v. City of San Diego*, supra, 26 Cal 3d 828; *State v. Lotze*, 92 Wash 2d 52, 593 P2d 811 (1979), appeal dismissed 444 U.S. 921 (1979); *Markham Advertising Co. v. State*, 73 Wash 2d 405, 439 P2d 248 (1968), appeal dismissed 393 U.S. 316 (1979); *Stuckey's Stores, Inc. v. O'Coneskey*, 93 NM 312, 600 P2d 258 (1979), appeal dismissed 446 U.S. 930, 100 S Ct 2145 (1980); *Newman Signs, Inc. v. Hjelle*, 268 NW2d 741 (N.D. 1978), appeal dismissed 440 U.S. 901 (1979); *Veterans of For. Wars, Inc. v. Steamboat Springs*, 575 P2d 835 (Colo 1978), dismissed for want of substantial federal question, 439 U.S. 809 (1978); *Suffolk Outdoor Advertising Co., Inc. v. Hulse*, 43 NY2d 483, 402 NYS2d 368, 373 NE2d 263 (1977), appeal dismissed 439 U.S. 808 (1978); *Donnelly Advertising Corp. v. City of Baltimore*, 279 Md 661, 370 A2d 1127 (1977); *John Donnelly & Sons, Inc. v. Outdoor Advertising Bd.*, 369 Mass 206, 339 NE2d 709 (1975); *E.B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F2d 1141 (5th Cir 1970); [***19] *United Advertising Corp. v. Borough of Raritan*, 11 NJ 144, 93 A.1 362 (1952); see generally 81 ALR3d 486-556 (1977), n 9

n10 Petitioners have failed to cite any billboard cases. The Council relies on *State v. Lotze*, 92 Wash 2d 52, 593 P2d 811 (1979), cert den 453 U.S. 922 (1980), discussed *infra*, and *State ex rel Dept. of Transp. v. Pile*, 603 P.2d 337 (Okla 1979). The Council's reliance on the decision in *Pile* is misplaced. In that case the court held that a statute prohibiting all billboards on rural byways did not include billboards used for purposes of non-commercial speech. The court reasoned that to read the act as including all billboards would raise serious First Amendment problems.

In most of these cases the petitioner's interest and the court's opinion are limited to the challenged regulation's effect on purely commercial speech. The major exception to this focus is the decision by the Washington Supreme Court in *State v. Lotze*, supra. In that case, the court specifically [***20] considered the prohibition against off-site advertising as it related to political speech. The court found that the state law, which sets out the requirements and exceptions of the federal Act and in effect prohibits political and public issue signs, did not violate the First Amendment to the federal Constitution. *State v. Lotze*, supra, 92 Wash 2d 52; see also *Donnelly Advertising Corp. v. City of Baltimore*, supra, 279 Md 660.

However, the majority of the court decisions on this latter, specific issue of interference with political [***411] speech are contrary to *Lotze*. Regulations which prohibit all political and ideological signs in a given location, e.g., in a city or on the state's highways, have been repeatedly found to be unconstitutional. See, e.g., *John Donnelly & Sons v. Campbell*, supra; *State v. Miller*, 83 NJ 402, 416 A2d 821 (1980); *Martin v. Wray*, 413 F Supp 1131 (E.D. Wis 1979); *Aiona v. Pai*, 516 F 2d 892 (9th Cir 1975); *Ross v. Goshi*, 351 F Supp 949 (D Hawaii 1972); *Peltz v. City of South Euclid*, 11 Ohio St 2d 128, 228 NE2d 320 (1967); *Norate Corporation v. Zoning Board of Adjustment*, 417 Pa 397, 207 A2d 890 (1965); [***21] *People v. Middlemark*, 100 Misc 2d 760, 420 NYS2d 151 (1979).

Like the federal Act and the state statutes and ordinances examined in the cases noted above, the Oregon Act attempts to eliminate outdoor advertising from a particular area, viz., the state and federal highway system. Commercial signs are banned unless they involve the sale of the property on which they are located or are temporary directional signs relating to the sale of agricultural products on the property on which they were produced. These are so called "on-premises" signs. The Act, as noted, also exempts official and motorist informational [***1225] signs and certain temporary signs advertising civic functions, state and county events and political signs. The political sign exemption is limited. It applies only to political signs erected or maintained by candidates or political committees and only to signs related to current political campaigns. There is no provision allowing persons other than candidates or committees to erect campaign signs in support of the candidate of their choice. Further, the exemption does not apply to other political issues or ideological speech which is not the subject [***22] of an election. Messages such as "Support E.R.A.," "No Nukes" or "Guns don't kill people -- people kill people" are banned altogether from the highways.

The regulation in question here narrows the political sign exemption even further than does the statute. By its provisions, such campaign signs as are permitted can only be erected for 60 days preceding an election. This regulation is, in the context of the larger statutory scheme, a significant restriction on political speech.

Unlike many of the cases discussed above, we are not here asked to decide the constitutionality of the Oregon [***412] Motorist Information Act as a whole. Petitioners challenge only the 60 day limitation on the erection of political signs. They do not take issue with the banning of ideological signs altogether, or the fact that only candidates and committees can erect political campaign signs. But see *John Donnelly & Sons v.*

Campbell, supra, 639 F2d 6. We turn now to the limited inquiry before us.

The stated purposes of the Oregon Act are three: highway safety, aesthetics and preservation of the state's recreational value. n11 We have no doubt that these are legitimate state interests. We [***23] find it difficult, however, to find a relationship between the 60 day limitation on the erection of political signs and public safety. Once political signs are allowed on a temporary basis, it is difficult to imagine how prohibiting political signs at other times significantly promotes highway safety. It is apparent that other restrictions on outdoor advertising structures such as spacing, size and lighting requirements are more closely related to the promotion of safe driving conditions. Limiting the time period during which political signs may be maintained is more closely related to considerations of aesthetics and preservation of the recreational value of Oregon's highways. These are, standing alone, valid state interests justifying the exercise of the state's police power. See *Oregon City v. Hartke*, 240 Or 35, 400 P.2d 255 (1965). n12 Although we recognize the relationship between aesthetic and recreational considerations and restricting the period of time during which signs will be visible from the highways, as we have already stated, we do not think that these interests are sufficient to justify the significant restriction on political speech imposed by the regulation. [***24] See *John Donnelly & Sons v. Campbell, supra*, 639 F2d at 12.

n11 The Council also contends that the state has an interest in receiving its full share of federal aid for the state's highways and that this interest is advanced by the questioned regulation. We have no doubt that the state has such an interest. However, the state's financial interest does not outweigh the constitutional interests asserted by the petitioners here.

n12 In *Oregon City v. Hartke, supra*, the court upheld an ordinance excluding automobile wrecking yards from the city on aesthetic grounds alone. Many of the decisions noted above have relied on the court's decision in *Hartke* finding aesthetics to be a sufficient basis for the regulation and/or prohibition of off-premise billboards.

[*413] The bases for our conclusion are threefold. Initially, we find the 60 day limitation unnecessarily restrictive in light of the important First Amendment interests involved and the state's interest sought to be advanced. We agree [***25] with the analysis of the

court in *John Donnelly & Sons v. Campbell, supra*, where the First Circuit held a Maine statute which prohibited most off-premises billboards unconstitutional because of its significant impact on ideological speech. The court noted that signs erected for an election, primary or referendum within three weeks of the event were exempted from the Act's operation. The court held, however, that the exception did not go far enough -- it not only failed to provide for other types of public issue signs [**1226] but also limited the period of time during which the election signs could be maintained. As the court stated, "*** we doubt that three weeks is enough time to publicize a campaign, particularly for the little known or unpopular candidate, or cause, with the greatest need for exposure." *Id.*, at 15.

It is true that the time limitation before us is more than twice as long as the one involved in the *Donnelly* case. However, the same reasoning applies. The process of acquainting the public with new candidates is a slow one. Two months is simply not enough time to allow a relatively unknown person to achieve household name familiarity. When [***26] Oregon's particular election scheme is considered, the unreasonable nature of the 60 day limitation becomes even more apparent: In Oregon, while primary elections are held in May, the general election is held the following November -- almost six months later. See *ORS 254.056*.

Secondly, although we recognize that alternative means of communication, i.e., means other than billboards along the state's highways, are available to political candidates, we find these to be inadequate. A persuasive decision in this area is that of the Ninth Circuit in *Baldwin v. Redwood City, supra*, 540 F2d 1360. The city ordinance under scrutiny in that case provided for a permit system and contained detailed regulations governing the erection and maintenance of all types of outdoor signs within the city. Included were temporary signs which were limited to a period of 60 days before and 10 days after the event they [*414] addressed. While exempted from various design and structural controls, temporary signs were subject to certain other regulations. Political campaign signs were included in the category of temporary signs. The court held that the ordinance's limit on the aggregate [***27] area of political signs on behalf of a single candidate or issue, its requirement that an application be filed before displaying temporary political signs and that a nonrefundable inspection fee be paid before displaying signs, its provision requiring payment of \$ 5 refundable deposit before displaying signs, its ban on display of signs in residential areas of the city and its provision permitting summary removal of any temporary political campaign sign under certain conditions were all unconstitutional on First Amendment grounds. n13 In

52 Ore. App. 399, *; 628 P.2d 1217, **;
1981 Ore. App. LEXIS 2555, ***, 7 Media L. Rep. 1772

considering the availability of alternative channels of communication, the court stated:

"The existence of such alternatives is not alone enough to justify any regulation the city may desire to impose upon this means of expression. It is, however, a factor to be considered in striking the appropriate accommodation between free speech and legitimate governmental interests.

"Its significance depends upon the nature of the First Amendment interest involved in the particular case, the purpose and the extent of the restriction imposed, and the availability of less restrictive means of accomplishing the legitimate governmental objective. As we have [***28] said, the First Amendment interests involved in the display of political posters adjacent to public thoroughfares are substantial. Moreover, means of political communication are not entirely fungible, political posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With exception of handbills, they are the least expensive means by which a candidate may achieve name recognition among voters in a local election." *Id.*, at 1368.

n13 The Redwood City ordinance's 60 day limit on the maintenance of political signs was not challenged or considered by the court in *Baldwin*.

This view was reiterated by the court in *John Donnelly & Sons v. Campbell, supra*. In that case the court noted that outdoor advertising is a "far less expensive means of communication than radio, television, newspaper or magazines" and that ideological and political speech [*415] significantly depends upon outdoor advertising. 639 F.2d at 16. As the court stated, [***29] "Signs which can be cheaply erected particularly permit advancing poorly financed causes of little people." *Ibid.*, quoting from *Martin v. [***1227] Struthers*, 319 U.S. 141, 146, 63 S.Ct. 862, 87 L.Ed. 1313 (1943).

Finally, we note that, although political signs are treated by the statute and regulation in question, here better than many other types of signs, they are, by virtue of the regulation before us, treated worse than some. In addition to official and informational signs, certain on-premise commercial signs, identified above, are not limited as to duration; the only limitation is that they must be removed after the sale they are advertising. Thus, the law may impact more heavily on the sale of ideas than on the sale of squash. Placed with a similar

provision in the Maine statute, the court in *John Donnelly & Sons v. Campbell, supra*, concluded, and we agree, that such a result is "a peculiar inversion of First Amendment values." *Id.*, at 15-16.

On the basis of the foregoing analysis, we conclude that OAR 733-20-050(3)(a) infringes upon First Amendment rights by impermissibly restricting the scope of political speech through its limitations on the time [***30] for erection of political signs.

3. Equal Protection Considerations

Although not necessary to our decision in this case, we wish to add one further observation concerning the regulation we are reviewing. The distinction in the regulation between political and commercial speech raises Equal Protection as well as First Amendment issues. In *Orazio v. Town of N. Hempstead*, 426 F.Supp. 1144 (ED NY 1977), the court was faced with a town ordinance that limited the erection of political wall signs to six weeks preceding an election. The ordinance placed no time limits on nonpolitical wall signs which advertised the nature of the business conducted on the premises. The court found that the ordinance violated both the First Amendment and the Equal Protection Clause. While recognizing the town's concern for aesthetic values, the court found the distinction between types of signs was not justified as political wall signs, in the court's view, were not inherently more obnoxious or ugly than other wall signs. In response to the [*416] defendant's claim that political signs are by nature temporary the court stated:

"Whether temporary or not, politics is important business, [***31] and it is difficult to perceive what governmental interest is served by placing time limits on the public's opportunity to be informed about candidates who are seeking public office or organizations which support them." *Id.*, at 1149.

We agree. n14

n14 Another decision which specifically discussed a time limit on the maintenance of political signs is *Ross v. Goshi, supra*. In that case, political campaign signs were exempted from certain erection and maintenance requirements for the 60 day period preceding an election. The court found the time limit reasonable. However, the court noted that political signs were permitted at any time before the 60 day period as long as they conformed to the restrictions placed on other outdoor signs.

52 Ore. App. 399, *; 628 P.2d 1217, **;
1981 Ore. App. LEXIS 2555, ***; 7 Media L. Rep. 1772

The court in *Orazio* distinguished the case before it from *Ross* on this basis.

We conclude that the 60 day limitation on the maintenance of political campaign signs prior to an election is unconstitutional. It violates both the First Amendment and the [***32] Equal Protection clause of the United States Constitution. The regulation is unduly restrictive and burdensome when the significant First Amendment interests involved are balanced against interests of the state it seeks to advance. Although alternative modes of communication are available, they are inadequate when compared to the manner of expression (billboards), and the location (the state highway system). Finally, the regulation treats certain commercial signs more favorably than political signs, a distinction not reasonably related to any appropriate governmental interest. n15

n15 Normally, we would consider Oregon constitutional issues first. Here, however, the Council argues in part that it is compelled to the enactment of OAR 733-20-050(3)(a) by provision of the Federal Highway Beautification Act. Because we consider analysis under the Federal Constitution dispositive, and in order to avoid a needless analysis of the applicability of the Supremacy Clause in this context, we have confined our discussion and holding to questions raised under it.

[***33]

[**1228] We are not unmindful of this state's interest in maintaining the beauty and recreational attractiveness of all of our resources, including the state highways. We recognize that billboards are viewed by many as a blight upon the land. However, this is a case involving significant First Amendment rights. As the court in *Baldwin v. Redwood City, supra*, stated:

[*417] "Communication by signs and posters is virtually pure speech. The element of conduct in a sign posted on behalf of an issue or candidate during a campaign is minimal. Baldwin and Cannon seek to use posters in political campaigning, and 'the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.' *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S Ct 621, 28 L Ed 2d 35 (1971). Posters and signs are erected adjacent to 'traditional first amendment forums, such as public sidewalks and other thoroughfares,' *Aiona v. Pai*, 516 F2d 892, 893 (9th Cir 1975) where 'expressive activity may be restricted only for weighty reasons.' *Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 S Ct 1194, 2303, 33 L Ed 2d 222 (1972). [***34] *** The regulations *** directly infringe the First Amendment rights of individuals who want to express political opinion in a traditional First Amendment forum." 540 F2d at 1366.

For the reasons stated above, we hold that OAR 733-20-050(3)(a) is unconstitutional and therefore invalid.

LEXSEE 557 f supp 52

**CITY OF ANTIOCH, a municipal corporation, Plaintiff, v. CANDIDATES'
OUTDOOR GRAPHIC SERVICE, a California corporation, et al., Defendants;
AND RELATED COUNTER ACTION CYNTHIA J. FULTON and CANDIDATES'
OUTDOOR GRAPHIC SERVICE, et al., Plaintiffs, v. MEMBERS OF THE CITY
COUNCIL OF THE CITY OF ANTIOCH, et al., Defendants**

Nos. C-82-0731-WWS, C-82-0832-WWS

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

557 F. Supp. 52; 1982 U.S. Dist. LEXIS 17228

October 15, 1982

COUNSEL:
[**1]

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JUDGES:
Schwarzer

OPINION BY:
SCHWARZER

OPINION:

[*53] **MEMORANDUM OF OPINION AND
ORDER**

These consolidated actions bring before the Court the question of the constitutionality of the City of Antioch's ordinance limiting to the 60 day period before an election the posting of political signs that promote candidates for public office or advocate a position on upcoming ballot propositions.

The city, which bears the burden of showing that its ordinance comports with the First Amendment, seeks a declaration affirming the constitutionality of Section 9-

5.1115(b)(4)(ii) of its Municipal Code and an injunction requiring defendants Candidates' Outdoor Graphics Service (COGS) and Cynthia Fulton n1 to obey the local law. By counter [*54] motion in a related suit, COGS and Fulton seek a declaratory judgment [**2] holding the Antioch ordinance violative of the First and Fourteenth Amendments and a permanent injunction against its enforcement.

n1 Although the City of Antioch did not raise the issue, there is a question whether these defendants have standing to challenge the ordinance. As a jurisdictional doctrine determining whether a controversy is justiciable, the issue of standing is properly raised by the court *sua sponte*. Problems of standing to litigate comprise both constitutional limitations on the judicial power under Article III of the federal Constitution and self-imposed prudential restraints. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 757-59, 70 L. Ed. 2d 700 (1982). The bedrock requirement for standing in the constitutional sense is a showing that the claimant has suffered cognizable injury; he may not be merely a concerned bystander who presents a generalized grievance about government. *Id.* at 758-59.

Both defendants in this case meet this showing of injury in fact. COGS prints and posts political signs for candidates in local, State, and national elections. The firm was engaged by a

candidate seeking statewide office to poster in preparation for the June 1982 primary. Posting was begun well in advance of the 60-day period. Although this candidate was defeated in the June primary, COGS, which has a Northern California office in the City of Belmont, is likely to again be hired to perform its services in Antioch and other Bay Area cities. *Taxpayers for Vincent v. Members of City Council*, 682 F.2d 847, 849 n.1 (9th Cir. 1982). The fact that COGS is paid to advertise candidates does not impose a barrier to standing, nor does it mean that the speech in question is unprotected or deemed commercial because COGS has an economic interest in its promotion. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 504, 69 L. Ed. 2d 800, 101 S. Ct. 2882 n.11 (1981).

Cynthia Fulton, the other defendant in this suit, lives in Antioch and intends to campaign by posting political signs in her community. The ordinance has the kind of direct and tangible effect on her legal interests which is requisite to her standing to participate in this suit.

[**3]

These suits testing the constitutionality of the Antioch law were brought in the early part of 1982. The city voluntarily agreed to suspend enforcement of its ordinance pending a determination by this Court of the ordinance's validity. With the general election of November 2nd now only weeks away, postering will be permitted under the ordinance's 60 day rule until after the election. Although the issue thus appears temporarily mooted, it may properly be considered as raising a case and controversy within the meaning of Article III since it is one of those issues which is "capable of repetition, yet evading review." *Sosna v. Iowa*, 419 U.S. 393, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975); *Taxpayers for Vincent v. Members of City Council*, 682 F.2d 847, 849 n.1 (9th Cir. 1982).

I. The Local Ordinance

The Antioch ordinance n2 limits the posting of outdoor political signs publicizing [*55] ballot propositions or promoting candidates for public office to a period of 60 days prior to the election to which they relate. The term "political sign" is defined as "any sign which is designed to influence the action of the voters for the passage or defeat of a measure appearing [**4] on the ballot at any national, State, or local election." Antioch, California Municipal Code § 9-5.1115(b)(2)(1979).

n2 Antioch, California Municipal Code § 9-5.1115(b) (1979) (amended 1981). The portion of the sign ordinance dealing with special restrictions placed on political signs reads as follows:

(b) Political signs.

(1) *Permission to use.* Notwithstanding anything to the contrary contained in this article, political signs shall be permitted in the City subject to the terms and conditions set forth in this subsection, which terms and conditions shall apply only to outdoor political signs.

(2) *Political sign defined.* "Political sign" shall mean any sign which is designed to influence the action of the voters for the passage or defeat of a measure appearing on the ballot at any national, State, or local election or which is designed to influence the voters for the election or defeat of a candidate for nomination or election to any public office at any national, State, or local election.

(3) *Registration of responsible parties for signs.* Any political campaign committee or candidate who utilizes political signs shall register the name of a person within the political committee or the candidate himself who shall be responsible for the political signs erected on behalf of and by such committee or candidate, their placement, and their maintenance within the City, and such person shall be considered the "responsible party." Such responsible party shall complete a registration form provided by the City, giving his name and address and where he can be contacted, and shall agree to become responsible for such political signs.

(4) *Location, time of erection, and type.* Political signs are hereby permitted in any zone without the prior approval of the Commission or Council. However, any such sign shall not:

- (i) Be permanent or lighted;
- (ii) Be erected earlier than sixty (60) days before the election to which they relate;
- (iii) Be attached to any utility pole, fence, tree, or other vegetation or upon any public right-of-way;
- (iv) Be so situated that the face thereof is specifically oriented for viewing toward any freeway right-of-way;

(v) Be erected in such a manner that it will or reasonably may be expected to interfere with, obstruct, confuse, or mislead traffic or be so situated as to endanger the health, safety, or welfare of people or endanger property;

(vi) Be erected or placed at the intersection of any street, or within the segment created by drawing an imaginary line between points fifty (50) feet back from where the curb lines of the intersection quadrant intersect;

(vii) Signs used in primary elections shall not remain for general election purposes on behalf of a successful primary campaign candidate but shall be removed pursuant to the provision of subsection (5) of this subsection.

(viii) Be erected without the permission of the owner of property on which it is located;

(ix) Be placed upon any other sign, unless specifically authorized by the owner or person in possession of such other sign; and

(x) Be erected by a political campaign committee or candidate without first having registered the responsible party.

(5) *Removal.* A political sign shall:

(i) Be removed within fourteen (14) days after the election to which it relates;

****(7) Exemptions.* The provisions of this subsection shall not apply to the following:

(i) A sign political in nature which is inside a building though visible from the exterior; and

(ii) Billboards posted by a person or corporation duly licensed to erect and maintain billboards, provided they are posted in a location in the manner authorized or permitted under other provisions of this article. "Billboard" is defined in paragraph (c) of this article.

[**5]

In effect, the local law imposes a year-round ban on political sign posting which is temporarily suspended 60 days before an election and reinstated after the election has taken place. Candidates and advocates have a sixty day window within which to reach Antioch voters via the medium of the temporary political sign, a medium whose unique advantages have been recognized by other courts. *Baldwin v. Redwood City*, 540 F.2d 1360, 1368 (9th Cir. 1976), cert. denied, 431 U.S. 913, 97 S. Ct. 2173, 53 L. Ed. 2d 223 (1977); *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 16 (1st Cir. 1980),

aff'd, 453 U.S. 916, 69 L. Ed. 2d 999, 101 S. Ct. 3151 (1981); *Van v. Travel Information Council*, 52 Or. App. 399, 628 P.2d 1217, 1226 (1981).

Only Section 9-5.1115(b) (4) (ii) of Antioch's Municipal Code is challenged by defendants; the Court is not asked to decide the constitutionality of the entire portion of the Antioch ordinance dealing with political signs. The Court notes in passing, however, that Section 9-5.1115(b)(4)(v) which purports to prohibit the posting of political signs in any manner that may interfere with, obstruct, confuse, or mislead traffic, or endanger the [**6] health, safety, or welfare of people, raises serious questions of vagueness and overbreadth.

II. Standard of Review in First Amendment Cases

The Ninth Circuit has outlined certain general principles which this Court must apply in analyzing legislative enactments, such as Antioch's, which regulate First Amendment rights. *Taxpayers for Vincent v. Members of City Council*, 682 F.2d 847, 849 (9th Cir. 1982) (quoting *Rosen v. Port of Portland*, 641 F.2d 1243, 1246 (9th Cir. 1981)) (citations omitted).

First, the law is presumptively unconstitutional and the state bears the burden of justification *Second*, the law must bear a "substantial relation" to a "weighty" governmental interest The law cannot be justified merely by the showing of some legitimate governmental interest *Third*, the law must be the least drastic means of protecting the governmental interest involved; its restrictions may be "no greater than necessary or essential to the protection of the governmental interest."

The city argues that this rigorous standard of review should not be applied to its ordinance because it is merely a "time, place, and manner" restriction [**7] which only incidentally burdens those seeking to inform the public about issues and candidates in upcoming elections. It is true that "laws regulating time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977). Such restrictions are permissible "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 771, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976).

The Antioch ordinance is clearly a regulation with respect to time; but it is unlike other regulations traditionally cast as "time, place, and manner"

restrictions. See, e.g., *Brown v. Louisiana*, 383 U.S. 131, 15 L. Ed. 2d 637, 86 S. Ct. 719 (1966) (silent vigil would not interfere with tranquility of [*56] public library, but noisy protest could be banned); *Adderley v. Florida*, 385 U.S. 39, 17 L. Ed. 2d 149, [**8] 87 S. Ct. 242 (1966) (jail grounds not an appropriate forum for civil rights demonstration, but state capitol grounds could not be closed to public protest); *Grayned v. Rockford*, 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972) (state could ban noisy protests near school since disruptive of classwork); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 69 L. Ed. 2d 298, 101 S. Ct. 2559 (1981) (state could confine persons soliciting donations for Krishna religion to one location on state fairgrounds).

The 60 day rule, unlike the typical "time, place, and manner" restriction, does not attempt to determine whether and at what times the exercise of First Amendment rights is compatible or incompatible with the normal uses of a particular forum or place. *Grayned v. Rockford*, 408 U.S. 104, 116, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); *Taxpayers*, *supra*, at 850. Rather, it imposes a general ban on the posting of signs promoting the candidacy of certain individuals or advocating a certain viewpoint on an upcoming ballot proposition. This ban is in effect everywhere in the city -- on sidewalks, parks, and streets, as well as, apparently, on [**9] all private property -- throughout the year. The ban is temporarily lifted for only a two-month period prior to an election and is reimposed in its wake. Such a pervasive restriction, which singles out political signs for special treatment, is properly analyzed under the test outlined in *Rosen*, *supra*, and reaffirmed by the Ninth Circuit in the *Taxpayers* case.

One must begin, therefore, with the proposition that the Antioch ordinance, which explicitly restricts and regulates a form of political speech, is presumptively unconstitutional. A heavy burden falls on the city to justify its regulation. Its regulatory goal must not only be a "weighty" governmental interest, but the city must show that no less restrictive alternative can be crafted which will promote that interest in a less onerous fashion.

With these governing principles in mind, the Court turns to the regulation before it. Two specific challenges are made to the Antioch law. First, the ordinance, by creating a classification based on the content or message of the communication conveyed on signs to be posted in the city, is attacked as violating the Fourteenth Amendment's guarantee of equal protection. Second, [**10] the local law is challenged as incompatible with the First Amendment's guarantee of freedom of speech because it imposes restrictions on one important medium which candidates and advocates use to inform the public

about elections for political office and about state referenda and initiatives -- the temporary political sign. Each of these issues will be considered in turn.

III. Equal Protection

The Supreme Court recently gave extensive consideration to the question whether a law which accords disparate treatment to commercial and to noncommercial speech impermissibly discriminates on the basis of content. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981). The Court reviewed an ordinance of the City of San Diego which permitted a business to erect an on-site billboard identifying its goods and services, but prohibited all off-site billboards. The local law contained a number of exceptions to the general ban on off-site billboards, including one exempting "temporary political campaign signs" erected no earlier than 90 days before an election. Although the San Diego ordinance spoke of "temporary campaign signs," the California Supreme [**11] Court provided a narrowing definition which limited the terms of the ordinance to permanent, fixed structures displaying advertisements, i.e., to billboards. *Metromedia, Inc. v. San Diego*, 26 Cal. 3d 848, 164 Cal. Rptr. 510, 513 n.2, 610 P.2d 407 (1980).

The San Diego law was invalidated in a 6-3 decision which generated five separate opinions. A plurality of Justices found that the ordinance impermissibly discriminated by classifying signs with respect to the content of the message conveyed and inverted [**57] the First Amendment "by affording a greater degree of protection to commercial than to noncommercial speech." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).ⁿ³ The plurality, in remanding the case to the California Supreme Court for a possible limiting and saving construction of the ordinance, explained that the San Diego law could only be saved by limiting its reach to commercial speech; it was fatally defective as applied to political or ideological speech.ⁿ⁴ On remand, the California Supreme Court declined to provide a narrowing construction on grounds that to do so would judicially rewrite the local law. The [**12] California Court noted that the political sign exception would be unnecessary in an ordinance limited to commercial speech. *Metromedia, Inc. v. San Diego*, 32 Cal. 3d 180, 649 P.2d 902, 185 Cal. Rptr. 260, slip op. at 16 (Cal. Sup. Ct., 1982).

ⁿ³ Chief Justice Burger, dissenting separately in *Metromedia*, argued vigorously against using the equal protection rationale to invalidate the ordinance. He found the law to be

"essentially neutral" because San Diego had not attempted to censor or suppress any particular viewpoint or ideological message. *Metromedia, supra*, 453 U.S. at 561-69.

n4 Two other Justices, concurring in the judgment invalidating the San Diego ordinance, would have done so on broader First Amendment grounds. Justices Blackmun and Brennan would have simply reversed the California Supreme Court's decision upholding the ordinance on grounds that the city had failed to justify the substantial restrictions imposed on First Amendment rights. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 521-40, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).

[**13]

The standard for analyzing equal protection in the First Amendment area was stated by the Court in *Police Department v. Mosley*, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972), a case striking down an ordinance which generally banned picketing at a school but created a special exception for labor picketing.

Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or controversial views Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Id. at 96.

Laws aimed at controlling the non-communicative aspects of speech must regulate evenhandedly; those which selectively discriminate on the basis of content or subject matter offend the Equal Protection Clause. *Linmark Associates v. Willingboro*, 431 U.S. 85, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977) (township ordinance prohibiting posting of "For Sale" and "Sold" signs to prevent white flight selectively and impermissibly bans signs based on content); *Carey v. [**14] Brown*, 447 U.S. 455, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980) (differential treatment of labor and nonlabor picketing impermissibly accords preferential treatment to views on one subject); *Erznoznik v. Jacksonville*, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975) (law prohibiting drive-ins from showing films with nudity invalidated; government may not selectively shield public from certain kinds of speech that may be more offensive than others); *Consolidated Edison v. Public Service Comm'n of New York*, 447 U.S. 530, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980) (ban on bill inserts discussing controversial

issues of public policy such as nuclear power not content neutral even though it suppressed both pro and con points of view; invalidated as an impermissible restriction based on message and subject matter).

A few cases have approved regulations which differentiate on the basis of subject matter. In *Lehman v. Shaker Heights*, 418 U.S. 298, 41 L. Ed. 2d 770, 94 S. Ct. 2714 (1974), the Court upheld an ordinance banishing political signs from city-owned buses. And in *Greer v. Spock*, 424 U.S. 828, 47 L. Ed. 2d 505, 96 S. Ct. 1211 (1976), a regulation prohibiting partisan [**15] political speeches on a federal military base was sustained. The *Metromedia* plurality distinguished these cases as turning on "unique fact situations involving government-created forums [*58]" *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514, 69 L. Ed. 2d 800, 101 S. Ct. 2882 n.19 (1981). Chief Justice Burger, dissenting in *Metromedia* found the *Lehman* principle, permitting a city to exclude all political advertisers, to be applicable to the San Diego ordinance, so long as no particular point of view or issue of public debate is censored. *Metromedia, supra*, 453 U.S. at 568 n.8.

The Antioch political sign ordinance is content neutral in the sense that it does not discriminate among political messages. But it imposes severely restrictive time limits on the posting of political signs -- limits not imposed, for example, on temporary signs advertising upcoming commercial, charitable, or civic events. By singling out political signs for restrictive treatment, the Antioch ordinance clearly conflicts with the *Metromedia* plurality and the *Mosley* line of cases. n5 Commercial speech, although subject to other limitations in the city's municipal sign [**16] ordinance, is merely regulated in Antioch; political speech is outlawed except during the sixty day period before an election.

n5 See also *Aiona v. Pai*, 516 F.2d 892 (9th Cir. 1975) (Hawaii statute banning movable political signs but not commercial signs from sidewalks violates equal protection); *Orazio v. Town of North Hempstead*, 426 F. Supp. 1144 (E.D. N.Y. 1977) (ordinance limiting posting of political wall signs to six weeks before election impermissibly discriminates on the basis of political content); *John Donnelly & Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980), *aff'd*, 453 U.S. 916, 69 L. Ed. 2d 999, 101 S. Ct. 3151 (1981) (state law banning billboards with limited exceptions imposed greater restrictions on ideological than commercial speech).

The Antioch ordinance, by imposing specially restrictive treatment to political signs, unconstitutionally discriminates in the exercise of First Amendment rights in the setting where they have their "most urgent application ... the conduct of campaigns [**17] for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971).

IV. First Amendment

Apart from its shortcomings under the equal protection principle of the plurality in *Metromedia*, the Antioch ordinance must fail because the city has not sustained its heavy burden of justification under the First Amendment. The city has not shown that its ordinance is the least drastic means of protecting its governmental interest under the test announced by the Ninth Circuit in *Rosen, supra*.

Each medium of communication offers special advantages to those seeking to convey a message and presents special regulatory problems to local governments seeking to mitigate the negative spillover effects that the medium may have on the rest of the community. Courts have stressed the uniqueness of each medium of expression in striving to find the proper accommodation of First Amendment values and other societal interests. "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses, and dangers. Each, in my view, is a law unto itself" *Kovacs [**18] v. Cooper*, 336 U.S. 77, 97, 69 S. Ct. 448, 93 L. Ed. 513 (1949) (Jackson, J.) We deal in this case with the temporary political sign, a medium with its own special virtues and vices.

The question whether durational limits on the posting of temporary political signs unnecessarily restrict the exercise of First Amendment rights has not been decided by this Circuit or by the U.S. Supreme Court. The *Metromedia* case did not directly decide whether it is constitutional to place time limits on political advertisement using temporary signs. The majority of Justices rejected the restrictions imposed by the ordinance at issue there on political and ideological speech. But the San Diego ordinance regulated billboards. n6 Permanent, fixed structures like billboards are a medium [*59] different from small, detachable political signs and present different regulatory problems. The Court of Appeals twice made passing reference to such time limits in other cases dealing with local sign ordinances, apparently considering them unobjectionable in the context of these cases. See *Baldwin v. Redwood City*, 540 F.2d 1360, 1370 (9th Cir. 1976); *Verrilli v. City of Concord*, 548 F.2d [**19] 262, 265 (9th Cir. 1977). But it has not had occasion to consider fully the

countervailing policy arguments and conflicting interests which must be weighed in determining whether a 60 day rule represents a fair and reasonable accommodation of the city's interest in protecting its aesthetic appearance and the public's interest in full and vigorous debate of political issues. n7

n6 The Antioch ordinance specifically exempts billboards from its political sign regulations. Antioch, California Municipal Code § 9-5.1115(b)(7)(ii)(1979) (amended 1981). And only outdoor political signs are subject to the 60 day rule. Antioch, California Municipal Code § 9-5.1115(b)(7)(i)(1979) (amended 1981).

n7 In its recent decision in *Taxpayers, supra*, the Ninth Circuit invalidated, on First Amendment grounds, an ordinance of the City of Los Angeles prohibiting the posting of signs on sidewalks, curbs, posts, telephone poles and other public objects. *Contra, Sussli v. City of San Mateo*, 120 Cal. App.3d 1, 173 Cal. Rptr. 781 (1981).

[**20]

Antioch enacted the 60 day rule in order to keep the community's streets, sidewalks, parks, and business and residential districts attractive, clean, and visually uncluttered. The governmental interest advanced is aesthetics and concern for visual amenities in the community. The legitimacy of this governmental objective is not disputed. See *Taxpayers for Vincent v. Members of City Council*, 682 F.2d 847, 851-52 (9th Cir. 1982); *Baldwin v. Redwood City*, 540 F.2d 1360, 1370 (9th Cir. 1976).

But this particular ordinance, banning the posting of temporary political signs everywhere in the city for all but a 60 day period before an election, is not the sort of narrowly drawn, sufficiently detailed restriction which can pass constitutional muster. It does not adequately accommodate its aesthetic and environmental goals to the public's right to be informed about upcoming elections.

The temporary political sign offers special advantages to the candidate seeking public office and to the advocate promoting a particular position on a state ballot measure. These signs are a relatively inexpensive means of campaigning. Their use can be localized so that certain areas which the advocate [**21] wishes especially to reach may be targeted. A candidate or partisan can use the temporary sign to place a name or an issue before the public. In a campaign for political office, political posters can be effectively utilized to

build up the candidate's name recognition and to establish him as a serious contender. The temporary political sign has special value to the non-incumbent or relatively unknown candidate who can use the signs to identify his name among the electorate. The less well-known candidate can test the waters to see whether his candidacy is viable before going to more expensive media such as television or radio.

As the Ninth Circuit noted in *Baldwin v. Redwood City*, 540 F.2d 1360, 1368 (9th Cir. 1976), in striking down an ordinance which, among other things, limited the aggregate area of temporary signs allowed on a parcel of land and banned them from residential areas altogether:

Means of political communication are not entirely fungible; political posters have unique advantages. Their use may be localized to a degree that radio and newspaper advertising may not. With the exception of handbills, they are the least expensive means by which a candidate [**22] may achieve name recognition among the voters in a local election.

Although the Antioch ordinance does not bar all campaigning outside the sixty day period, it does severely restrict the use of one important vehicle for political advertisement, the temporary sign. The alternative means for informing the voters in Antioch -- newspapers, radio, television, and door-to-door solicitation -- may not be satisfactory substitutes as they may be more costly and perhaps less effective if not preceded by a vigorous sign campaign. See [**60] *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93, 52 L. Ed. 2d 155, 97 S. Ct. 1614 (1977); *Baldwin v. Redwood City*, supra, at 1368.

n8 In the Joint Statement of Facts, all parties to the suit stipulated to the following: "Political signs can constitute an important element in many political campaigns in California and offer a relatively effective and inexpensive means by which little-known candidates can achieve name recognition among the electorate."

Other [**23] courts have found ordinances which impose time limits on the posting of temporary political signs to be unconstitutional. A state appellate court in Oregon struck down a statute limiting the right to erect temporary political signs on land bordering state highways to 60 days before an election. *Van v. Travel Information Council*, 52 Or. App. 399, 628 P.2d 1217 (1981). While recognizing the legitimacy of the state's interest in the beauty of its highways, the Oregon court

found that this interest did not sufficiently justify the restrictions imposed on political speech. The court stated:

The process of acquainting the public with new candidates is a slow one. Two months is simply not enough time to allow a relatively unknown person to achieve household familiarity.

Id. at 413, 628 P.2d at 1226.

A district court in New York, considering a similar ordinance which limited the posting of "political wall signs" to six weeks prior to an election, invalidated the rule on equal protection grounds. *Orazio v. Town of North Hempstead*, 426 F. Supp. 1144 (E.D.N.Y. 1977). Addressing the inherent public policy problems associated with the imposition of time limits [**24] on political advertisement, the *Orazio* court noted:

Defendants ... assert that time restrictions on political wall signs are necessitated by the fact that politics is a temporary business. Whether temporary or not, politics is an important business and it is difficult to see what governmental interest is served by placing time limits on the public's opportunity to be informed about political candidates who are seeking public office or organizations which support them.

Id. at 1149.

These precedents are persuasive. The city has failed to show that its legitimate interest in maintaining a clean, litter-free, visually attractive community justifies placing time limits on the posting of political signs but not on temporary signs that convey commercial messages or ideological messages unrelated to an upcoming election. Nor has the city shown that this particular time period of sixty days, even if evenhandedly applied to all temporary signs, reasonably and adequately provides for the exercise of First Amendment rights. Before the city may impose durational limits or other restrictions on political advertising within its community to advance aesthetic goals, [**25] it must show that it is "serious and comprehensively addressing aesthetic concerns with respect to its environment." *Taxpayers for Vincent v. Members of City Council*, 682 F.2d 847, 852 (9th Cir. 1982) (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 530-31, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981)).

V. Less Drastic Alternatives

This Court is sensitive to the need for judicial restraint in intruding on the exercise of the police power

by local governments to regulate land uses in the interest of public safety, health, morality, peace and quiet, and the general welfare. Temporary political signs, while possessing unique advantages as a means for informing voters about candidates and public issues, may also pose special problems to a city in its attempts to maintain aesthetic standards. Because of their eye-catching colors and the profusion in which they are sometimes posted, political signs may convey their message in a strident or discordant fashion. See *Ross v. Goshi*, 351 F. Supp. 949, 953-54 n.13 (D. Hawaii 1972). If completely uncontrolled, they could subject the community to visual blight and pollution.

However not all efforts to regulate temporary [**26] signs will necessarily be invalid. In its recent opinion in *Taxpayers, supra*, the [*61] Ninth Circuit has pointed the way toward less restrictive alternatives available to city government:

Instead of a general ban, the City might regulate the size, design, and construction of the posters ... institute

clean up or removal requirements, ... or provide more stringent regulations for the areas of the City more in need of protection. Moreover, the City might specifically prohibit the erection of signs that obscure hydrants, traffic signs, and signals, or that block motorists' line of sight. We also think it clear that the City might prohibit the posting of signs on trees or shrubs.

Id. at 852-53 (citations omitted).

VI. Conclusion

For the reasons stated the City of Antioch's 60 day time limit on the posting of political signs is unconstitutional. The motion for a permanent injunction against enforcement of the ordinance is granted. All other relief is denied. The parties will bear their own costs.

IT IS SO ORDERED.

LEXSEE 121 wn 2d 737

Michael Collier, et al, Respondents, v. The City of Tacoma, Appellant

No. 59442-2

SUPREME COURT OF WASHINGTON

121 Wn.2d 737; 854 P.2d 1046; 1993 Wash. LEXIS 139

July 1, 1993, Decided

July 1, 1993, Filed

PRIOR HISTORY:
[***1]

Superior Court: The Superior Court for Pierce County, No. 90-2-06091-3, Frederick B. Hayes, J., on February 15, 1991, entered a judgment in favor of the plaintiff but refused to award attorney fees.

DISPOSITION:

Holding that the ordinances restrict the right to political expression in violation of the federal and state constitutions, that only those portions of the ordinances that impermissibly restrict political speech are invalid, and that the plaintiff was entitled to an attorney fee award under 42 U.S.C. § 1988, the court *affirms* the judgment in part, *reverses* it in part, and *remands* the case for an award of attorney fees.

COUNSEL:

William J. Barker, City Attorney, and *John C. Kouklis*, *Patricia Bosmans*, and *Heidi Ann Horst*, Assistants, for appellant.

Adam Kline, for respondents.

Richard L. Andrews, on behalf of the City of Bellevue and Washington State Association of Municipal Attorneys, amici curiae.

JUDGES:

En Banc. Guy, J. Utter, Dolliver, Smith, and Johnson, JJ., concur. Durham, J., Andersen, C.J., and Brachtenbach, J., concur in the result by separate opinion; Madsen, J., did not participate in the disposition of this case.

OPINION BY:
GUY

OPINION:

[*741] [*1048] Michael Collier, a candidate for Congress, posted his political campaign signs in residential areas within the city of Tacoma more than 60 days prior to the 1990 primary election. City workers removed Collier's signs from residential yards and parking strips in accordance with two Tacoma ordinances that restrict the preelection posting of political [*742] signs [***9] in such areas to a 60-day campaign window. Collier sued Tacoma claiming the ordinances violated his free speech rights. The trial court entered judgment in favor of Collier, holding the ordinances unconstitutional. We accepted certification from the Court of Appeals and affirm in part and reverse in part.

Facts

Michael Collier was a candidate for the Democratic Party's nomination for Congress in the Sixth Congressional District of Washington in 1990. Collier had not previously held or run for any elective office. He was not considered a public figure or well known in political circles. Collier's opponent in the primary election was Representative Norm Dicks, a 14-year incumbent.

The primary election was scheduled for September 18, 1990. Collier began to plan his campaign in December 1989 and began fundraising in February 1990. Collier identified that the greatest obstacles to his campaign were lack of name familiarity and funding. During the course of the primary campaign, Collier

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

raised and spent a total of \$ 29,000. Representative Dicks spent \$ 329,000 in his primary campaign.

Given his resources, Collier determined that yard signs were the most cost-effective means of [***10] communicating his political message. At the beginning of May 1990, the Collier campaign assembled some 700 2-sided yard signs. The first of these was posted outdoors between May 20 and 30. Collier supporters placed "Mike Collier for Congress" signs in their front yards and parking strips.

Tacoma Municipal Code (TMC) 2.05.275 defines and regulates political signs. The ordinance defines political signs as "[a]ll signs which are displayed out-of-doors on real property relating to the nomination or election of any individual for a public political office or advocating any measure to be voted on at any special or general election". The ordinance limits the posting of such political signs to a period of not more [*743] than 60 days prior to and 7 days after the date of the election for which the signs are intended. TMC 2.05.275(1). n1

n1 The full text of TMC 2.05.275(1) provides:

"(1) Such political signs shall not be displayed more than sixty days prior to and seven days after the date of the election for which intended. In cases where a general election follows within 55 days of a primary election, those signs for candidates whose names will appear on the ballot in the general election may be displayed during the interim period and up to seven days after the general election. In all instances herein in which political signs are required to be removed within seven days after the election for which the political sign was displayed, if said signs are not removed, they will be subject to removal by the City of Tacoma Public Works Department. Provided, however, that this provision shall not prohibit political signs in areas where other provisions of the Official Code of the City of Tacoma allows the same as legally licensed outdoor advertising displays."

[***11]

[**1049] Tacoma Municipal Code 6.03.070 prohibits any person, firm, or corporation from posting any signs

on any public street or highway or upon any curbstone, lamp post, street sign, pole, hydrant, bridge, tree, or other

thing situated upon any public street or highway or any publicly owned property within the City of Tacoma, except as may be authorized by ordinances of the City of Tacoma ... PROVIDED, HOWEVER, the prohibition contained herein shall not apply to political signs placed on parking strips preceding a primary or general election where such political signs are installed pursuant to the permission of the owner of the property abutting said parking strip and installed in such a manner as not to constitute a traffic hazard

Real estate signs advertising the sale or rent of the property upon which they stand or to which they are attached, and other signs attached to any building or sidewalk advertising the business carried on in the building, are *exempt* from the provisions of this chapter. TMC 6.03.080.

Pursuant to these ordinances, Tacoma Public Works Department employees removed signs displaying "Mike Collier for Congress" from residential yards [***12] and parking strips within the city of Tacoma that were posted more than 60 days prior to the primary election. Mr. Benjamin Thompson, City Engineer for Tacoma, testified that he directed personnel from his department to pick up all signs in the public [*744] right of way n2 throughout the city. Mr. Thompson testified that his department also removes commercial signs from residential areas since commercial signs are not permitted in those areas. Mr. Thompson understood that the ordinance allows an exception for on-site commercial signs pertaining to the sale or rent of private property. He testified that in order to enforce the ordinances, he differentiates between commercial and political signs by reading them.

n2 Mr. Thompson defined public "right-of-way" as "that area within a development that is set aside for and dedicated for use of a public street, sidewalks, and public utilities." Report of Proceedings, at 11. Mr. Thompson testified that the public right of way extends 15 feet from the curb: 5 feet for the parking strip, 5 feet for the sidewalk, and an additional 5 feet into the homeowner's front yard.

[***13]

Collier filed this action in July 1990 seeking a temporary restraining order, an injunction against the ordinances' enforcement, a declaratory judgment that the ordinances are unconstitutional, and attorney fees. The complaint was subsequently amended to include plaintiff n3 Joel Beritich, a Collier supporter who had political signs removed from his yard and parking strip. The

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

amended complaint also cited 42 U.S.C. § 1983 as an additional source of protection for the rights involved and 42 U.S.C. § 1988 as the statutory basis for the claim of attorney fees. On February 15, 1991, the trial court entered judgment in favor of Collier, holding that the ordinances were unconstitutional, but denied Collier's claim for attorney fees. Tacoma appealed the trial court's judgment as to the ordinances, and Collier cross-appealed the trial court's denial of attorney fees. We accepted certification from the Court of Appeals and now affirm in part and reverse in part.

n3 Hereafter, both plaintiffs are identified collectively as "Collier".

***14]

Issues

This case presents three issues for review. First, do the Tacoma ordinances unconstitutionally restrict Collier's free speech rights? We hold that Tacoma's durational limitation [*745] on the preelection posting of political signs unconstitutionally restricts Collier's right to political expression.

Second, did the trial court err in declaring the Tacoma ordinances unconstitutional in their entirety? We answer in the affirmative and hold unconstitutional only [*1050] those portions of the Tacoma ordinances that impermissibly restrict political speech.

Third, did the trial court err when it denied plaintiffs' request for attorney fees pursuant to 42 U.S.C. § 1988? We reverse the trial court on the issue of attorney fees and remand for a determination of an award of fees consistent with this opinion.

Analysis

I

[1] The Tacoma ordinances are challenged under both the first and fourteenth amendments to the United States Constitution, and article 1, section 5 of the Washington Constitution. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech". U.S. Const. amend. 1. The freedom of [*15] speech which is secured by the First Amendment is "among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State." *Burson v. Freeman*, U.S. , 119 L. Ed. 2d 5, 12, 112 S. Ct. 1846 (1992) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 95, 84 L. Ed. 1093, 60 S. Ct. 736 (1940)). Article 1, section 5 of the Washington Constitution provides that "[e]very person may freely speak, write and publish on

all subjects, being responsible for the abuse of that right."

[2, 3] As we stated in *O'Day v. King Cy.*, 109 Wn.2d 796, 801-02, 749 P.2d 142 (1988) (citing *State v. Coe*, 101 Wn.2d 364, 373-74, 679 P.2d 353 (1984)), "[t]his court has a duty, where feasible, to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law." We do so because in addition to our responsibility to interpret Washington's constitution, we must furnish a rational basis "for counsel [*16] to predict the future course of state decisional law." *State v. Gunwall*, 106 Wn.2d 54, 60, [*746] 720 P.2d 808, 76 A.L.R.4th 517 (1986). See *Utter, The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 Temp. L. Rev. 1153 (1992). We recognize that the free speech clauses of the state and federal constitutions are different in wording and effect, but that the result reached by previous Washington cases in general adopted much of the federal methodology for application to state constitutional cases. The federal cases cited here and in our prior decisions are used for the purpose of guidance and do not themselves compel the result the court reaches under our state constitution. See *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983); *Seantle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 775 (1988). With these statements in mind, we turn to our analysis of the Tacoma ordinances.

II

[4] The Tacoma ordinances implicate several concerns in our [*17] free speech jurisprudence: regulation of political speech, regulation of political speech in a public forum, and regulation based on the content of the speech. The speech restricted by Tacoma Municipal Code sections 2.05.275 and 6.03.070 is political speech. The code defines "political signs" and restricts the time and place in which such signs may be posted. Wherever the extreme perimeters of protected speech may lie, it is clear the First Amendment protects political speech, see *Carey v. Brown*, 447 U.S. 455, 467, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980), giving it greater protection over other forms of speech. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981). The constitutional protection afforded political speech has its "fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971).

[5, 6] The second important feature of the Tacoma [*18] ordinances is that they restrict political speech in a traditional public forum. The traditional public forum includes those places "which by long tradition or

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

by government fiat have [*747] been devoted to assembly and debate," such as parks, streets and sidewalks. *Burson v. Freeman*, *supra* at 13 [**1051] (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515, 83 L. Ed. 1423, 59 S. Ct. 954 (1939). See also Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. Ill. L. Rev. 949, 951. The parking strips n4 in which Collier and his supporters placed his political signs lie between the "streets and sidewalks" and thus are part of the "traditional public forum". Because these places occupy a special position in terms of First Amendment protection, the government's ability to restrict expressive activity is very limited. *Boos v. Barry*, 485 U.S. 312, 318, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988). [***19]

* n4 Collier also raises an issue concerning the restriction of political speech on private property. This issue was not adequately addressed in the briefing, is not necessary to our decision in this case, and thus will not be discussed further.

[7] Since the Tacoma ordinances do not ban political signs altogether, we analyze the ordinances as time, place, and manner restrictions. See, e.g., *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986). The United States Supreme Court has held that even in a public forum, the government may impose reasonable restrictions on the time, place, and manner of protected speech, provided the restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); [***20] *Perry Educ. Ass'n*, 460 U.S. at 45. We diverge from the Supreme Court on the state interest element of the time, place, and manner test, "as we believe restrictions on speech can be imposed consistent with Const. art. 1, § 5 only upon showing a compelling state interest." n5 [*748] *Bering v. Share*, 106 Wn.2d 212, 234, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987). The broad language of Const. art. 1, § 5 as compared with the federal constitution compels this result.

n5 Our prior holdings have required counsel to discuss at least the factors enunciated in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986) when they assert the applicability of our state constitution. Counsel's

failure in this case to discuss these factors would normally preclude our consideration of the state constitutional issues. *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988). Citation of *Bering v. Share*, 106 Wn.2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987) is not enough. Because *Bering* is a post-*Gunwall* case without *Gunwall* analysis, it might be construed not to call for such an analysis. For this reason, in this case only, we will not require a separate analysis of the nonexclusive factors in *Gunwall* to reach the state constitutional issue. For future cases, we stress that this court must have the benefit of a state constitutional argument that is of assistance to the court to determine the meaning of the language used as it relates to the state constitutional claim and whether there are factors other than language that should determine the scope of our constitutional provisions. See Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 Temp. L. Rev. 1153, 1160-63 (1992).

[***21]

Tacoma and amici curiae City of Bellevue and Washington State Association of Municipal Attorneys argue that the Tacoma ordinances are constitutionally permissible restrictions on the time, place, and manner of political speech. We disagree. Applying the 3-part test for time, place, and manner regulations outlined above, we conclude that Tacoma's durational limitation on the preelection posting of political signs is unconstitutional. Our analysis of the Tacoma ordinances under each element of the time, place, and manner test follows.

Content Neutrality

[8] The trial court held that Tacoma Municipal Code sections 2.05.275 and 6.03.070 are "not content-neutral, in that they expressly define and regulate 'political' signs." Tacoma and amici argue that the ordinances are content-neutral because the City does not regulate the message conveyed — only the method by which it is conveyed. Collier claims the ordinances are content based because they define and regulate political speech as a class of expression. Constitutionally permissible time, place, or manner restrictions may not be based upon either the content or subject [**1052] *matter of speech*. See *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 536, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980). [***22] Content-based restrictions on speech are presumptively [*749] unconstitutional and are thus subject to strict scrutiny. *Renton*, at 46-47; *Burson v. Freeman*, 119 L. Ed. 2d at

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

13-14. Under that intense level of review, government must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Perry Educ. Ass'n*, 460 U.S. at 45.

The Tacoma ordinances do not fit neatly into either the content-based or the content-neutral category. Our review of the case law and commentary on this subject indicates that the distinction is not always transparent. See, e.g., Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983-1984). In determining whether a restriction is content neutral or content based, the Supreme Court has held that "[g]overnment regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. at 791. [***23] While the Tacoma ordinances do not regulate political signs in terms of viewpoint, they describe and regulate permissible sign posting in terms of *subject matter*. Subject-matter restrictions are not directed at "particular ideas, viewpoints, or items of information, but at entire subjects of expression." Stone, 25 Wm. & Mary L. Rev. at 239. In this case, political signs are subject to a 60-day restriction "out-of-doors on real property", whereas on-site commercial signs identifying a property for sale or for rent are not. TMC 2.05.275; TMC 6.03.070, .080. How long a sign may be maintained depends upon the kind of message the sign seeks to convey. The trial court found that Tacoma Public Works Department personnel have to read the signs in order to determine whether they are prohibited at a particular time.

The United States Supreme Court has held that an ordinance is content based if it distinguishes between permissible and impermissible signs at a particular location by reference to content. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 516-17, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981); *FCC v. League of Women Voters*, 468 U.S. 364, 383-84, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984). [***24] As one commentator noted, the United States [***25] Supreme Court's prohibition of content-based regulations is based "both on equal protection grounds and on a first amendment grant of equal access to an open forum." (Footnotes omitted.) Note, *Members of the City Council v. Taxpayers for Vincent: The Constitutionality of Prohibiting Temporary Sign Posting on Public Property to Advance Local Aesthetic Concerns*, 34 De Paul L. Rev. 197, 208-09 (1984-1985). The question is "not whether all those within the classes defined by the state are treated equally but, rather, whether the classification itself is permissible." Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233, 276. As the Supreme Court stated in *Burson v. Freeman*, 119 L. Ed. 2d at 13 n.3, content-based restrictions raise Fourteenth Amendment equal

protection concerns because such restrictions differentiate between types of speech. See *Metromedia*, 453 U.S. at 517-21 (billboard ordinance favoring commercial speech over noncommercial speech [***25] violated First Amendment neutrality); *Police Dep't v. Mosley*, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972) (ordinance that prohibited picketing near a school building, but that expressly exempted peaceful labor picketing, held unconstitutional); *Mathews v. Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (town bylaw that barred the posting of political signs on residential property but permitted the posting of certain commercial signs held facially unconstitutional because bylaw was concerned with content, as opposed to the time, place, or manner of the speech); *People v. Middlemark*, 100 Misc. 2d 760, 420 N.Y.S.2d 151 (Dist. Ct. 1979) (ordinance which proscribed political signs but allowed other signs in residential [***1053] areas subjected to strict scrutiny); *Antioch v. Candidates' Outdoor Graphic Serv.*, 557 F. Supp. 52 (N.D. Cal. 1982) (municipal ordinance which imposed a 60-day limitation on political signs but not on commercial signs discriminated in the exercise of First Amendment rights in violation of the [***26] equal protection clause). The Tacoma ordinances, by regulating sign posting in terms of subject matter, albeit viewpoint neutral, fall within the realm of content-based restrictions.

[*751] Tacoma and amici argue that in determining content neutrality, the question is not whether the signs must be read, but whether the City of Tacoma prohibited the signs out of disapproval of the message promoted. n6 Citing *Ward*, Tacoma claims the principal inquiry in determining content neutrality in time, place, or manner cases is whether the government has adopted a regulation of speech "because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984)). Tacoma contends that since the ordinances serve a purpose unrelated to a sign's content, the ordinances are content neutral. See *Ward*, at 791.

n6 The stated purpose of Tacoma's sign code is "to provide minimum standards to safeguard life, health, property and public welfare by regulating and controlling the design, quality of materials, construction, location, electrification, and maintenance of all signs and sign structures." TMC 2.05.020.

[***27]

Collier argues that this standard is too subjective, and that a showing of "improper legislative intent" would

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

be practically impossible to make. We agree. The Supreme Court has recognized that "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 592, 75 L. Ed. 2d 295, 103 S. Ct. 1365 (1983). In some cases, the fact that a regulation is content based and invalid will be apparent from its face. See *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, U.S. , 116 L. Ed. 2d 476, 492, 112 S. Ct. 501 (1991) (Kennedy, J., concurring). In other cases, a censorial justification "will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech or ideas." *Burson v. Freeman*, U.S. , 119 L. Ed. 2d 5, 23, 112 S. Ct. 1846 (1992) (Kennedy, [***28] J., concurring). Although the Tacoma ordinances are viewpoint neutral, they define and regulate a specific subject matter -- political speech. [*752] This content-based distinction, while viewpoint neutral, is particularly problematic because it inevitably favors certain groups of candidates over others. The incumbent, for example, has already acquired name familiarity and therefore benefits greatly from Tacoma's restriction on political signs. The underfunded challenger, on the other hand, who relies on the inexpensive yard sign to get his message before the public is at a disadvantage. We conclude therefore that while aesthetic interests are legitimate goals, they require careful scrutiny when weighed against free speech interests because their subjective nature creates a high risk of impermissible speech restrictions. "[D]emocracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgments in this area". *Metromedia*, 453 U.S. at 519.

[9] Finally, Tacoma cites *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), [***29] for the proposition that an apparently content-based statute may be content neutral if the restriction on speech is targeted at the speech's secondary effects. In *Renton*, the Supreme Court considered the constitutionality of a zoning ordinance that restricted the location of adult theaters to one area of town. The ordinance was held constitutional because it did not target the content of the films shown at the theaters. Rather, the ordinance was aimed at the secondary effects that adult theaters have on the [**1054] surrounding community. *Renton*, at 46. We do not find *Renton* dispositive since it did not analyze a content-based restriction on political speech. While a distinction between adult theaters and other kinds of theaters may be permissible based on a "secondary effects" analysis, drawing a similar distinction between

commercial speech and political speech turns the favored status of political speech on its head. We therefore decline to draw such a distinction where a restriction on political speech in a public forum is at issue.

[10] In summary, the Tacoma ordinances are viewpoint neutral, but are content based in that they classify permissible [***30] [*753] speech in terms of subject matter. Ordinarily this conclusion would take the ordinances out of the domain of time, place, and manner restrictions, *Metromedia*, 453 U.S. at 516-17, and would instead require a strict scrutiny analysis. *Burson v. Freeman*, 119 L. Ed. 2d at 13-14. See *Perry Educ. Ass'n*, 460 U.S. at 45. We conclude, however, that the Tacoma ordinances can be reviewed under a time, place, and manner formulation. We hold that time, place, and manner restrictions on speech that are viewpoint neutral, but subject-matter based, are valid so long as they are narrowly tailored to serve a compelling state interest and leave open ample alternative channels of communication. This formulation of the standard of review comports with free speech jurisprudence under both article 1, section 5 of the Washington Constitution, *Bering v. Share*, 106 Wn.2d 212, 234, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050 (1987), [***31] and the first amendment to the United States Constitution. See *Burson v. Freeman*, 119 L. Ed. 2d at 23 (Kennedy, J., concurring) (recognizing that in time, place, and manner cases, since the regulation's justification is a "central inquiry", the compelling interest test may be one analytical device to detect, in an objective way, whether the asserted justification is in fact an accurate description of the purpose and effect of the law). n7 In this manner, we are able to balance the competing interests while recognizing that the burden of justifying a restriction on speech remains on the State. See *Burson*, at 32 (Stevens, J., dissenting).

n7 For cases requiring careful judicial scrutiny of regulations to ensure that no covert content-based restrictions exist, see *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980); *Erznoznik v. Jacksonville*, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975). See Note, *Members of the City Council v. Taxpayers for Vincent: The Constitutionality of Prohibiting Temporary Sign Posting on Public Property To Advance Local Aesthetic Concerns*, 34 De Paul L. Rev. 197, 206 (1984-1985).

[***32]

Compelling State Interest

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

[11, 12] Inasmuch as we have dealt with the first element of the time, place, and manner analysis, content neutrality, we next discuss the state interest element. Applying the standard enunciated above, Tacoma must prove that its [*754] ordinances, taken together, are narrowly drawn to serve a compelling state interest. To constitute a compelling interest, the purpose must be a fundamental one and the legislation must bear a reasonable relation to the achievement of the purpose. *Adult Entertainment Ctr., Inc. v. Pierce Cy.*, 57 Wn. App. 435, 439, 788 P.2d 1102, review denied, 115 Wn.2d 1006 (1990). See *Bates v. Little Rock*, 361 U.S. 516, 524-25, 4 L. Ed. 2d 480, 80 S. Ct. 412 (1960). We determine the reasonableness of a time, place, and manner restriction by balancing the public interest advanced by the regulation against the extent of the restriction on free speech rights. *State v. Lotze*, 92 Wn.2d 52, 58, 593 P.2d 811, appeal dismissed, 444 U.S. 921 (1979); [***33] *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 502, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).

[13] Tacoma argues that its interest in city aesthetics and traffic safety is a compelling state interest, and that the ordinances were "narrowly tailored" to serve that interest. We disagree. Although [**1055] aesthetics has been determined to be a significant governmental interest, *Members of City Coun. v. Taxpayers for Vincent*, 466 U.S. 789, 805, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984), it has not been determined to be an interest sufficiently compelling to justify restrictions on political speech in a public forum. The record in this case does not justify such a result. While Tacoma and amici cite *Vincent* and *State v. Lotze*, *supra*, for support, neither decision supports their premise that aesthetics and traffic safety are state interests sufficiently compelling to outweigh the restrictions imposed on Collier's free speech.

In *Vincent*, the Court upheld a municipal ordinance prohibiting the posting of any [***34] signs on public property. Ro' and Vincent was a candidate for election to the Los Angeles City Council. His political signs were attached to utility poles throughout the city. Pursuant to the ordinance, his signs were removed from the poles. The Court concluded that the ordinance was a valid time, place, and manner restriction. *Vincent*, at 815. *Vincent* is distinguishable from this case in two important respects. First, *Vincent* involved a law that prohibited the posting of all signs, regardless of content. Second, [*755] the utility poles upon which *Vincent's* signs were posted were not considered part of the traditional public forum. *Vincent*, at 814. See also Note, *Members of the City Council v. Taxpayers for Vincent: The Constitutionality of Prohibiting Temporary Sign Posting on Public Property To Advance Local Aesthetic Concerns*, 34 De Paul L. Rev. 197, 227 (1984-1985) (analyzes *Vincent* as

misapplying First Amendment precedent and the primacy of political speech).

In *State v. Lotze*, *supra*, we held that aesthetics and, to a greater extent, traffic safety were interests [***35] sufficiently compelling to outweigh the incidental restrictions on the appellants' exercise of First Amendment speech. *Lotze*, at 58-60. In *Lotze*, the State sought to remove political billboards adjacent to a highway under the authority of Washington's highway sign law (RCW 47.42), which generally prohibits all signs visible from interstate, primary or scenic systems except as permitted under the act. The listed exceptions under the act include signs advertising the sale or lease of property upon which they are located. We stated that unlike on-premise business signs and realty for sale signs, political messages such as the signs involved in *Lotze* are addressed "to the general universality of political ideas" and need not be linked with a specific site in order to derive meaning. *Lotze*, at 59. We held that the statute met the test for a state restraint on First Amendment rights because appellants' speech was not controlled as to content and because alternative means of communicating such views were available. *Lotze*, at 60.

The Supreme Court in *Metromedia*, 453 U.S. at 513 n.18, overruled its prior [***36] summary approval of *State v. Lotze*, 92 Wn.2d 52, 593 P.2d 811, appeal dismissed, 444 U.S. 921 (1979). Finding that San Diego's aesthetic interests were sufficiently significant to justify its ban on off-site commercial advertising, but were insufficient to warrant a ban on noncommercial signs, the Court observed that some decisions, including *State v. Lotze*, *supra*, have failed to give adequate weight to the distinction between commercial and noncommercial speech. *Metromedia*, 453 U.S. at 513 n.18. Other courts have also criticized the analysis in *Lotze*. In [*756] *Van v. Travel Information Coun.*, 52 Or. App. 399, 628 P.2d 1217 (1981), the Oregon Court of Appeals held that a 60-day restriction on temporary political signs adjacent to highways was unconstitutional. The *Van* court relied on a majority of decisions which were contrary to *Lotze* in order to conclude that aesthetic interests were insufficient to justify the significant restriction [***37] on political speech imposed by the 60-day limitation on political campaign signs. *Van*, at 416.

[14] We agree with Collier that *Lotze* should not be controlling on this issue. We depart from our holding in *Lotze* to the extent it [**1056] implies that aesthetics and traffic safety are compelling interests justifying greater restrictions on political speech than on commercial speech. We recognize that Tacoma's ordinances, unlike the statute at issue in *Lotze*, do not completely prohibit political sign posting. Given the preferred status of political speech, however, Tacoma has failed to show that its interest in maintaining a clean,

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

litter-free community n8 is sufficiently compelling to justify its disparate treatment of political speech. In *Metromedia*, San Diego's allowance of some billboards, but not others, was evidence that its interests in traffic safety and aesthetics, while "substantial", fell short of "compelling". *Metromedia*, 453 U.S. at 520. Likewise, Tacoma's disparate treatment of on-site commercial signs over political signs indicates that its interest in aesthetics is significant, [***38] but not compelling.

n8 Indeed, Collier argues that the self-interest and good sense of candidates already serves to regulate political yard signs.

Furthermore, Tacoma has not shown that yard signs create a substantial traffic hazard. There was no evidence that any of Collier's signs were hazardous to traffic or blocked pedestrian access. Mr. Thompson knew of no yard signs that had been found blocking sidewalks, utility lines or poles, or streets. Tacoma's claim that it restricts political yard signs to a 60-day period on behalf of a "compelling state interest" in traffic safety lacks evidentiary support. Once political signs are allowed on a temporary basis, "it is difficult to imagine how prohibiting political signs at other times significantly promotes highway safety." *Van*, 52 Or. App. at 412.

[*757] A regulation that serves a compelling state interest must be narrowly tailored to serve that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); [***39] *Bering v. Share*, 106 Wn.2d 212, 233-34, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050 (1987). The trial court found that neither ordinance is narrowly tailored to serve a compelling state interest. Tacoma argues that its restrictions are narrowly drawn since they allow political signs to be posted for the duration of a political campaign. We disagree.

The Tacoma ordinances restrict political expression by imposing durational limitations on the preelection posting of political campaign signs. Tacoma cites two cases for authority that preelection sign limitations have been upheld. Neither decision provides a satisfactory rationale for upholding such restrictions. In *Huntington v. Estate of Schwartz*, 63 Misc. 2d 836, 839, 313 N.Y.S.2d 918 (Dist. Ct. 1970), the court held that a 6-week limitation on political signs was within the scope of the municipality's police powers. The court found that the municipality could use or consider aesthetic considerations in applying such power. Cf. *People v. Middlemark*, 100 Misc. 2d 760, 763, 420 N.Y.S.2d 151 (Dist. Ct. 1979) [***40] (distinguished *Huntington*,

holding that a similar political sign ordinance was unconstitutional because it made an impermissible distinction between political signs and other signs). In *Ross v. Goshi*, 351 F. Supp. 949, 955 (D. Hawaii 1972), the court upheld a 60-day restriction, stating only that the ordinance was a "proper balancing of the conflicting interests". We find these decisions unpersuasive since they lack a discussion of the First Amendment and equal protection considerations at issue.

Other courts have held that preelection durational limitations on political campaign signs are unconstitutional. In *Antioch v. Candidates' Outdoor Graphic Serv.*, 557 F. Supp. 52 (N.D. Cal. 1982), the court held that the Antioch municipal ordinance, which banned the posting of temporary political signs everywhere in the city for all but a 60-day period before an election, unconstitutionally discriminated in the [*758] exercise of First Amendment rights in violation of the equal protection clause. The *Antioch* court viewed the ordinance as a general "ban" on political speech, with a temporary, 60-day suspension, prior [***41] to an election. *Antioch*, at 56. See also *Van v. [**1057] Travel Information Coun.*, supra at 416 (60-day limitation unnecessarily restrictive in light of the First Amendment interests involved and the State's interests sought to be advanced); *Orazio v. North Hempstead*, 426 F. Supp. 1144 (E.D.N.Y. 1977) (ordinance which limited the posting of political wall signs to 6 weeks prior to an election was invalidated on equal protection grounds). See generally Blumoff, *After Metromedia: Sign Controls and the First Amendment*, 28 St. Louis U.L.J. 171, 194-96 (1984).

[15] Tacoma's 60-day restriction, unlike the typical time, place, and manner restriction, does not attempt to determine whether and at what times the exercise of free speech rights is compatible or incompatible with the normal uses of a traditional forum or place. The Tacoma ordinances, like the ordinances in *Antioch*, *Van*, and *Orazio*, unnecessarily restrict the preelection posting of signs promoting the candidacy of certain individuals or advocating a certain viewpoint on an upcoming ballot proposition. Tacoma has not [***42] shown that its restrictive time period of 60 days, even if evenhandedly applied to all temporary signs, reasonably and adequately provides for the exercise of political speech. Before the City may impose durational limits or other restrictions on political speech to advance aesthetic interests, it must show that it is seriously and comprehensively addressing aesthetic concerns with respect to its environment. *Antioch*, 557 F. Supp. at 60. *Accord, Tauber v. Longmeadow*, 695 F. Supp. 1358, 1362 (D. Mass. 1988). See also *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 528-31, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981) (Brennan, J., concurring in judgment) (failure to provide

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

adequate justification for a restriction on protected activity merits invalidation of the restriction). Tacoma has made no showing on the record that it is seriously and comprehensively addressing aesthetic or traffic safety concerns other than through the ordinances in question.

[*759] While Tacoma is correct that the ordinances are not invalid simply because there may be some "imaginable alternative [***43] that might be less burdensome on speech", *Ward*, 491 U.S. at 797 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 86 L. Ed. 2d 536, 105 S. Ct. 2897 (1985)), the ordinances fail to provide adequately for Collier's free speech rights. Given the preferred status accorded political speech, and the persuasive authority in other jurisdictions which have dealt with this issue, we conclude the Tacoma ordinances are not narrowly drawn to serve a compelling state interest. In balancing the competing interests, we hold that Tacoma's regulatory interests in aesthetics and traffic safety, as demonstrated on the record, do not outweigh Collier's right to political speech. We depart from our decision in *Loize* to the extent it conflicts with our decision in this case.

Alternative Channels of Communication

The third and final element of both the federal and state constitutional tests requires that a time, place, and manner restriction leave open ample alternative channels for communication. *Ward*, 491 U.S. at 791; [***44] *Bering*, 106 Wn.2d at 234. The trial court found that Collier had not "sustained [his] burden of proof that the ordinances do not leave open ... an alternative means of communication". Collier assigns error to the trial court's placement of the burden of proof on him. We agree with Collier.

[16] Government may impose reasonable restrictions on the time, place, or manner of speech, provided the restrictions meet the standards enunciated above. Because Tacoma seeks to uphold the ordinances as reasonable time, place, and manner restrictions on political speech, it has the burden of meeting each element of the time, place, and manner test. We conclude the trial court erred in assigning Collier the burden of proving the "availability of alternative channels of communication", the third element of the time, place, and manner test. *See Bering*, 106 Wn.2d at 234; *Ward*, 491 U.S. at 791. That burden properly rests [***58] with Tacoma, and Tacoma has failed to meet

[*760] [17] Both Tacoma and amici argue that politicians [***45] have numerous ways of expressing themselves through other media than the posting of signs. Collier does not dispute that he had the right to purchase radio and television time and to engage in

direct mail. His argument is that these alternative modes of communication were effectively unavailable to him as an underfunded challenger. Based on our review of the record, we agree with Collier. In Collier's case, the yard sign was the most cost-effective, realistic method of increasing his name familiarity. Because means of political speech are not entirely fungible, the political yard sign offers special advantages to the candidate seeking public office. Political yard signs are relatively cost-effective and can be localized to a high degree. *Antioch*, 557 F. Supp. at 59 (citing *Baldwin v. Redwood City*, 540 F.2d 1360, 1368 (9th Cir. 1976), cert. denied, 431 U.S. 913 (1977)). In Collier's case, the issue is not whether "ample alternatives" are available, but whether they are *practically* available. Alternatives are not "alternatives" if they are far from satisfactory. *Metromedia*, 453 U.S. at 516. [***46] Thus, the "summary seizure of a political sign for even a few days can deprive the sign's owner of an important First Amendment liberty interest." *Baldwin*, 540 F.2d at 1374. Given the record before us, we conclude that Tacoma's restrictions on political sign posting did not afford Collier adequate alternative channels of communication.

In summary, we concur with the trial court that the Tacoma ordinances are invalid time, place, and manner restrictions. Tacoma has failed to prove that its interests in aesthetics and traffic safety are sufficiently compelling to justify the restrictions imposed on Collier's rights to political expression. Tacoma has also failed to prove that its restrictions left Collier ample alternative channels in which to communicate his message. We conclude, therefore, that Tacoma's durational limitation on the preelection posting of political campaign signs violates the free speech provisions of both the Washington and the United States Constitutions.

[*761] III

Tacoma claims the trial court erred in declaring both ordinances unconstitutional in their entirety. We agree. The record indicates that the parties' dispute focused [***47] on section (1) of TMC 2.05.275, rather than on the ordinance as a whole. No issue was raised as to section (2) (size limitations), or section (3) (requiring consent of private property owners). Similarly, only those portions of TMC 6.03.070 and .080 that affect political expression are at issue.

[18] As a general rule "only the part of an enactment that is constitutionally infirm will be invalidated, leaving the rest intact." *National Advertising Co. v. Orange*, 861 F.2d 246, 249 (9th Cir. 1988). *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 94 L. Ed. 2d 661, 107 S. Ct. 1476 (1987). We hold unconstitutional only those provisions of the ordinances which impermissibly restrict the scope of political speech through limitations on the

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

time and place for the preelection posting of political signs. Tacoma's interests in aesthetics and traffic safety are sufficient to justify reasonable, content-neutral regulation of the *noncommunicative* aspects of political signs, such as size, spacing, and consent of the private property owner.

We are sensitive to the need for judicial restraint [***48] in intruding on the exercise of the police power by local governments to regulate land uses in the interest of public health, safety, and welfare. Consequently, our holding does not compel a change to postevent *removal* requirements as long as such requirements are reasonable and apply to all temporary events, such as political campaigns, home sales and residential renting. While preelection political speech interests may outweigh a municipality's regulatory interests in a given case, those same interests are not present postevent and may be outweighed by a [**1059] municipality's demonstrated interests in aesthetics or traffic safety. See *Baldwin v. Redwood City*, *supra* (10-day postelection removal requirement upheld).

[*762] IV

Collier assigns error to the trial court's holding that the "special circumstances" of trial publicity and representation by the ACLU preclude an award of attorney fees under 42 U.S.C. § 1988. Collier also requests additional fees for the purposes of this appeal.

[19] A party prevailing in an action under 42 U.S.C. § 1983 may recover reasonable [***49] attorney fees pursuant to 42 U.S.C. § 1988. *Jacobsen v. Seattle*, 98 Wn.2d 668, 675, 658 P.2d 653 (1983). A prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Jacobsen*, at 675-76 (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402, 19 L. Ed. 2d 1263, 88 S. Ct. 964 (1968)).

[20, 21] In the instant case, the trial court ruled in favor of plaintiffs Collier and Beritich. They are "prevailing parties" for the purposes of the statute. The trial court, however, identified publicity gained by the suit and ACLU representation as "special circumstances" which warranted denial of an award of attorney fees. We disagree. In *Runyon v. Fasi*, 762 F. Supp. 280 (D. Hawaii 1991), the plaintiff requested attorney fees pursuant to 42 U.S.C. § 1988 in a factually similar action challenging the constitutionality of a city ordinance which prohibited outdoor political signs. The *Runyon* [***50] court addressed the identical issue of public service representation as a "special circumstance". We agree with the *Runyon* court's conclusion that the fact that the prevailing party was represented by a public service firm or association funded by public funds is irrelevant. See *Runyon*, 762 F. Supp. at 286 (citing

Watkins v. Mobile Housing Bd., 632 F.2d 565 (5th Cir. 1980)). As to the issue of trial publicity, Tacoma urges this court to accept the trial court's denial of attorney fees as a proper use of discretion. The trial court, however, made no finding that Collier used the judicial system to gain publicity for political purposes.

Tacoma argues that should this court reverse the trial court on the issue of attorney fees, the court should limit the amount of attorney fees to reflect work performed from the [*763] point after which the complaint was amended. Tacoma reasons that until respondents filed the amended complaint which cited 42 U.S.C. § 1988 as statutory authority for attorney fees, Tacoma had no notice of any claim for attorney fees. We disagree. Tacoma had [***51] notice of respondents' claim for attorney fees with the filing of Collier's original complaint. Collier's amendment of his complaint to add an additional source of authority for obtaining attorney fees does not alter the fact that Tacoma had sufficient notice to prepare an adequate response to Collier's request for attorney fees.

The final issue to resolve is whether the requested fees were reasonable. The trial court found that the plaintiffs' attorney had spent 99.3 hours in the prosecution of this action, and "said hours have been expended reasonably and necessarily in view of the result obtained." The trial court also found that the plaintiffs' attorney's hourly rate of \$ 150 was reasonable compensation for the work performed. These findings were uncontroverted. We will not disturb these findings on appeal.

Conclusion

The Tacoma ordinances impermissibly restrict Collier's right to political expression in violation of article 1, section 5 of the Washington Constitution, and the first and fourteenth amendments to the United States Constitution. We hold unconstitutional those portions of the Tacoma ordinances that impose durational limitations on the preelection posting of political [***52] signs. We remand for a determination of a reasonable [**1060] attorney fee, to include a determination of attorney fees on appeal.

CONCURBY:
DURHAM

CONCUR:

Durham, J. (concurring)

For 15 years, this court has wrestled with the difficult concept of independent state constitutional analysis. The circumstances under which it should be

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

applied has been the subject of many divided opinions and [*764] considerable acrimony. Finally, in 1986, this court *unanimously* agreed on a list of six nonexclusive criteria to aid in determining when state constitutional analysis is appropriate. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986). Shortly thereafter, in *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988), we unequivocally stated the necessity of employing the *Gunwall* criteria:

Wethered urges this court to follow our holding in *State v. Lavaris*, 99 Wn.2d 851, 664 P.2d 1234 (1983) under Const. art. 1, § 9 and cites *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980) [***53] as general authority that "the Washington Constitution can be and has been interpreted as more protective of individual rights than the United States Constitution. He fails to use the *Gunwall* interpretive principles to assist this court By failing to discuss at a minimum the six criteria mentioned in *Gunwall*, he requests us to develop without benefit of argument or citation of authority the "adequate and independent state grounds" to support his assertions. See *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). We decline to do so consistent with our policy not to consider matters neither timely nor sufficiently argued by the parties. In *re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

(Italics mine.)

Since *Gunwall* and *Wethered*, over 70 Washington appellate decisions have acknowledged our rule barring consideration of state constitutional issues absent briefing of the *Gunwall* factors. E.g., *State v. Greenwood*, 120 Wn.2d 585, 614, 845 P.2d 971 (1993); *Tellevik v. 31641 West Rutherford St.*, 120 Wn.2d 68, 77, 838 P.2d 111, 845 P.2d 1325 (1992); [***54] *State v. Rodriguez*, 65 Wn. App. 409, 414 n.1, 828 P.2d 636, review denied, 119 Wn.2d 1019 (1992). In fact, one noteworthy commentator has explained that:

Assistance from counsel in interpreting state constitutional provisions is *vitaly important*. *Wethered* directs counsel to bring the constitutional issues into as sharp a focus as they possibly can by *requiring* them to fashion a state constitutional argument that addresses textual language, constitutional and common law history, structural differences, and local concerns. *Our decision in Wethered reaffirmed that the criteria are a necessary starting point for a discussion between bench and bar about the meaning of a state constitutional provision.*

(Italics mine.) Justice Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's* [*765] *Experience*. 65 Temp. L. Rev. 1153, 1162 (1992). This same commentator has

recognized that "*Gunwall* functions as a *procedural threshold* for considering state constitutional claims". (Italics mine.) Utter, at 1165.

Today, however, 8 years of painfully [***55] crafted jurisprudence is cast aside in a footnote: "[b]ecause *Bering v. Share*, 106 Wn.2d 212, 721 P.2d 918 (1986) is a post-*Gunwall* case without *Gunwall* analysis, it might be construed not to call for such an analysis. For this reason, in this case only, we will not require a separate analysis of the nonexclusive factors in *Gunwall* to reach the state constitutional issue." Majority, at 747-48 n.5. This reasoning completely ignores the *Wethered* rule, which was adopted 2 years after *Bering*. Moreover, putting aside the majority's attempt to limit its own case to the facts, there is no principled way to keep this exception from swallowing the rule. *Bering* was not unique. There were several cases between *Gunwall* and *Wethered* that engaged in a state constitutional exegesis without the [**1061] benefit of the *Gunwall* factors. See, e.g., *Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988) (interpreting Const. art. 1, § 7); *O'Day v. King Cy.*, 109 Wn.2d 796, 801-02, 749 P.2d 142 (1988) (interpreting Const. [***56] art. 1, § 5); *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986) (plurality opinion) (interpreting Const. art. 1, § 7). As such, the majority's analysis only serves to cast doubt on a wide body of law under Const. art. 1, §§ 5 and 7 requiring briefing of the *Gunwall* factors. If, indeed, it is the intention of a majority of this court to cast aside the *Gunwall/Wethered* principles, it should be done forthrightly and with reasoned analysis. n9

n9 It is so that "[t]his court has a duty, *where feasible*," to consider state constitutional analysis. (Italics mine.) Majority, at 745. However, the case cited in the lead opinion for this proposition, *O'Day*, 109 Wn.2d at 801-02 (citing *State v. Coe*, 101 Wn.2d 364, 373-74, 679 P.2d 353 (1984)), was decided prior to the *Wethered* rule. In fact, *Wethered* specifically recognized that this language from *O'Day* and *Coe* was limited by, and subject to, briefing of the *Gunwall* factors. See 110 Wn.2d at 471-72.

[***57]

Ironically, the majority's result in negating the Tacoma sign ordinance could be reached under federal law analysis. See, e.g., *Burson v. Freeman*, U.S. , 119 L. Ed. 2d 5, [*766] 112 S. Ct. 1846 (1992) (both plurality and dissent would require strict scrutiny for content-based, but viewpoint-neutral speech); *Antioch v. Candidates' Outdoor Graphic Serv.*, 557 F. Supp. 52

121 Wn.2d 737, *; 854 P.2d 1046, **;
1993 Wash. LEXIS 139, ***

(N.D. Cal. 1982) (law banning posting of political signs except for 60 days prior to election violated equal protection clause). It is only because of the applicability of federal law that I concur in the result.

LEXSEE 746 p2d 961

George W. PIGG, Plaintiff-Appellee, v. STATE DEPARTMENT OF HIGHWAYS, Defendant-Appellant.
State of Colorado; State Highway Commission of Colorado; King H. Harris, Grant Wilkins, Charles Hanavan, George Brennan, James Golden, Bill E. Roundtree and Richard M. Hays, in their individual and official capacities as State Highway Commissioners, and Robert M. Hays, in his individual and official capacity as Chief Engineer, State Division of Highway

No. 86SA4

Supreme Court of Colorado

746 P.2d 961; 1987 Colo. LEXIS 657

November 30, 1987

PRIOR HISTORY:

[**1]

Appeal from District Court, City and County of Denver, Honorable John W. Coughlin, Judge, Judgment Reversed and Case Remanded.

COUNSEL:

Morris, Lower & Sattler, Bruce W. Sattler, Attorneys for Plaintiff-Appellee.

Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Mark E. May, Assistant Attorney General, Natural Resources Section, Robert A. Hykan, Assistant Attorney General, Lynn B. Obermyer, First Assistant Attorney General, Attorneys for Defendants-Appellants.

JUDGES:

En Banc. Justice Rovira.

OPINION BY:

ROVIRA

OPINION:

[*962] JUSTICE ROVIRA delivered the Opinion of the Court.

The Colorado Outdoor Advertising Act (Act), § 43-1-401 to -420, 17 C.R.S. (1984), and regulations promulgated thereunder by the appellant *Colorado State*

Department of Highways (Department), 2 C.C.R. 601-3 (1983), restrict the content, size, lighting, and spacing of signs that may be erected and maintained along highways in Colorado. The issue in this case is whether the Act applies to noncommercial advertising devices, and if so whether it is constitutional.

I.

Appellee George W. Pigg operates a ranching business near Pueblo, Colorado. Interstate [**2] Highway 25 divides Pigg's property into four parts: one large parcel abuts the east side of the highway, and three smaller parcels abut the west. Pigg purchased the property in 1956, and from then until 1974 he maintained a number of commercial advertising signs along both sides of the highway.

In 1974, the Department condemned 21 of Pigg's signs pursuant to the Act, § 43-1-414(1), 17 C.R.S. (1984), and later paid him \$ 17,900 for the taking; that figure was determined to be just compensation in an eminent domain proceeding. See § 43-1-414(2), 17 C.R.S. (1984). Pigg appealed the award as inadequate. In a separate proceeding, the Department obtained permission to remove five more signs Pigg erected after the eminent domain proceeding. Pigg appealed that decision, also, but was unsuccessful on both appeals. See *State Department of Highways v. Pigg*, 656 P.2d 46 (Colo. App. 1982) (affirming \$ 17,900 compensation award); *State Department of Highways v. Pigg*, 653 P.2d 67 (Colo. App. 1982) (affirming summary judgment in favor of Department on its complaint to remove signs).

Before those two cases were resolved on appeal, Pigg erected over 50 signs bearing noncommercial messages, [**3] most of which were related to his dissatisfaction with the condemnation award and his dealings with [*963] the Department. n1 In response, the Department sent Pigg a Notice of Violation (Notice) of the Act on July 27, 1982, directing him to remove all but three of the signs. Of the 54 "advertising devices" enumerated in the Notice as standing in violation of the Act and regulations, 35 bore noncommercial messages, one bore an arguably commercial message, and 18 were in some state of disrepair or were bare structures holding no signs at all.

n1 Some signs are intended primarily to decry the inadequacy of the compensation Pigg was awarded for the condemnation of his signs:

Help! if the Right to 21 Advertising Signs

WAS AGAIN RETURNED TO ME

OR JUST COMPENSATION For the taking

NOT STARVING WOULD I BE

And:

This Sign Produced Landowner /
Compensation Paid Landowner

\$ 50.00 Net Per Mo. / For Its Taking \$
4.00 Per Mo.

ANYONE WHO CLAIMS

\$ 50.00 TAKEN FROM ME

WILL EQUALLY BE REPLACED

WITH \$ 4.00

Can Only Be Classed As An Idiot

Others comment more generally on Pigg's perception of the government after his dealings with the Department:

The small thief is sent to CANON sentenced to LUXURY for his Act

The big thief goes to Denver and becomes a Bureaucrat

And:

Take all the Bulls in Texas Pile the manure in a stack

The volume would be minor Compared to bureaucrats

[**4]

- Pigg challenged the Notice pursuant to the State Administrative Procedure Act. After a hearing at which Pigg was represented by counsel, the hearing officer concluded that the Notice was correct and ordered Pigg to remove the advertising devices.

Pigg then appealed to the Colorado Highway Commission (Commission), which affirmed and adopted the hearing officer's decision in its final decision and order. Pigg then filed a complaint in the district court seeking judicial review of a final agency decision. He claimed that the Act regulates only commercial speech, and that the Department's regulations are void because the Act does not authorize the regulation of structures bearing noncommercial messages. Further, he argued, if the Act and regulations were interpreted to apply to his noncommercial signs, they would be in violation of the first and fourteenth amendments to the United States Constitution and article II, section 10 of the Colorado Constitution.

The district court ruled that the Act was intended to govern only commercial advertising devices, and therefore the Department had no statutory authority to place restrictions on noncommercial advertising devices such as Pigg's. The [**5] court reversed the Commission's final decision and order. The Department, the Commission, and the chief engineer of the Department appeal that decision. We reverse the judgment of the district court.

II.

A.

Colorado began regulating roadside advertising in the early part of this century, but for the most part the restrictions on advertising were minimal. See 1963 C.R.S. 120-5-1 to -13 The Act, which effectively bans outdoor advertising in rural and residential areas, was enacted in 1966 primarily to enable the state to receive its full share of federal aid highway funds in light of the Federal Highway Beautification Act of 1965, 23 U.S.C.A. § 131 (1966 & Supp. 1987) (Beautification Act).

The Beautification Act was enacted to combat the overuse of billboards and other outdoor advertising devices along the nation's highways "in order to protect the public investment in such highways, to promote the

safety and recreational value of public travel, and to preserve natural beauty." *Id.* § 131(a). The Beautification Act does not itself regulate outdoor advertising. Instead, it penalizes a state that fails to provide "effective control" of outdoor advertising by mandating forfeiture [**6] of 10 percent of its federal aid highway funds until such time as the state provides for effective control. *Id.* § 131(b). The statute specifies that:

[*964] Effective control means that such signs, displays, or devices shall, pursuant to this section, be limited to (1) directional and official signs and notices, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices advertising activities conducted on the property on which they are located

23 U.S.C.A. § 131(c) (1987 Supp.).

The Secretary of Transportation has promulgated regulations pursuant to the Beautification Act further defining "effective control" in terms of restrictions on the content, size, lighting, and spacing of signs permitted under section 131. 23 C.F.R. § 750.101 *et seq.* (1987). Those regulations include certain limitations with respect to the on-premise signs referred to in section 131(c)(2) and (3), but at the same time require states to determine the circumstances in which certain signs are exempt from section 131(c):

On-property or on-premise advertising [**7]

(d) Signs are exempt from control under 23 U.S.C. 131 if they solely advertise activities conducted on the property on which they are located State laws or regulations shall contain criteria for determining exemptions. These criteria may include:

...
(2) A purpose test for determining whether a sign has as its sole purpose the identification of the activity located on the property

(3) The criteria must be sufficiently specific to curb attempts to improperly qualify outdoor advertising as "on-property" signs, such as signs on narrow strips of land contiguous to the advertised activity when the purpose is clearly to circumvent 23 U.S.C. 131.

23 C.F.R. § 750.709 (1987).

The Act, as it was originally enacted, followed the formal requirements and utilized the language of the Beautification Act. As the Act was amended over the years, the legislature ensured the statute's conformity

with the Beautification Act by adopting those definitions and restrictions set out in federal regulations. The practice of the legislature in conforming the Act to the federal law with few substantial changes suggests both that the legislature's primary concern [**8] has remained the preservation of the state's share of federal highway funds, and that the legislature intended to prohibit only those signs that would conflict with federal law. n2

n2 Additional history of the Act may be found in *Nat'l Advertising Co. v. Dept. of Highways*, 718 P.2d 1038 (Colo. 1986).

We turn now to the specific statutory provisions at issue in this case. The Act defines "advertising device" to mean:

Any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other contrivance designed, intended, or used to advertise or to give information in the nature of advertising and having the capacity of being visible from the travel way of any state highway

§ 43-1-403(1), 17 C.R.S. (1984). See 23 C.F.R. 750.703(i) (1987) (utilizing substantially identical definition, but with phrase "used to advertise or inform").

The Act specifies the types of advertising devices that may be erected and maintained "when in compliance with [**9] all provisions of this [Act] and the rules and regulations adopted by the department [of highways]." § 43-1-404(1), 17 C.R.S. (1984). Included among the permitted advertising devices are on-premise advertising devices. § 43-1-404(1)(b).

The Department contends that Pigg's signs fall within the category of "on-premise" advertising devices and that the regulations governing the number of such signs are valid. Further, the Department argues that the order requiring Pigg to limit the size and number of billboard's on his property did not infringe his constitutional right to free speech.

Pigg asserts three bases for upholding the district court's judgment. He argues [**965] first -- and the district court found -- that the Act was intended to govern only commercial advertising devices and not political or ideological signs. Therefore, the Department's regulations which purport to control Pigg's signs are void as falling outside the Department's statutory authority.

Second, he contends that if the Act bans all advertising devices except those enumerated, it is

unconstitutional since ideological signs are not "on-premise" advertising devices and are not otherwise permitted. As [**10] a consequence, the Act impermissibly discriminates in favor of commercial signs.

Finally, he argues, even if the Department's regulations allow the construction of noncommercial on-premise signs, the statute unconstitutionally favors commercial speech by exempting certain tourist-related signs.

We disagree with all three arguments.

B.

The Act was modeled on the Beautification Act and designed to permit the erection and maintenance of any sign consistent with the restrictions imposed by the federal law. We thus look first to the federal law to assist us in determining whether the Act was intended to govern only commercial advertising devices. We then consider the language of the statute and its legislative history to determine whether it should apply only to commercial signs.

Unfortunately, the history of the Beautification Act contains no clear evidence of how Congress itself viewed the law as affecting noncommercial and ideological signs. The witnesses called before House and Senate subcommittees testified either to support the economic necessity of commercial advertising devices, or else to support the proposed limitations on signs for aesthetic reasons. Neither the subcommittees [**11] nor the witnesses appear to have addressed the law's effect on ideological signs located on a sign owner's land. See generally, *Hearings on S. 2084 Before the Subcommittee on Roads of the Senate Committee on Public Works*, 89th Cong., 1st Sess. (1965); *Hearings on H.R. 8487 Before the Subcommittee on Roads of the House Committee on Public Works*, 89th Cong., 1st Sess. (1965). In addition, neither the House Report on the Beautification Act as it was finally passed nor the Senate Report on its own similar legislation sheds much light on the Act's intended scope with respect to noncommercial signs. See H.R. Rep. No. 1084, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Admin. News 3710; S. Rep. No. 709, 89th Cong., 1st Sess. (1965). Finally, we are reluctant to accord much weight to what little legislative history there is, especially since passage of the Beautification Act was accomplished quickly and with little consideration either in committee or on either floor. See *Minority Views on S. 2084*, H.R. Rep. No. 1084, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Admin. News 3710, 3724.

The legislative history of the Act is similarly unenlightening. [**12] It is axiomatic that "legislative

intent is the polestar of statutory construction." *People v. District Court*, 711 P.2d 666, 670 (Colo. 1985); *Schubert v. People*, 698 P.2d 788, 793 (Colo. 1985). We may look both to the language of the statute and to the purposes underlying enactment of the law to help us ascertain that intent. *Schubert*, 698 P.2d at 793-94; *Colorado Department of Social Services v. Board of County Commissioners*, 697 P.2d 1 (Colo. 1985). In both the purposes of the Act and in its various definitional provisions we find strong reasons to believe that the Act was intended to cover noncommercial, as well as commercial, advertising.

The definition of "directional" advertising devices indicates that the legislature was concerned with noncommercial, as well as commercial, advertising devices:

(4) "Directional advertising device" includes, but is not limited to: Advertising devices containing directional information about public places owned or operated by federal, state, or local governments or their agencies; publicly or privately owned natural phenomena, historic, cultural, [*966] scientific, educational, and religious sites; and areas of natural [**13] scenic beauty or naturally suited for outdoor recreation, deemed to be in the interest of the traveling public

§ 43-1-403, 17 C.R.S. (1984). The legislature's specific enumeration of permissible directional signs, many of which clearly are noncommercial, belies the claim that the legislature was concerned only with commercial signs. If Pigg were correct that noncommercial signs are not subject to the regulations promulgated under the Act, then there would be little purpose in the statute's inclusion of devices advertising governmentally controlled places or devices identifying natural wonders as permitted directional advertising devices.

The definition of "official advertising device" is similarly telling:

(13) "Official advertising device" means any advertising device erected for a public purpose authorized by law, but the term shall not include devices advertising any private business.

43-1-403, 17 C.R.S. (1984). Had the legislature intended to control only commercial signs, it would have been unnecessary to specify that official signs may be maintained. The express exclusion of signs "advertising any private business" from the class of "official [**14] advertising devices" further demonstrates that the Act was intended to provide for the regulation of more than just commercial signs.

Moreover, noncommercial signs pose as much a threat to the goals underlying the Act as do commercial signs. The Act was designed:

To further the following substantial state interests:

- (I) Protection of the public investment in the state highway system;
- (II) Promotion of safety upon the state highway system;
- (III) Promotion of the recreational value of public travel;
- (IV) Promotion of public pride and spirit both on a statewide and local basis;
- (V) Preservation and enhancement of the natural scenic beauty of this state;
- (VI) Broadening the economic well-being and general welfare by attracting to this state tourists and other travelers

§ 43-1-402(1)(a), 17 C.R.S. (1984).

It is self-evident that an advertising device detracts from the natural scenic beauty visible from the highway whether it bears a commercial message or a noncommercial message. Also, to the extent the state is concerned about the safety of travelers when drivers are distracted by reading signs, that concern does not depend on the **[**15]** nature of the message being communicated.

We believe that neither the history of the Act nor its language suggests that the legislature intended that the Act apply only to commercial signs. We hold that the Act's proscriptions cover advertising devices bearing noncommercial messages.

C.

Among the advertising devices permitted by the Act are "on-premise advertising devices," which the Act defines as encompassing any

- (14) Advertising device advertising the sale or lease of the property on which it is located or advertising activities conducted on the property on which it is located.

§ 43-1-403, 17 C.R.S. (1984).

The Department is responsible for adopting and enforcing rules and regulations governing on-premises advertising devices. § 43-1-415(1)(c), 17 C.R.S. (1984). The Department's regulations divide on-premise signs

into several categories based on their content, and tailor restrictions to the category in which the sign belongs. See *Rule V.1, 2 C.C.R. 601-3 (1983)*.

The Department asserts that Pigg's signs are subject to the following regulation:

For the purposes of noncommercial advertising devices (ex. religious, social or political commentaries) **[**16]** erected by the owner or lessee of property, the premises is the primary structures, parking area and private roadway. Noncommercial signs that are on the premises or within **[*967]** approximately 50 feet thereof are on-premise signs. To further the purposes of the act, noncommercial signs that are more than approximately fifty feet from the premises may be no larger than 150 square feet and are limited to two signs visible to traffic proceeding in any one direction if the highway frontage of the property upon which the premises is located is less than one mile in length. If the highway frontage of the property upon which the premises is located is more than one mile in length, one sign visible to traffic proceeding in any one direction per mile is allowable.

Rule V.1.f, 2 C.C.R. 601-3 (1983). The size and placement restrictions are identical to those imposed on commercial on-premise signs. *Rule V.1.d, 2 C.C.R. 601-3 (1983)*.

Pigg contends that his signs are not "on-premise" advertising devices within the meaning of the Act. As a consequence, he argues, the Act imposes an unconstitutional ban on ideological speech. n3

n3 Pigg does not suggest a definition of "ideological" in his brief. For the purposes of his argument, we will assume that Pigg's signs display the type of speech that is afforded protection by the first amendment. See *City of Lakewood v. Colfax Unlimited Ass'n, Inc.*, 634 P.2d 52, 57 n.5 (Colo. 1981).

IS LARGELY DISREGARDED

Because we find that the Act does permit the maintenance of advertising devices that exhibit noncommercial or ideological messages, we do not address whether a complete ban on such speech would be unconstitutional. Pigg asserts that it would be, but provides no authority or argument in support of his contention. The courts that have addressed the issue are not in agreement. Compare *Wheeler v. Comm'r of Highways*, 822 F.2d 586 (6th Cir. 1987) and *State v. Lotze*, 92 Wash. 2d 52, 593 P.2d 811, appeal dismissed, 444 U.S. 921, 62 L. Ed. 2d 177, 100 S. Ct. 257 (1979) (bans on political

billboards held constitutional) with *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514, 69 L. Ed. 2d 800, 101 S. Ct. 2882 n.18 (1981) (plurality opinion) (disagreeing with *Lotze*) and *Van v. Travel Information Council*, 52 Ore. App. 399, 628 P.2d 1217 (1981) (ban on political billboards held unconstitutional) and *State v. Pile*, 603 P.2d 337 (Okla. 1979), cert. denied, 453 U.S. 922, 69 L. Ed. 2d 1004, 101 S. Ct. 3158 (1981) (suggesting that ban on noncommercial signs would raise serious constitutional problems).

[**17]

The crux of Pigg's argument is that under the Act, a sign must advertise the sale or lease of the property on which the sign is located, or advertise activities conducted thereon, to constitute an on-premise sign. By construing ideological signs as on-premise signs, he claims, the regulations go beyond the scope of authority granted by the Act.

Administrative regulations are presumed valid and will be set aside only when the party who challenges them establishes their invalidity beyond a reasonable doubt. *Augustin v. Barnes*, 626 P.2d 625, 627 (Colo. 1981). In addition, we will accord deference to the interpretation of a statute by the executive agency charged with enforcing it. *Ingram v. Cooper*, 698 P.2d 1314, 1316 (Colo. 1985); *City & County of Denver v. Industrial Commission*, 690 P.2d 199, 203 (Colo. 1984). We will not, however, enforce a regulation which modifies or contravenes a statute or regulates beyond the scope of authority granted by the legislature. *Miller International, Inc. v. Department of Revenue*, 646 P.2d 341, 344 (Colo. 1982); *Travelers Indemnity Co. v. Barnes*, 191 Colo. 278, 282, 552 P.2d 300, 303 (1976).

In *South Dakota v. Adams*, 506 F. [**18] Supp. 60 (D.S.D.), aff'd, 635 F.2d 698 (8th Cir. 1980), cert. denied, 451 U.S. 984, 68 L. Ed. 2d 841, 101 S. Ct. 2316 (1981), the court addressed a similar challenge to the federal regulations. South Dakota forfeited a portion of its federal aid highway funds after the Secretary of Transportation determined that South Dakota's content restrictions on directional signs were inadequate to satisfy the "effective control" requirement of section 131 of the Beautification Act. South Dakota argued that the content restrictions embodied in the federal regulations went beyond those authorized by Congress. The court disagreed:

The Highway Beautification Act explicitly gives the Secretary authority to promulgate regulations relative to directional signs. This authority has been delegated to the Federal Highway Administration When authority is

thus expressly delegated, a reviewing court does not have the power to set aside the regulations simply because the court [**968] might have interpreted the statute in a manner different from the agency's interpretation. The regulations under § 131(c)(1) are not merely interpretative, but rather, legislative regulations. They [**19] have the force and effect of law and can be set aside only if they clearly exceed the statutory authority or are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The record is barren of any evidence that the rules constitute this type of abuse. The court might have adopted different standards, but Congress did not assign the task of adopting such standards to the court. The regulations were adopted under express authority and have been in place since 1973. Congress has not acted to change them. Since their adoption is not clearly outside the statutory mandate, the regulations cannot now be set aside merely because this court might interpret § 131(c)(1) differently.

506 F. Supp. at 67 (citations omitted).

Although *Adams* dealt with the federal regulation of directional advertising devices, we find its reasoning persuasive and consistent with the applicable principles of Colorado law.

We noted above that the scant legislative history available suggests only that the legislature intended to permit the maintenance of any sign not inconsistent with the Beautification Act. The regulations promulgated under the Beautification Act in turn [**20] require states to establish criteria, either through statutes or through administrative regulations, for assessing whether particular classes of signs satisfy the "on-premise" exception. The Colorado legislature left the specification of those criteria to the Department, and made no statutory change to alter the Department's interpretation of the "on-premise" exception after those regulations were promulgated.

The effect of the regulation is to permit the owner of property to place on his land any sign, not leased or rented to a third party, which conforms to the applicable size, spacing, lighting, and content requirements. The regulations do not discriminate against noncommercial or ideological signs, inasmuch as they are governed by the same restrictions which apply to other on-premise signs. We also note in passing that by so interpreting the statute, the department's regulations avoid the potential constitutional problems that would arise were the statute to be interpreted as entirely prohibiting ideological signs on the owner's property.

D.

Finally, Pigg argues that the Act and regulations, as promulgated and interpreted by the Department, discriminate unconstitutionally in [**21] favor of certain tourist-related signs. We are not persuaded by his argument.

Section 43-1-414(5)(a), 17 C.R.S. (1984), exempts from removal under the Act "tourist-related advertising devices which comply with the rules and regulations adopted by the department," when such removal would work "substantial economic hardship" in the affected area. The exemption was adopted after Congress specifically permitted states to provide such exemptions consistent with the Beautification Act, 23 U.S.C.A. § 131(o) (Supp. 1987). Pigg is correct in asserting that the tourist-related sign exemption operates to permit the maintenance of certain commercial signs only and not the maintenance of any noncommercial signs. That it does so does not, however, render the statutory scheme unconstitutional.

In *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981), Justice Brennan concurred in the judgment and, although finding San Diego's sign regulations impermissible, added:

[A] city can have specific goals the accomplishment of which would conflict with the overall goals addressed by the total billboard ban. It would make little sense to say that a city [**22] has an all-or-nothing proposition -- either ban all billboards or none at all If a city can justify a total ban, I would allow an exception only if it directly furthers an interest that is at least as important as the interest underlying the total ban, if the exception is no broader than necessary [*969] to advance the special goal, and if the exception is narrowly drawn so as to impinge as little as possible on the overall goal. To the extent that exceptions rely on content-based distinctions, they must be scrutinized with special care.

453 U.S. at 532 n.10. We adopted Justice Brennan's analysis in *City of Lakewood v. Colfax Unlimited Association*, 634 P.2d 52, 69 (Colo. 1981), when we considered under what circumstances *de minimis* content-based distinctions could be drawn by a municipal sign ordinance.

Here, the tourist-related sign exception is directly related to the state's goal of avoiding "substantial economic hardship," which the statute defines as:

[A] significant negative economic effect, such as a loss of business income, an increase in unemployment, a reduction in sales taxes or other revenue to the state or other government entity, [**23] a reduction in real estate taxes to the county, and other significant negative economic factors.

§ 43-1-403(18), 17 C.R.S. (1984).

The state's interest in not undercutting the economic base of those areas heavily dependent on tourist-related income is, we believe, as important as its desire to protect the safety of highway travel and to enhance the scenic view from highways. The Act defines the exception narrowly so as to permit only those signs in existence on May 5, 1976, see § 43-1-403(16), 17 C.R.S. (1984), and imposes on the sign owners the burden of demonstrating the economic necessity of their signs, § 43-1-414(5)(a), 17 C.R.S. (1984), as do the regulations promulgated to implement the exemption. See *Rule XVIII, 2 C.C.R. 601-3 (1983)*. Finally, claims of hardship to a single business are insufficient to justify an exemption for that business's signs. Several businesses must demonstrate that they will be adversely affected and that "the defined area as a whole will be significantly economically impacted if those businesses' non-conforming signs are removed." *Rule XVIII.B.2.b, 2 C.C.R. 601-3 (1983)*. See also 23 C.F.R. § 750.503(a) (1987) ("Neither [**24] the States nor the FHWA shall rely on individual claims of economic hardship.").

Because the tourist-related sign exemption is tailored narrowly to further an important interest of the state, that exception does not unconstitutionally discriminate in favor of tourist-related advertising devices.

We conclude, therefore, that the Act applies to noncommercial advertising devices and that the Notice of Violation was issued pursuant to valid regulations of the Department. The judgment is reversed, and the case remanded to the district court with directions to dismiss the complaint.

HB

245

COMPARISON OF SB 171 WITH CSHB 245(JUD)

- The substantive change between the two versions of the bill is the deletion from CSHB 245(JUD) of all references to "homeland security". Thus CSHB 245(JUD) omits homeland security workers and homeland security activities from the amendments to Title 26, relating to civil defense.
- The sections of the bill affected by this substantive change are sections 7 through 10 of SB 171.
- CSHB 245(JUD) also reflects formatting changes made by Legislative Legal Counsel. It is anticipated that if there is a committee substitute for SB 171, Legislative Legal Counsel will incorporate the same formatting changes.

*Prepared by Gail T. Voigtlander, Assistant Attorney General
Office of the Attorney General, State of Alaska*

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

FRANK H. MURKOWSKI, GOVERNOR

*1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-5903
PHONE: (907)269-5190
FAX: (907)258-0760*

May 15, 2003

Senator Ralph Seekins
Senate Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: SB 171 – “An act relating to certain suits and claims by members of the military services or regarding acts or omissions of the organized militia; relating to liability arising out of certain search and rescue, civil defense, homeland security, and fire management and firefighting activities; and providing for an effective date”

Dear Seantor Seekins:

I am writing this letter to request that you and your committee consider and adopt the attached amendments to the subject bill. These amendments are consistent with those made by the House in CSHB (JUD) which has also been referred to your committee.

If you have any questions, please feel free to contact me.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By:

David W. Marquez
Assistant Attorney General

DWM/pr

cc: Mike Tibbles, Legislative Director, Office of the Governor
Deborah Behr, Legislation and Regulations Attorney, Department of Law

AMENDMENT

OFFERED IN THE SENATE JUDICIARY
COMMITTEE
TO: SB 171

BY _____

1 Page 1, line 2, following "**militia;**":

2 Insert "**relating to workers' compensation and death benefits for members of the**
3 **organized militia;**"

4

5 Page 1, line 3:

6 Delete "**homeland security,**"

7

8 Page 3, line 27:

9 Delete "**or homeland security**"

10

11 Page 4, line 3:

12 Delete "**or homeland security**"

13

14 Page 4, line 4:

15 Delete "**or homeland security**"

16

17 Page 4, line 12:

18 Delete "**or homeland security**"

19

20 Page 4, line 13:

21 Delete "**or homeland security**"

22

23 Page 4, lines 30 - 31:

1 Delete "or homeland security"

2

3 Page 5, lines 12 - 15:

4 Delete all material.

5

6 Renumber the following bill sections accordingly.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 245
(H) Publish Date: 4/4/03

Revision Date/Time (Note if correction): _____ Dept. Affected: Law
Title: "An Act relating to certain suits and claims by BRU Civil
members of the military services . . ." Component: Special Litigation
Sponsor: Rules Committee
Requester: Governor Component No.: 2213

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The Alaska Supreme Court, in a recent decision, ruled that the State of Alaska may be sued and could be held liable for tort claims by injured members of the Alaska National Guard and a member of the Indiana National Guard for injuries that were incurred during the members' service with the national guard. The Alaska Supreme Court did not adopt the federal rule (known as the *Feres* doctrine), that bars tort claims by military service personnel for injuries arising out of activities that were incident to their service in the federal military or the national guard. While the Alaska Supreme Court did not address tort claims by members of the United States military or other parts of the Alaska organized militia, its ruling could be applied to permit such claims against the State of Alaska. This bill will essentially adopt the federal *Feres* doctrine, and would provide the state and state military personnel with the same protection from tort lawsuits that the federal government and federal military personnel are provided under the *Feres* doctrine. It

Prepared by: Joan M. Kasson Phone: (907) 465-5370
Division: Attorney General's Office Date/Time: 1/27/03 3:13 PM
Approved by: Kathryn Daughhete for Gregg D. Renkes, Attorney General Date: 1/27/2003
Agency: Department of Law

FISCAL NOTE #1

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. HB 245

ANALYSIS CONTINUATION

will also make clear that the state can be liable to third parties only for the conduct of militia members on active state service acting in the line of duty under orders of the governor, and not for the conduct of "borrowed" federal employees. Similarly, the bill clarifies that state workers' compensation benefits would only be due for injuries or death of organized militia members ordered into active state service by the governor.

Passage of this legislation will have no fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: HB 245
 (H) Publish Date: 4/4/03

Revision Date/Time (Note if correction): _____ Dept. Affected: Natural Resources
 Title: Tort Immunity BRU: Statewide Fire Suppression
 Component: Fire Suppression
 Sponsor: Rules
 Requester: Governor Component No. 437

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Tort immunity legislation will require no operating or capital expenditures. It has the potential of saving the state a significant but undeterminable amount in litigation costs and damages resulting from natural disasters such as wildfire.

Prepared by: Dean Brown Phone 269-8476
 Division: Forestry Date/Time 4/3/2003
 Approved by: Tom Irwin, Commissioner Date 4/3/2003
 Agency: Natural Resources

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: HB 245
(H) Publish Date: 4/8/03

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
Title An Act relating to certain claims and suits..... BRU Risk Management
Component Risk Management
Sponsor _____
Requester _____ Component No. 71

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
The state's self insurance program for tort liability exposures will be favorably affected by this bill.

The limitation of civil actions arising out of certain claims & suits by members of the military service or regarding acts or omissions of the organized militia, or arising out of certain search & rescue, civil defense, homeland security, and fire management & fire fighting activities will reduce state liability exposure and thereby decrease future defense costs.

Projected costs for a low frequency yet potentially high severity risk is not possible, therefore the fiscal impact is indeterminate. In future years, Risk Management's liability premium assessments will reflect the reductions actually realized as our premium charges are developed from actual claims expense incurred.

Prepared by: J. Brad Thompson, Director Phone _____
Division Risk Management Date/Time 2/14/03 7:46 AM
Approved by: Mike Miller, Commissioner Date 2/14/2003
Agency Administration

FRANK H. MURKOWSKI
GOVERNOR
GOVERNOR@GOV.STATE.AK.US



HB245
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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

April 3, 2003

The Honorable Pete Kott
Speaker of the House
Alaska State Legislature
State Capitol, Room 208
Juneau, AK 99801-1182

Dear Speaker Kott:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to certain suits and claims by members of the military services or regarding acts or omissions of the organized militia, and relating to liability arising out of certain search and rescue, civil defense, homeland security, and fire management and firefighting activities.

The bill consists of four main parts:

Suits Arising from Search and Rescue Activities
(Section 2 of the bill)

First, by statute, search and rescue activities are permissive functions of the commissioner of public safety. In practice, the Alaska State Troopers make decisions about when and where to conduct search and rescue activities, and how to allocate resources -- both state personnel and community volunteers -- to those activities. The expenses are borne by the state treasury.

This bill provides that a person may not bring a lawsuit for damages that arise out of such search and rescue activities, or the failure to initiate such search and rescue activities. Given Alaska's vast geographic area, harsh climatic conditions, and limited trooper resources, it is important to ensure that search and rescue decisions are not undermined by possible tort exposure. It is also important to ensure that the safety of local volunteers who conduct search and rescue operations under trooper supervision is not jeopardized by the possibility of a search and rescue decision being influenced by potential tort liability rather than being based on appropriate safety concerns.

Alaska Supreme Court decisions have provided that no actionable duty is owed by police agencies when they undertake, or fail to undertake, police

The Honorable Pete Kott

April 3, 2003

Page 2

investigations. Search and rescue operations are essentially another form of investigation. They should be conducted, or not conducted, on their own intrinsic merits, as judged by the participating officers. By prohibiting lawsuits arising out of search and rescue activities, this bill would treat those activities consistently with other police investigations.

Certain Suits and Claims by Members of Military Services Arising from Military Services and Concerning the Organized Militia
(Sections 3 - 6 of the bill)

Second, the Alaska Supreme Court, in a recent decision, ruled that the State of Alaska may be sued and held liable for tort claims by injured members of the Alaska National Guard and a member of the Indiana National Guard for injuries that were incurred during the members' service with the national guard. The Alaska Supreme Court did not adopt the federal rule (known as the *Feres* doctrine) that bars tort claims by military service personnel for injuries arising out of activities that were incident to their service in the federal military or the national guard. While the Alaska Supreme Court did not address tort claims by members of the United States military or other parts of the Alaska organized militia, its ruling could be applied to permit such claims against the State of Alaska.

State national guard or militia operations may include air and sea rescue missions, civil defense activities, training exercises, and travel to military bases and locations in Alaska and in other states and countries. Given this state's vast land area, its harsh geographic and climatic conditions, and the inherent hazards of national guard and militia activities, the State of Alaska may be faced with significant financial exposure for injuries to national guard, militia, or other military service members. In addition, tort lawsuits by injured service members against the Alaska National Guard, the militia, or other service members would involve the courts in reviewing and second-guessing military decisions regarding the personnel, training, equipment, orders, discipline, and operations of the national guard and militia. It is important to ensure that such decisions are based on the professional judgment and military needs of the Alaska National Guard and other parts of the Alaska organized militia rather than on concerns regarding possible tort liability.

This bill provides that a lawsuit for damages may not be brought by or on behalf of a member of the military services against the State of Alaska, the Alaska National Guard or other part of the Alaska organized militia, or any other member of the military services, for death, personal injury, or other injury of a member of the military services, including the United States military, the Alaska National Guard or other parts of the Alaska organized militia, or the national guard of another state, incurred during or arising out of activities that were part of the member's military service. It would essentially

The Honorable Pete Kott

April 3, 2003

Page 3

adopt the federal *Feres* doctrine that bars intra-military tort claims by service personnel for injuries arising out of activities incident to their military service. It would provide the state and state military personnel with the same protection from tort lawsuits that the federal government and federal military personnel are provided under the *Feres* doctrine.

Under this bill, injured military service members would still be entitled to various military or veteran's benefits for injuries incurred in the course of their military service. The availability of these military benefits is one of the reasons that the federal courts have barred personal injury claims by military personnel under the *Feres* doctrine.

This bill also would clarify that members of the Alaska National Guard or other parts of the organized militia are entitled to only workers' compensation benefits for injuries, illness, or death related to active state service. Because members of the Alaska National Guard are entitled to federal benefits when not on state active duty, this change will not affect receipt of those benefits.

Additionally, this bill would bar actions against the State of Alaska regarding activities of Alaska National Guard members when they are not on state active duty. This change is necessary because members of the Alaska National Guard who are not on state active duty, including those on federal active duty, active duty for training, inactive duty, active guard and reserve (AGR) duty, and civilian technicians, are under the command and control of the federal government. The change is necessary to address two Alaska Supreme Court decisions that held that the state could be responsible for the actions of national guard members who are not on state active duty, as being "borrowed" federal employees, and that considered those in AGR status to be state employees. The changes made by the bill would ensure that the state is not liable for acts or omissions of the federal government or federal employees.

Suits and Claims Arising from Civil Defense and Homeland Security Activities
(Sections 7 - 11 of the bill)

Third, the bill would amend AS 26.20.140, a section in the civil defense chapter of the statutes that provides immunity for government and employees from liabilities arising out of civil defense activities. Presently, AS 26.20.140(a) provides that the state, any district established for civil defense purposes, and the agents or representatives of a state or district, may not be held liable for injury or property damage sustained by a volunteer civilian defense worker. The bill would amend AS 26.20.140(a) to broaden the immunity to cover injury or property damage sustained by any civilian defense or homeland security worker, including authorized volunteers and employees, and to specify that the immunity extends to employees of the state or district as well as the agents and representatives of the state or district. In addition, existing AS 26.20.140(b)

provides that the state and any district established for civil defense purposes, their employees, agents, or representatives, authorized volunteer or auxiliary civil defense workers, and members of any other agency engaged in civilian defense activities, who are complying with or reasonably attempting to comply with AS 26.20 or an order or regulation issued under AS 26.20, are not liable for injury to persons or damage to property as a result of their activities. The bill would amend AS 26.20.140(b) to provide immunity for homeland security activities as well as civil defense activities, and to include any homeland security or civil defense activities undertaken under the authority of AS 26.20, the civil defense statutes.

AS 26.20.140(b) presently provides an exception to the immunity in cases of wilful misconduct, gross negligence, or bad faith. The bill would amend that subsection to provide an exception only where malice or reckless indifference to the interests, rights, or safety of others is shown by clear and convincing evidence. The bill's amendment to AS 26.23.210 would make the immunity also apply when the entities and persons covered by AS 26.20.140 perform duties under AS 26.23.010 - 26.23.220, the Alaska Disaster Act.

The bill also would amend AS 26.20.140 to add a new subsection to specify that "civilian defense or homeland security worker" means any worker engaged in a civil defense or homeland security activity in an official capacity or at the direction of the state, including federal, state and local officials, state and local contractors, officers and employees of other states, and volunteers.

The bill would amend the definitions section of the civil defense statutes, AS 26.20.200. The existing definition of "civil defense" in AS 26.20.200(1) would be amended to include security, vaccinations and other actions to protect public health and training, preparation, travel, and other activities necessary for the provision of civil defense services. A new paragraph (4) also would be added to the definitions statute to define "homeland security" to mean the detection, prevention, preemption, deterrence of, protection from, and response to, attacks targeted at state territory, population, or infrastructure. This definition is based on a definition of homeland security in the Iowa statutes.

Suits Arising From Fire Management and Firefighting Activities
(Sections 12 and 13 of the bill)

By statute, the commissioner of natural resources (commissioner) is authorized to provide for fire management and firefighting activities throughout the state, including preventing, monitoring, suppressing, or controlling forest fires. The commissioner, through the division of forestry, provides for fire management and firefighting activities. The division of forestry's authority to

The Honorable Pete Kott
April 3, 2003
Page 5

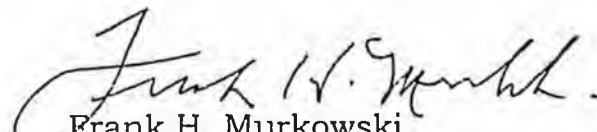
prevent, monitor, suppress, or control forest fires is one aspect of its authority to manage state forest resources. The division of forestry is asked to respond to forest fires in various geographic areas and population zones in Alaska, which often occur simultaneously during the fire season. When responding to a given fire, authorities cannot forget other fires that may be burning simultaneously or that may soon occur. The division of forestry's fire prevention, monitoring, control, or suppression decisions are complicated decisions that involve an evolving, and primarily emergency, situation.

The Alaska Supreme Court, in tandem decisions issued in 2001, ruled that the State of Alaska may be sued and held liable for tort claims for losses due to fire suppression efforts. These decisions open the door to significant financial exposure to the state for losses due to fires. The Alaska Supreme Court departed from substantial precedent immunizing such activities.

Decisions regarding forest management related to fire control and suppression should be prompted by sound forestry and firefighting principles, rather than concerns regarding possible tort liability. Litigation of such claims inherently disrupts the division of forestry's day-to-day operations and diverts substantial state resources to defend such lawsuits. At the same time such litigation will not reduce the number of future fires, nor will it increase the resources available to fight such fires.

I urge your prompt and favorable action on this measure.

Sincerely,


Frank H. Murkowski
Governor

HB

249

Alaska State Legislature

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Chair, Judiciary Committee

Vice-Chair, House Committee on
Economic Development,
Trade and Tourism

Member
Oil & Gas Committee

Representative Lesil McGuire *House District 28*

MEMORANDUM

To: Senator Ralph Seekins, Chair,
Senate Judiciary Committee

From: Representative Lesil McGuire *jm*

Date: April 24, 2003

Re: Request for Hearing, HB 249: Restraint of Trade: Fees and Costs

I respectfully request that HB 249: Restraint of Trade: Fees and Costs, be scheduled for a hearing at your earliest convenience☺. I have attached the following for your information:

1. Sponsor Statement
2. CSHB 249 (JUD) am
3. CSHB 249
4. HB 249
5. House Journal Text
6. Relevant Statutes and Rules
7. Zero Fiscal Note

If you have any questions please feel free to contact me personally, or my staff, Vanessa Tondini, at 4990.

Alaska State Legislature

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Chair, Judiciary Committee

Vice-Chair, House Committee on
Economic Development,
Trade and Tourism

Member
Oil & Gas Committee

Representative Lesil McGuire

House District 28

Sponsor Statement CSHB 249(JUD) am

“An Act relating to the award of costs and attorney fees to defendants under court rule in civil actions brought under monopoly and restraint of trade statutes; and providing for an effective date.”

This bill clarifies the provision of the Alaska Antitrust Act that governs the award of attorney fees and costs to the prevailing party.

Since 1962, Alaska statutes have authorized the Alaska Supreme Court to adopt court rules providing that the losing party in a lawsuit shall pay all or part of the costs and attorney fees of the prevailing party. The Supreme Court has adopted such a rule, specifically Alaska Rule of Civil Procedure 82(a), which provides that as a matter of course, the losing party in litigation in Alaska is ordered to pay costs and partial attorney fees to the prevailing party. These rules discourage meritless lawsuits and encourage valid claims and defenses by providing the successful party with partial reimbursement for the costs of litigation.

The Alaska Antitrust Act includes a provision specifically declaring that a successful plaintiff may recover at least partial attorney fees, and in some circumstances may recover full attorney fees. See AS 45.50.576(a). The Act does not state expressly how, if at all, this special statutory provision is intended to affect the right of a successful antitrust defendant to recover partial attorney fees from the losing plaintiff, in accordance with Rule 82.

The history of the Alaska Antitrust Act confirms that there was never an intent to preclude a successful antitrust defendant from recovering partial attorney fees. However, some courts have reached a different interpretation by assuming that successful antitrust defendants could not recover any attorney fees because the current statute does not explicitly authorize such an award. This bill is designed to clarify that the standard attorney fee rules, applicable to essentially all civil cases, apply to successful antitrust defendants. It ensures that the provision that authorizes recovery of attorney fees to successful antitrust plaintiffs will not be misinterpreted to prohibit successful antitrust defendants from partial recovering attorney fees in accordance with standard court rules. This bill was also amended to clarify that if the plaintiffs in an action in which the defendant prevails are a class certified pursuant to Alaska Civil Procedure Rule 23, any

award of attorney fees to the defendant may be satisfied only through funds, if any, that the plaintiff class has collected from settlements with or judgments against other defendants and that the attorney fee award shall not be a liability of any individual member of the class.

It is unfair to permit a situation where antitrust defendants, if they go to trial and lose a complex lawsuit, must be prepared to pay part or all of the plaintiffs' attorney fees, while plaintiffs face no risk of paying even part of the defendants' fees if a jury decides that plaintiffs' claims are meritless. This bill does not even demand full equity, because successful defendants would be enabled to recover only partial attorney fees, in contrast to some successful plaintiffs' ability to recover full attorney fees. However, this bill ensures that some right of recovery, along with some risk of having to pay damages, applies to both sides in an antitrust case.

The Legislature enacted a very similar statutory provision in 1998 concerning attorney fees in consumer protection and unfair trade practice cases, which are closely related to antitrust cases. AS 45.50.537 states expressly that a successful plaintiff in a consumer protection and unfair trade practice case shall recover full reasonable attorney fees, and a successful defendant shall recover partial attorney fees in accordance with standard court rules.

Because this bill does not create any change in law, but merely clarifies existing law, it is appropriate for the bill to take effect immediately upon passage.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSHB 249(JUD)
 (H) Publish Date: 4/11/03

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
 Title Monopolies and restraint of trade BRU Alaska Court System
 Component Trial Courts
 Sponsor Representative McGuire
 Requester House Judiciary Component No. 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of HB 249.

Prepared by: Douglas Wooliver, Administrative Attorney Phone 463-4750
 Division Alaska Court System Date/Time 4/8/03 4:55 PM
 Approved by: Stephanie Cole, Administrative Director Date 4/8/2003
 Agency Alaska Court System

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Current Law:

Sec. 45.50.576. Suits by persons injured; treble damages.

(a) A person who is injured in business or property by a violation of AS 45.50.562 - 45.50.570, or a person so injured because the person refuses to accede to a proposal for an arrangement that, if consummated, would be a violation of AS 45.50.562 - 45.50.570, may bring a civil action

(1) for damages sustained by the person, and if the judgment is for the plaintiff and the trier of fact finds that the defendant's conduct was wilful, the plaintiff shall be awarded threefold the amount of damages sustained by the person, plus the costs of the suit, including reasonable attorney fees; and

(2) to enjoin the unlawful practice, and if judgment is for the plaintiff, the plaintiff may be awarded the costs of the suit, including reasonable attorney fees.

(b) When the state, a home rule or general law city or borough, or other governmental entity is injured by reason of a violation of AS 45.50.562 - 45.50.570, it may maintain an action in the same manner as prescribed in (a) of this section for an injured person; and the state, city, borough, or other governmental entity is entitled to the same relief as provided in (a) of this section.

(b) A person may not bring an action under (a) of this section unless

(1) the person first provides written notice to the seller or lessor who engaged in the unlawful act or practice that the person will seek an injunction against the seller or lessor if the seller or lessor fails to promptly stop the unlawful act or practice; and

(2) the seller or lessor fails to promptly stop the unlawful act or practice after receiving the notice. (§ 5 ch 96 SLA 1998)

Effective dates. — Section 5, ch. 96, SLA 1998, which enacted this section, took effect on September 10, 1998.

Sec. 45.50.536. Mediation. Notwithstanding the other provisions of AS 45.50.471 — 45.50.561, a civil action under AS 45.50.531 or 45.50.535 may be submitted to mediation under the Alaska Rules of Civil Procedure. The mediation must begin within 30 days after the court's order for mediation. During mediation, the court may, if it is determined appropriate by the court, enjoin the defendant from engaging in the act or practice that is the subject of the civil action. (§ 5 ch 96 SLA 1998)

Effective dates. — Section 5, ch. 95, SLA 1998, which enacted this section, took effect on September 10, 1998. provides that the 1998 enactment of this section "applies only to causes of action that accrue on or after September 10, 1998."

Editor's notes. — Section 7, ch. 96, SLA 1998

Sec. 45.50.537. Attorney fees, costs, and damages. (a) In an action brought by a private person under AS 45.50.471 — 45.50.561, a prevailing plaintiff shall be awarded costs as provided by court rule and full reasonable attorney fees at the prevailing reasonable rate.

(b) Unless the action is found to be frivolous, in an action brought by a private person under AS 45.50.471 — 45.50.561, a prevailing defendant shall be awarded attorney fees and costs as provided by court rule. If the action is found to be frivolous, the attorney fees to be awarded to the defendant shall be full reasonable attorney fees at the prevailing reasonable rate.

(c) Notwithstanding the other provisions of this section, in an action brought by a private person under AS 45.50.471 — 45.50.561, if the plaintiff is not the prevailing party and if the court finds that the action was brought by the plaintiff to obtain a competitive business advantage, the court shall award a prevailing defendant costs as provided by court rule, full reasonable attorney fees at the prevailing reasonable rate, and any damages suffered by the prevailing defendant as a result of the plaintiff's allegations.

(d) In this section, "frivolous" means

(1) not reasonably based on evidence or on existing law or a reasonable extension, modification, or reversal of existing law; or

(2) brought to harass the defendant or to cause unnecessary delay or needless expense. (§ 5 ch 96 SLA 1998)

Effective dates. — Section 5, ch. 96, SLA 1998, which enacted this section, took effect on September 10, 1998.

NOTES TO DECISIONS

Cited in *Garrison v. Dixon*, 19 P.3d 1229 (Alaska 2001).

Sec. 45.50.541. Nonnegotiability of consumer paper. (a) If a contract for sale or lease of consumer goods or services on credit entered into between a retail seller and a retail buyer requires or involves the execution of a promissory note or instrument or other evidence of indebtedness of the buyer, the note, instrument, or evidence of indebtedness

Gregoire v. National Bank of Alaska, Op. No. 336, 413 P2d 27 (Alaska 1966).

Where a client states by affidavit that he has discharged his attorney by means of letter, it is not error to allow that attorney to withdraw, even though the attorney does not serve the client with notice of hearing on a motion to be allowed to withdraw. *Moran v. Kenai Towing and Salvage, Inc.*, Op. No. 1056, 523 P2d 1237 (Alaska 1974).

Where there is no dispute as to the material terms of a settlement, the provisions of paragraph (e) of this rule are met if both parties admit either in a writing filed with the clerk or orally in open court that a settlement had been reached. *Interior Credit Bureau, Inc., v. Bussing*, Op. No. 1366, 559 P2d 104 (Alaska 1977).

Trial court did not err in holding that plaintiff, who was both a doctor and a lawyer, could either represent himself or be represented by counsel, but not both, in his action against hospital for its failure to renew his staff privileges. *Eufemio v. Kodiak Island Hosp.*, Op. No. 3868, 837 P2d 95 (Alaska 1992)

Trial court abused its discretion in denying attorney's properly presented motion to withdraw as counsel. *Devincenzi v. Wright*, Op. No. 4136, 882 P2d 1263 (Alaska 1994).

Rule 82. Attorney's Fees.

(a) **Allowance to Prevailing Party.** Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) **Amount of Award.**

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, if awarded, Prejudgment Interest	Contested With Trial	Contested Without Trial	Non-Contested
First \$ 25,000	20%	18%	10%
Next \$ 75,000	10%	8%	3%
Next \$400.00	10%	6%	2%
Over \$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

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

- (A) the complexity of the litigation;
- (B) the length of trial;
- (C) the reasonableness of the attorneys' hourly rates and the number of hours expended;
- (D) the reasonableness of the number of attorneys used;
- (E) the attorneys' efforts to minimize fees;
- (F) the reasonableness of the claims and defenses pursued by each side;
- (G) vexatious or bad faith conduct;
- (H) the relationship between the amount of work performed and the significance of the matters at stake;
- (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;
- (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and
- (K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

(c) **Motions for Attorney's Fees.** A motion is required for an award of attorney's fees under this rule or pursuant to contract, statute, regulation, or law. The motion must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment as defined by Civil Rule 58.1. Failure to move for attorney's fees within 10 days, or such additional time as the court may allow, shall be construed as a waiver of the party's right to recover attorney's fees. A motion for attorney's fees in a default case must specify actual fees.

(d) **Determination of Award.** Attorney's fees upon entry of judgment by default may be deter-

mined by the clerk. In all other matters the court shall determine attorney's fees.

(e) **Equitable Apportionment Under AS 09.17.080.** In a case in which damages are apportioned among the parties under AS 09.17.080, the fees awarded to the plaintiff under (b)(1) of this rule must also be apportioned among the parties according to their respective percentages of fault. If the plaintiff did not assert a direct claim against a third-party defendant brought into the action under Civil Rule 14(c), then

(1) the plaintiff is not entitled to recover the portion of the fee award apportioned to that party; and

(2) the court shall award attorney's fees between the third-party plaintiff and the third-party defendant as follows:

(A) if no fault was apportioned to the third-party defendant, the third-party defendant is entitled to recover attorney's fees calculated under (b)(2) of this rule;

(B) if fault was apportioned to the third-party defendant, the third-party plaintiff is entitled to recover under (b)(2) of this rule 30 or 20 percent of that party's actual attorney's fees incurred in asserting the claim against the third-party defendant.

(f) **Effect of Rule.** The allowance of attorney's fees by the court in conformance with this rule shall not be construed as fixing the fees between attorney and client.

(Adopted by SCO 5 October 9, 1959; amended by SCO 497 effective January 18, 1982; by SCO 712 effective September 15, 1986; by SCO 921 effective January 15, 1989; by SCO 1006 effective January 15, 1990; by SCO 1066 effective July 15, 1991; repealed and reenacted by SCO 1118am effective July 15, 1993; amended by SCO 1195 effective July 15, 1995; by SCO 1200 effective July 15, 1995; by SCO 1241 effective July 15, 1996; by SCO 1246 effective July 15, 1996; by SCO 1281 effective August 7, 1997; by SCO 1340 effective January 15, 1999; and by SCO 1455 effective July 15, 1993)

Note to SCO 1118am: By adopting these amendments to Civil Rule 82, the court intends no change in existing Alaska law regarding the award of attorney's fees for or against a public interest litigant, see, e.g., *Anchorage Daily News v. Anchorage School Dist.*, 803 P.2d 402, 404 (Alaska 1990); *City of Anchorage v. McCabe*, 568 P.2d 986, 993-94 (Alaska 1977); *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974), or in the law that an award of full attorney's fees is manifestly unreasonable in the absence of bad faith or vexatious conduct by the non-

prevailing party. See, e.g., *Malvo v. J.C. Pen Co.*, 512 P.2d 575, 588 (Alaska 1973); *Demosh New*, 737 P.2d 780, 788 (Alaska 1987).

Note: AS 25.25.313(c), added by § 6 of ch. 57 § 1995 (the Uniform Interstate Family Support Act) has the effect of amending Civil Rule 82 by requiring the court to award costs and fees against a party who requests a hearing primarily for delay in a proceeding listed in AS 25.25.301.

RABINOWITZ, Justice dissenting.

I dissent from the court's adoption of the amendments to Civil Rule 82 called for in [SCO 1118]. In my view no compelling case has been demonstrated for these changes.¹ From my judicial hunch is that these amendments to Civil Rule 82, in particular the new provisions reflecting (b)(3)(A) through (K), will unnecessarily and automatically increase litigation over attorney's awards both in our trial courts as well as in court.²

¹In this regard I note that the Alaska Judicial Council is scheduled to conduct an in depth empirical study of the workings of Civil Rule 82. My preference is to await the results of the Council's study before deciding whether any of the current provisions of Rule 82 should be amended. Such a study should position this court to make a more informed assessment as to whether the current rule operates in a fashion which unjustly denies access to our courts. I further note that our Civil Rules Committee recently surveyed the Alaska Bar membership on discrete aspects of Civil Rule 82. A clear majority of those responding to the committee's question indicated: that Civil Rule 82 does not deter people from filing moderate means from filing valid claims; that the rule does not put excessive pressure on middle income people to settle valid claims; and that the rule is needed to discourage frivolous litigation.

²Any attorney worth his or her salt will, pursuant to the expansive provisions of (b)(3)(A) through (K) request variations from the attorney's fees as called for under either the monetary recovery rule provisions of (b)(1), or the provisions of (b)(3) which apply where no money judgment is recovered by the prevailing party.

Note to SCO 1281: In 1997 the legislature amended AS 09.30.065 concerning offers of judgment according to ch. 26, § 52, SLA 1997, the amendment to AS 09.30.065 has the effect of amending Civil Rules 68 and 82 by requiring the offeree to pay cost reasonable actual attorney fees on a sliding scale based on percentages in certain cases, by eliminating provisions relating to interest, and by cha

provisions relating to attorney fee awards. According to § 55 of the session law, the amendment to AS 09.30.065 applies "to all causes of action accruing on or after the effective date of this Act." However, the amendments to Civil Rule 68 adopted by paragraph 5 of this order are applicable to all cases filed on or after August 7, 1997. See paragraph 17 of this order.

Note: Chapter 94 SLA 1998 adopts AS 46.03.761, which allows the Department of Environmental Conservation to impose administrative penalties against an entity that fails to construct or operate a public water supply system in compliance with state law or a term or condition imposed by the department. According to section 5 of the act, subsection (j) of this statute has the effect of amending Civil Rules 79 and 82 by allowing the recovery of full reasonable attorney fees and costs in an action to collect administrative penalties assessed under AS 46.03.761.

Annotations

Cases

- I. In General
- II. Prevailing Party
- III. Review
 - A. Standard
 - B. Abuse of Discretion or Error
- IV. Fee Schedule

I. In General

The common law did not permit allowance of attorney's fees as costs to the prevailing party, but in Alaska such allowance is of relatively ancient origin and prior to attainment of statehood the matter was regulated by statute. *McDonough v. Lee*, Op. No. 378, 420 P2d 459 (Alaska 1966).

The purpose of this rule is to encourage settlement of civil litigation as well as to avoid protracted litigation. *Milkautsch v. Dominick*, Op. No. 538, 452 P2d 438 (Alaska 1969).

Where a mechanics' lienor files a four-count complaint against the beneficiary of a deed of trust to foreclose the mechanics' liens but prevails on only one count, the trial court may properly refuse to award either party costs or attorney's fees. *Brand v. First Federal Savings & Loan Association of Fairbanks*, Op. No. 658, 478 P2d 829 (Alaska 1970).

This rule does not apply where plaintiffs seek an injunction and are awarded an injunction which is to be void if the defendant pays certain damages, since the rule in such case is not an accurate criterion for determining a fee. *Stauber v. Granger*, Op. No. 777, 495 P2d 67 (Alaska 1972).

The purpose of this rule is only to partially compensate a client for the productive work done by his attorney. It is irrelevant that actual attorney's fees are several times the amount awarded. *State v. Abbott*, Op. No. 804, 498 P2d 712 (Alaska 1972).

The determination of which party prevails and is entitled to costs is within the discretion of the trial judge. *DeWitt v. Liberty Leasing Co. of Alaska*, Op. No. 818, 499 P2d 599 (Alaska 1972).

A party is not barred from appealing from the disallowance of costs and attorney's fees by his acceptance of payment of the judgment and by signing a document entitled "Satisfaction of Judgment." *DeWitt v. Liberty Leasing Co. of Alaska*, Op. No. 818, 499 P2d 599 (Alaska 1972).

Under this rule, an award of prejudgment interest is to be included in the amount of the "money judgment." *Era Helicopters, Inc. v. Digicon Alaska, Inc.*, Op. No. 999, 518 P2d 1057 (Alaska 1974).

Under this rule, a trial judge may award attorney fees without a formal motion and without a hearing, especially in a situation where the parties seeking to be heard did not file a formal request for fees. *Urban Development Company v. Dekreon*, Op. No. 1083, 526 P2d 325 (Alaska 1974).

This rule does not apply in a divorce action. *Burrell v. Burrell*, Op. No. 1169, 537 P2d 1 (Alaska 1975).

A trial judge may award attorney's fees without a formal motion and without a hearing. *National Bank of Alaska v. J.B.L. & K. of Alaska, Inc.*, Op. No. 1239, 546 P2d 579 (Alaska 1976).

A "hold harmless" indemnity clause includes the cost of recovery in the clause itself. *Manson-Osberg Co. v. State*, Op. No. 1292, 552 P2d 654 (Alaska 1976).

Where parties' potential liability for payment of actual recovery greatly exceeded potential liability for cost of defense, the main issue could not be said to be the cost of defense. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

The cost of in-house counsel is not an attorney's fee within the meaning of this rule. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

Attorney's fees should be computed on basis of net, not gross, recovery. *Fairbanks Builders, Inc. v. Sandstrom Plumbing & Heating, Inc.*, Op. No. 1324, 555 P2d 964 (Alaska 1976).

Attorney's fees are not recoverable under this rule in an action in federal court grounded on both admiralty and diversity jurisdiction. *Kalanback, Inc. v. Insurance Co. of the State of Pennsylvania, Inc.*, 422 FS 44 (USDC Alaska 1976).

Where defendant is dismissed under Civil Rule 41(a)(1)(a) before service of any pleading or motion by defendant but would have required trial court to consider merits of controversy, there is no joinder of issue, no prevailing party, and an award of attorney's fees is precluded. *State v. Alaska International Air, Inc.*, Op. No. 1409, 562 P2d 1064 (Alaska 1977).

One and one-half page memorandum devoid of authorities was not statement required by Civil Rule 77(b)(2), so that motion to dismiss was frivolous and issue was not joined, precluding award of attorney's fees. *State v. Alaska International Air, Inc.*, Op. No. 1409, 562 P2d 1064 (Alaska 1977).

When condemnee is eligible for attorney's fees in eminent domain action, he must receive full compensation under Civil Rule 72, not partial compensation under Civil Rule 82. *Greater Anchorage Area Borough v. Ten Acres*, Op. No. 1417, 563 P2d 269 (Alaska 1977).

It was proper to allow party attorney's fees for defending against one party, and separate fee for prevailing on cross-claim against third party. *Kaps Transport, Inc. v. Henry*, Op. No. 1527, 572 P2d 72 (Alaska 1977).

When a public corporation's active representation in litigation is by in-house counsel rather than retained counsel, award of attorney's fees pursuant to Rule 82 is proper. *Greater Anchorage Area Borough v. Sisters, Etc.*, Op. No. 1550, 573 P2d 862 (Alaska 1978).

An oral explanation on the record by the trial judge is adequate to justify decision denying attorney's fees. *Larry v. Dupree*, Op. No. 1652, 580 P2d 326 (Alaska 1978).

Civil Rule 82 applies only to "costs of the action," and not to attorney's fees incurred in the conduct of a prior arbitration. *Alaska State Housing v. Riley Pleas, Inc.*, Op. No. 1765, 586 P2d 1244 (Alaska 1978).

Attorney's fees could not be assessed against a public school teacher whose dismissal from employment was upheld by the superior court where the teacher had a statutorily guaranteed right to contest his dismissal in the courts. *Crisp v. Kenai Peninsula Borough Sch. Dist.*, Op. No. 1771, 587 P2d 1168 (Alaska 1978).

Civil Rule 82 had no application to claim for attorney fees by defendant retailer in suit based on strict tort liability against retailer and manufacturer, but retailer could recover costs based on indemnification obligation of manufacturer. *Heritage v. Pioneer Brokerage & Sales*, Op. No. 1855, 604 P2d 1059 (Alaska 1979).

Plaintiffs were jointly and severally liable for costs and attorney's fees although they filed separate complaints, where cases were consolidated for trial. *Stepanov v. Gavrilovich*, Op. No. 1823, 594 P2d 30 (Alaska 1979).

Civil Rule 82 does not govern appeals to Superior Court from administrative agency decision. *Kodiak Western Alaska v. Bob Harris Flying Service*, Op. No. 1820, 592 P2d 1200 (Alaska 1979).

A client's absence of obligation to pay for legal services rendered does not preclude an award of attorney's fees. *Arctic Slope Native Assoc. v. Paul*, Op. No. 2058, 609 P2d 32 (Alaska 1980).

Where prevailing party's attorneys, apparently motivated by considerations of professional courtesy, charged him for their services at the rate of \$30.00 per hour rather than the customary rate of \$75.00 per hour, the court would be justified in valuing those services using the customary rate. *Arctic Slope Native Assoc. v. Paul*, Op. No. 2058, 609 P2d 32 (Alaska 1980).

In determining the amounts of attorney's fees on appeal in public interest litigation, the same considerations are applicable as at the trial level, and it is therefore appropriate to award full attorney's fees on appeal to a successful public interest litigant. *Thomas v. Bailey*, Op. No. 2094, 611 P2d 536 (Alaska 1980).

It was not unreasonable for the superior court to find that plaintiffs exercising their rights under the election contest statute, were public interest litigants against whom an assessment of attorney's fees would be improper. *Thomas v. Croft*, Op. No. 2135, 614 P2d 795 (Alaska 1980).

Where the defendants in litigation stemming from a contested gubernatorial election were the state and the primary winners, it was proper to award attorney's fees against the state as a coprevailing party since the litigation was caused by the irregularities of state election officials in the conduct of the election. *Thomas v. Croft*, Op. No. 2135, 614 P2d 795 (Alaska 1980).

Under this rule, trial court could in its discretion order co-defendant to pay all of the fees awarded to the prevailing party, especially where the court believed that participant co-defendant to be the wrongdoer. *Muses v. McGarvey*, No. 2139, 614 P2d 1363 (Alaska 1980).

This rule does not require the court to limit its award to amount requested. *State v. Fairbanks North Star Borough School Dist.*, Op. No. 2257, 621 P2d 1329 (Alaska 1981).

To the extent that work performed is duplicative unnecessary, it should not be considered in determining proper award under this rule. *State v. Fairbanks North Star Borough School Dist.*, Op. No. 2257, 621 P2d 1329 (Alaska 1981).

An attorney-litigant who defends an action through retained counsel should not be reimbursed for his own participation unless the court clearly segregates his compensable time expended as an attorney active in the litigation, and noncompensable time, expended as client. *Sherry v. She*, Op. No. 2271, 622 P2d 960 (Alaska 1981).

The decision in *Crisp v. Kenai Peninsula Borough School District*, 587 P2d 1168 (Alaska 1978) does not apply to appeals of administrative decisions if the consequences are for less significant than in the *Crisp* case, and courts continue to assess reasonable attorney's fees against the litigant in such cases. *Sjong v. State*, Op. No. 2269, 622 P2d 1329 (Alaska 1981).

While attorney's fees are costs, they are not covered by literal requirements of Civil Rule 79(b). *State v. University of Alaska*, Op. No. 2303, 624 P2d 807 (Alaska 1981).

Under this rule an attorney is entitled to attorney's fees punitive damage award unless the court in its discretion specifically states otherwise. *Sturm, Ruger & Co. v. Day*, No. 2330, 627 P2d 204 (Alaska 1981).

Superior court does not have authority to award costs fees in a child in need of aid proceeding. *Cooper v. State*, No. 2453, 638 P2d 174 (Alaska 1981).

Award of costs and fees in child custody action may include costs or fees incurred in any other action, such as child in need of aid proceeding, no matter how closely related the issues might be. *Cooper v. State*, Op. No. 2453, 638 P2d 174 (Alaska 1981).

On appeal to superior court of a municipal zoning decision it was error for the court to award attorney's fees to prevailing parties based upon the civil rules rather than appellate rules. *Royal Crest Const. v. Anchorage*, Op. No. 2400, 640 P2d 133 (Alaska 1981).

Award of attorney's fees under this rule to prevailing party in state action arising out of the admiralty jurisdiction of the United States was proper. *Williams v. Eckert*, Op. No. 2443, 643 P2d 991 (Alaska 1982).

Where natural parent consented to adoption of her child then unsuccessfully sought to withdraw such consent, an award of substantial attorney's fees to the prevailing party manifestly unreasonable. *S.O. v. W.S.*, Op. No. 2491, 643 P2d 997 (Alaska 1982).

Where it was unclear what the parties intended in a judgment on offer and acceptance which provided that attorney fees be provided under the terms of "an Alaska Civil Rule endorsement" contained in an insurance policy of defense, remittal was appropriate to determine whether there was a meeting of the minds of the parties on the issue of attorney fees.

fees. *Salmine v. Knagin*, Op. No. 2501, 645 P2d 148 (Alaska 1982).

Where a judgment on offer and acceptance was signed January 18, but the action was not dismissed by court order until July 24, a request by counsel filed August 1 for a hearing on the amount of attorney fees was timely, July 24 being the proper date from which the request period should have been calculated. *Salmine v. Knagin*, Op. No. 2501, 645 P2d 148 (Alaska 1982).

In a proceeding to modify the terms of a property settlement incorporated into a divorce decree, an award of attorney's fees and costs is properly made pursuant to this rule. *Stoue v. Stone*, Op. No. 2522, 647 P2d 582 (Alaska 1982).

Trial court's award of twenty percent of prevailing party's costs and fees in case where no recovery was had was not abuse of discretion. *Alvey v. Pioneer Oilfield Services*, Op. No. 2532, 649 P2d 599 (Alaska 1982).

When assessing attorney's fees in litigation under the Truth-in-Lending Act, the standards set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F2d 714 (5th Cir. 1974) should be applied. *Hayer v. National Bank of Alaska*, Op. No. 2658, 663 P2d 547 (Alaska 1983).

Given the dissimilar underlying policies between awards of attorney's fees under this rule and 15 U.S.C. § 1640(a)(3) of the Truth-in-Lending Act, it was error for the trial court to resort to the guidelines of this rule in determining its fee award under the federal act. *Hayer v. National Bank of Alaska*, Op. No. 2658, 663 P2d 547 (Alaska 1983).

Where the right to the conveyance of certain real property was the "main issue" in litigation involving a demand for specific performance and a claim of unlawful detainer, the party prevailing on the "main issue" was entitled to attorney's fees notwithstanding that the final accounting between the parties showed that on balance the prevailing party owed damages to the other party. *Currington v. Johnson*, Op. No. 2828, 685 P2d 73 (Alaska 1984).

Where State's motion for attorney's fees cited Appellate Rule 508 as authority for its request for fees, the court's order granting the State's motion, which appeared on the very same document, could not reasonably be construed as based on any other authority. *Rosen v. State Bd. of Public Accountancy*, Op. No. 2880, 689 P2d 478 (Alaska 1984).

Unsuccessful challenger to a rezoning decision on ground that open meetings act was violated qualified as a public interest litigant under this rule. *Brookwood Area Homeowners v. Anchorage*, Op. No. 2953, 702 P2d 1317 (Alaska 1984).

In a divorce action, the "prevailing party" standard of this rule does not apply. *H.P.A. v. S.C.A.*, Op. No. 2961, 704 P2d 205 (Alaska 1985).

Although award of attorney fees was not unreasonable, the judgment for attorney's fee had to be vacated since part of the judgment on which it was based was reversed. *Dillingham Comm. Co. v. City of Dillingham*, Op. No. 2966, 705 P2d 410 (Alaska 1985).

In unsuccessful negligence action by sawmill employee against state for alleged failure of state to properly inspect the sawmill for safety violations, it was not manifestly unreasonable to award \$65,000 to the state for attorney fees even though the employer insisted on full satisfaction of its compensation lien, making settlement impossible. *Smith v. State*, Op. No. 2984, 706 P2d 1160 (Alaska 1985).

An explanation is required in all cases where the trial court refuses to award attorney fees to the prevailing party. *Pratt v. Kirkpatrick*, Op. No. 3054, 718 P2d 962 (Alaska 1986).

When counsel requests attorney's fees, other than based on the schedule in the Civil Rules, accurate records of the hours expended and a brief description of the services reflected by those hours should be submitted. *Hayes v. Xerox Corp.*, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Failure of the judgment to grant attorney's fees on punitive damage award was a legal error, but trial judge had discretion to waive the thirty-day rule for correcting such errors so as to grant a late request for modification of the judgment. *Alaskan Village, Inc. v. Smalley*, Op. No. 3069, 720 P2d 945 (Alaska 1986).

As the prevailing party at trial, defendant could receive the maximum amount of attorney fees under Civil Rule 82; the fact that defendant had made an offer of judgment under Civil Rule 68 would not increase or diminish the award of attorney fees. *Hutchins v. Schwartz*, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

A defendant who ultimately fares better than his offer of judgment is entitled only to partial compensation for post-offer attorney's fees. *Wickwire v. State*, Op. No. 3116, 725 P2d 695 (Alaska 1986).

In an action against the State for wrongful termination of an assistant attorney general, trial court, in awarding attorney's fees, improperly considered additional expenses incurred by the State resulting from plaintiff's decision to sue several individual defendants as well as the State, where a stipulation dismissing the individual defendants provided that each side would pay its own attorney's fees. *Wickwire v. State*, Op. No. 3116, 725 P2d 695 (Alaska 1986).

Superior court's award of \$55,000 in attorney's fees, which amounted to approximately 60 percent of the requested amount and 45 percent of the actual fees incurred, was sustained on appeal. *Dahle v. Atlantic Richfield Co.*, Op. No. 3120, 725 P2d 1069 (Alaska 1986).

Where party successfully enjoined nonjudicial foreclosure of deed of trust, award of \$50,000 in attorney fees, based upon the party's potential liability of \$57,000, the amount by which he was alleged to be in default, was not manifestly unreasonable. *Tolstrup v. Miller*, Op. No. 3129, 726 P2d 1304 (Alaska 1986).

Award of 80 percent of prevailing party's attorney fees was not manifestly unreasonable where trial court characterized the losing party's defense as bordering on bad faith. *Crook v. Mortenson-Neal*, Op. No. 3128, 727 P2d 297 (Alaska 1986).

In computing prejudgment interest on negligence action award to plaintiff, trial court correctly computed the interest on the entire judgment amount rather than computing the interest on the judgment amount less worker's compensation benefits paid to plaintiff. *Alyeska Pipeline Service Co. v. Beadles*, Op. No. 3151, 731 P2d 572 (Alaska 1987).

Trial court's award of 75 percent of the prevailing party's actual attorney's fees was not manifestly unreasonable. *Steenmeyer Corp. v. Mortenson-Neal*, Op. No. 3154, 731 P2d 1221 (Alaska 1987).

Award to plaintiff of \$700 in interim attorney's fees for its cost in litigating defendant's successful motion to have defendant's own admissions withdrawn was proper. *City of Kenai v. Ferguson*, Op. No. 3155, 732 P2d 184 (Alaska 1987).

The purpose of this rule is to compensate a prevailing party partially, not fully, for attorney's fees; an award of full attorney's fees is "manifestly unreasonable" in the absence of bad faith or vexatious conduct by the losing party. *Demoski v. New*, Op. No. 3184, 737 P2d 780 (Alaska 1987).

Contract provision allowing the prevailing party "reasonable" attorney fees justified trial court's award of full instead of partial attorney fees since the plain meaning of a contract provision prevails over any limitation otherwise imposed by this rule. *Ursiu Seafoods v. Keener Packing Co.*, Op. No. 3217, 741 P2d 1175 (Alaska 1987).

Trial court had no authority to require the state to pay costs or attorney's fees as a sanction in a juvenile case. *State v. Superior Court, Third Jud. Dist.*, Op. No. 744, 743 P2d 381 (Alaska App. 1987).

Although workers' compensation claim by employees against an adjuster was not made in bad faith, it was frivolous, justifying an award of full attorneys' fees. *Crawford and Co. v. Vienna*, Op. No. 3243, 744 P2d 1175 (Alaska 1987).

This rule does not apply to judgments in divorce cases. *L.L.M. v. P.M.*, Op. No. 3323, 754 P2d 262 (Alaska 1988).

The "prevailing party" standard and the divorce action judgment exception to this rule are inappropriate standards for determining the question of attorney's fees in connection with motions to amend or enforce child custody orders. *L.L.M. v. P.M.*, Op. No. 3323, 754 P2d 262 (Alaska 1988).

The statutory standard of "willfully and without just excuse" is appropriate for determining the question of attorney's fees after a motion to amend or enforce a custody or visitation order is adjudicated; in this way any unsuccessful party who reasonably, and in good faith, believes that his or her action was justified by the best interests of the children will not be deterred from action by the possibility of an award of fees and costs. *L.L.M. v. P.M.*, Op. No. 3323, 754 P2d 262 (Alaska 1988).

Projected attorney's fees under this rule based on a stipulated projected verdict were a part of a wrongful death defendant's liability insurance policy limits. *Schultz v. Travelers Indem. Co.*, Op. No. 3325, 754 P2d 265 (Alaska 1988).

Whether an entity is a public interest litigant cannot depend on the interests of a single member; rather, it must depend on the interests of typical members; accordingly, where only a few out of more than 100 members of a nonprofit corporation bringing suit had sufficient personal economic incentive to bring such a suit, the nonprofit corporation could qualify as a public interest litigant. *Citizens For The Preservation v. Sheffield*, Op. No. 3368, 758 P2d 624 (Alaska 1988).

In child support modification action, trial court did not err in awarding attorney's fees to the Child Support Enforcement Division under this rule. *Patch v. Patch*, Op. No. 3379, 760 P2d 526 (Alaska 1988).

The prevailing party rule for determining attorney fee awards under this rule does not apply to fee awards in divorce cases. *Mann v. Mann*, Op. No. 3491, 778 P2d 590 (Alaska 1989).

The divorce judgment exception to this rule does not extend to post-judgment modifications and enforcement motions. *Hartland v. Hartland*, Op. No. 3459, 777 P2d 636 (Alaska 1989).

Clause in lease/option agreement providing for full reasonable attorney's fees to prevailing party in any legal action relating to the demised premises was not superseded by subsequent earnest money agreement which did not mention attorney's fees. *Jackson v. Barbero*, Op. No. 3456, 776 P2d 786 (Alaska 1989).

The "prevailing party" rule used for determining attorney fees under this rule does not apply to divorce cases; instead relevant considerations are the relative economic situation and earning power of each party. Also, the court may award attorney fees where there is bad faith. *Streb v. Streb*, Op. No. 3443, 774 P2d 798 (Alaska 1989).

Trial court erred in awarding attorney fees to the prevailing party in a post-judgment child custody and support case after a finding that the other party acted in bad faith. *House v. House*, Op. No. 3498, 779 P2d 1204 (Alaska 1989).

Award of attorney fees in a child custody and support case between unmarried individuals is to be governed by the standard used in divorce actions rather than the prevailing party standard. *Bergstrom v. Lindback*, Op. No. 3516, 779 P2d 1235 (Alaska 1989).

Superior court did not err in allowing the prevailing party to file a supplemental memorandum five months after the party's initial motion for attorney fees was made, where the supplemental memorandum itemized fees requested for work done after the initial motion was filed in opposing the losing party's motion for relief from judgment. *Kenai Peninsula Borough v. English Bay Village*, Op. No. 3517, 781 P2d 6 (Alaska 1990).

Trial court erred in taking past settlement negotiations into account in making an award of attorney fees under this rule. *Doyle v. Peabody*, Op. No. 3519, 781 P2d 957 (Alaska 1990).

Trial court did not abuse its discretion in ruling that reformation of attorney fees, filed 70 days after entry of judgment, was filed within a reasonable time, absent any substantial prejudice resulting from the delay. *T & G Aviation, Inc. v. Foothold*, Op. No. 3609, 792 P2d 671 (Alaska 1990).

In suit by insured against insurer for violating insurance agreement, trial court erred in permitting jury to award attorney fees beyond those authorized by this rule. *Alaska Pacific Assurance Co. v. Collins*, Op. No. 3614, 792 P2d 936 (Alaska 1990).

A non-attorney pro se litigant is not entitled to attorney fees under this rule. *Alaska Federal S & L v. Bernhardt*, Op. No. 3562, 794 P2d 579 (Alaska 1990).

The argument that trial courts should never be permitted to award fees in excess of those established under "noncontested" or "without trial" schedules of Civil Rule 68 was rejected. *Van Dort v. Culliton*, Op. No. 3630, 794 P2d 642 (Alaska 1990).

In arbitration proceeding by borough against brokerage firm in which the brokerage firm sued certain borough officials for contribution, ascertain by brokerage firm that law firm had a conflict of interest in representing both the borough in the arbitration proceeding and the individual defendants in the contribution case, and should therefore be barred on public policy grounds from receiving an award of attorney fees. *Integrated Res. Equity v. Fairbanks Borough*, Op. No. 3633, 799 P2d 295 (Alaska 1990).

Where nationwide class action law suit was not submitted to Alaska attorney general as required by A

statute, the action was deemed frivolous as to Alaska claimants; accordingly, the defendant, as prevailing party vis-a-vis the Alaska claimants, was entitled to recover for its attorney fees spent in Alaska. *Deadwyler v. Volkswagen of America, Inc.*, 748 F. Supp. 1146 (W.D.N.C. 1990).

In property dispute case, award of attorney fees to an adverse possessor was appropriate notwithstanding argument that the award amounted to an unjustified "windfall." *Nome 2000 v. Fagerstorm*, Op. No. 3638, 799 P2d 304 (Alaska 1990).

The appellate rules rather than the civil rules control an award of attorney fees when the superior court determines an administrative appeal. *Diedrich v. City of Ketchikan*, Op. No. 3661, 805 P2d 362 (Alaska 1991).

The divorce judgment exception to this rule does not apply to post-judgment modification and enforcement motions; accordingly, fees in such cases are awarded under the prevailing party standard of this rule for post-judgment money and property issues, under which the parties' relative economic positions are irrelevant. *Lowe v. Lowe*, Op. No. 3726, 817 P2d 453 (Alaska 1991).

Any award of attorney fees for legal services incurred subsequent to a judgment for past due child support is a cost of the action to the extent the fees are attributable to reasonable and necessarily incurred legal efforts to collect the judgment. *Cameron v. Hughes*, Op. No. 3805, 825 P2d 882 (Alaska 1992).

The four criteria for determining whether a particular lawsuit involves the public interest are: (1) Is the case designed to effectuate strong public policies? (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit? (3) Can only a private party have been expected to bring the suit? (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance? *Anchorage Daily News v. Anchorage School Dist.*, Op. No. 3652, 803 P2d 402 (Alaska 1990); *Citizens Coalition v. McAlpine*, Op. No. 3686, 810 P2d 162 (Alaska 1991); *Loeb v. Rasmussen*, Op. No. 3786, 822 P2d 914 (Alaska 1991).

Any award of attorney fees for legal services incurred subsequent to a judgment for past due child support is a cost of the action to the extent the fees are attributable to reasonable and necessarily incurred legal efforts to collect the judgment. *Cameron v. Hughes*, Op. No. 3805, 825 P2d 882 (Alaska 1992).

Award of attorney fees in divorce cases is not governed by this rule. *Hilliker v. Hilliker*, Op. No. 3831, 828 P2d 1205 (Alaska 1992).

The "prevailing party" standard of this rule does not apply in divorce actions; instead, court must base award of fees on parties' relative economic situations and earning power. *Jones v. Jones*, Op. No. 3856, 835 P2d 1173 (Alaska 1992).

Argument that this rule violates due process clauses of state and federal constitutions because risk of incurring large attorney fee award deters many plaintiffs from bringing suit was rejected. *Van Huff v. Sohio Alaska Petroleum Co.*, Op. No. 3857, 835 P2d 1161 (Alaska 1992).

Opposing party should have been allowed ten days to file motion opposing award of attorney's fees. *McGill v. Wahl*, Op. No. 3886, 839 P2d 393 (Alaska 1992).

Where a statute expressly calls for an award of reasonable attorney's fees to successful plaintiffs, full fees should be awarded as long as those fees are reasonable. *Boblich v. Stewart*, Op. No. 3913, 843 P2d 1232 (Alaska 1992).

In awarding attorney fees and costs to plaintiffs who successfully challenged state legislative redistricting plan, trial court did not err by (1) failing to apportion awards by issue, (2) awarding fees for post-trial litigation in which plaintiffs did not prevail, and (3) awarding fees and costs for work attributable to both state case and noncompensable Department of Justice proceedings. *Hickel v. Southeast Conference*, Op. No. 4055, 868 P2d 919 (Alaska 1994).

Award of attorney's fees under this rule must relate solely to attorney's services performed in case in which judgment is entered and must only provide compensation for services performed up to time of judgment. *Torrey v. Hamilton*, Op. No. 4073, 872 P2d 186 (Alaska 1994).

Attorney's fees incurred in adversary proceeding in bankruptcy were not recoverable as costs of collection for original state court judgment. *Torrey v. Hamilton*, Op. No. 4073, 872 P2d 186 (Alaska 1994).

It is within the trial court's discretion to consider a party's pre-litigation fees in determining an award of attorney's fees. *Bowman v. Blair*, Op. No. 4169, 889 P2d 1069 (Alaska 1995).

It is error for the court to rule on a motion for an award of attorney's fees before the opposing party in given an opportunity to respond. *Bowman v. Blair*, Op. No. 4169, 889 P2d 1069 (Alaska 1995).

Attorney's fees award was vacated in light of ruling requiring remand of case for further evidencing hearing. *Sweet v. Sisters of Providence in Washington*, Op. No. 4200, 893 P2d 1252 (Alaska 1995).

An award of only approximately thirty percent of the prevailing party's attorney's fees was within the court's discretion since the case was the first Alaska case dealing with arbitral immunity. *Feichtinger v. Conant*, Op. No. 4189, 893 P2d 1266 (Alaska 1995).

When a trial court awards attorney's fees, it may, but need not, take into account the existence of an unaccepted Rule 68 offer if the claimant-offeree fails to better the offer. *Fairbanks North Star Borough v. Lakeview Enterprises, Inc.*, Op. No. 4218, 897 P2d 47 (Alaska 1995).

Given the amendments to Civil Rule 82 effective July 15, 1993, pre-amendment case law discussing the impact of successful Rule 68 offers on attorney's fees awards have limited application. *Fairbanks North Star Borough v. Lakeview Enterprises, Inc.*, Op. No. 4218, 897 P2d 47 (Alaska 1995).

Where case was in process when new Rule 82 went into effect, new rule was to be applied of attorney's fees. *Bishop v. Municipality of Anchorage*, Op. No. 4233, 899 P2d 149 (Alaska 1995).

Non-profit corporation organized for purpose of discouraging prostitution which brought action to abate house of prostitution qualified as public interest litigant. *SAC v. Lot 3, Block 3, Evergreen*, Op. No. 4245, 902 P2d 766 (Alaska 1995).

Amendment to this rule effective July 15, 1993, should have been applied to case where summary judgment was entered on June 7, 1993, defendants were declared prevailing parties on August 16, 1993; and attorney's fees were award on November

1, 1993. *Nielson v. Benton*, Op. No. 4258, 903 P2d 1049 (Alaska 1995).

The rule of *Cameron v. Hughes*, 825 P2d 882 (Alaska 1992), that legal costs reasonably and necessarily incurred in collecting a judgment for past-due child support should be treated as "costs of the action" and awarded to the collecting party, applies only to post-judgment fees incurred after a support obligation has been reduced to a unitary, fixed-sum judgment and only in child support cases. It does not apply in an action to reduce a spousal support obligation to judgment. *Saltz v. Saltz*, Op. No. 4272, 903 P2d 1070 (Alaska 1995).

While this rule does not generally apply to divorce cases, it does apply to post-judgment enforcement and modification motions. *Saltz v. Saltz*, Op. No. 4272, 903 P2d 1070 (Alaska 1995).

Native Alaskan Council of elders which filed suit to prevent clearcut harvesting of tract of timber believed to be location of historic Eyak village and burial ground qualified as public interest litigant. *Eyak Elders Council v. Sherstone, Inc.*, Op. No. 4273, 904 P2d 420 (Alaska 1995).

This rule does not preempt applicability of common fund doctrine, wholly or in part. *Edwards v. Alaska Pulp Corp.*, Op. No. 4362, 920 P2d 751 (Alaska 1996).

This rule, a fee-shifting tool which provides partial reimbursement of prevailing party's legal fees, was not intended to cap recovery of attorney fees under common fund doctrine, a fee-spreading mechanism which prevents unjust enrichment of those who derive benefit from efforts of others. *Edwards v. Alaska Pulp Corp.*, Op. No. 4362, 920 P2d 751 (Alaska 1996).

Where class representatives agreed to pay their lawyers whatever fees the court awarded, determination by court of "actual" fees was not necessarily limited to hourly fees. *Municipality of Anchorage v. Gentile*, Op. No. 4388, 922 P2d 248 (Alaska 1996).

Where police officers and fire fighters prevailed in class action against municipality to prevent reduction of post-retirement medical benefits, and class representatives had agreed to pay their attorneys whatever attorney fees were awarded by trial court, trial court had discretion to use risk enhancement and common fund doctrine as factors in calculating fee award and to require class members to contribute to attorney fees from benefits created or protected by class action. *Municipality of Anchorage v. Gentile*, Op. No. 4388, 922 P2d 248 (Alaska 1996).

All motions for attorney fees, including motions grounded on statutes, made after July 15, 1996, must be made within 10-day time frame of this rule. *Jones v. Jones*, Op. No. 4430, 925 P2d 1339 (Alaska 1996).

Excess insurer was not responsible for part of attorney's fees paid by primary insurer. *Safety Nat. Cas. v. Pacific Employees*, Op. No. 4440, 927 P2d 748 (Alaska 1996).

Trial court's ruling that labor organization representing city firefighters in litigation against city was not entitled to full, reasonable attorney fees under bad faith exception to this rule was not clearly erroneous. *Fairbanks Fire Fight. Ass'n v. Fairbanks*, Op. No. 4801, 934 P2d 759 (Alaska 1997).

Final findings of fact and conclusions of law in which trial court denied grandparents' petition for adoption and awarded physical custody of child to father was final judgment triggering 10-day period for filing of motion for attorney fees and

costs; petition for review of interim custody order had on finality of trial court's entry of findings and cor and stay of trial court's order did not affect trial jurisdiction to entertain motions for costs and attorney fees. *D.L.M. v. M.W.*, Op. No. 4840, 941 P2d 900 (Alaska 1997).

Contractors who filed declaratory judgment action that amendments to Little Davis-Bacon Act should their pre-existing contracts failed to qualify as public interest litigants since each had substantial economic incentive suit. *Eastwind, Inc. v. State*, Op. No. 4927, 951 P2d 900 (Alaska 1997).

Court does not abuse its discretion if it fails to let prevailing party's victory on subsidiary issue as "factor" mandating reduction of award to prevailing party. *Nielson v. Benton*, Op. No. 4978, 957 P2d 971 (Alaska 1997).

Award of attorney fees to property claimant forfeiture proceeding had to be reversed if property used fictitious name. *State v. Johnson*, Op. No. 4991, 958 P2d 440 (Alaska 1998).

Where trial court unquestionably possessed jurisdiction over state in civil forfeiture proceeding power to award attorney's fees against state notwithstanding that court released jurisdiction over res prior to award. *Johnson*, Op. No. 4991, 958 P2d 440 (Alaska 1998).

Superior court hearing appeal from administrative awards attorney's fees under Appellate Rule 508, in violation of Rule 82. *Stalnaker v. Williams*, Op. No. 5003, 960 P2d 1000 (Alaska 1998).

Argument that losing plaintiff in civil rights action be shielded from liability for fees and costs under this rule unless plaintiff's lawsuit is frivolous, unreasonable or without foundation was rejected. *Moody-Herrera v. State of Alaska Natural Resources*, Op. No. 5050, 967 P2d 79 (Alaska 1998).

Divorce exception to this rule did not apply to post-judgment action. *Rubright v. Arnold*, Op. No. 5083, 973 P2d 1000 (Alaska 1999).

Where trial ended after three days when directed verdict motion was granted, case did in fact go "to trial" for purposes of this rule. *Martin v. State*, Op. No. 1622, 973 P2d 1000 (Alaska App. 1999).

This rule is not authority for assessing attorney's fees against counsel. *Wilson v. Municipality of Anchorage*, Op. No. 5111, 977 P2d 713 (Alaska 1999).

Civil Rules 79(h) and 82(e), which address the allocation of costs and attorney's fees respectively between third-party plaintiffs and third-party defendants joined in an action, do not apply to the original plaintiff who has made a direct claim against the party defendant; in such cases, the usual Alaska practice awarding costs and attorney's fees to the prevailing party applies. *City of Kodiak v. Parish*, Op. No. 5170, 986 P2d 1000 (Alaska 1999).

Award of attorney's fees in any proceeding arising under Alaska's Uniform Landlord and Tenant Act should be under AS 34.03.350 rather than Civil Rule 82. *Sullivan v. Subramaniam*, Op. No. 5270, 2 P3d 66 (Alaska 2000).

Because child support case was settled without reference to attorney's fees and because alleged prevailing party failed to notify other party of her intent to pursue recovery of attorney's fees in addition to terms negotiated in settlement,

agreement, any award of Rule 82 attorney's fees was barred. *Sanders v. Barth*, Op. No. 5328, 12 P3d 766 (Alaska 2000).

Award of attorney fees under this rule may not include fees incurred in defending against 42 U.S.C. § 1988 claims. *Brown v. Ely*, Op. No. 5347, 14 P3d 257 (Alaska 2000).

Where plaintiffs' claims were based upon common law and the Unfair Trade Practices Act, trial court had discretion to look to both this rule and the statute in deciding attorney's fees. *Garrison v. Dixon*, Op. No. 5378, 19 P3d 1229 (Alaska 2001).

This rule does not allow for awards of "several" attorney's fees against multiple non-prevailing parties; an award is based on the amount of the prevailing party's actual reasonable attorney's fees, and the number of non-prevailing parties is inconsequential. *Garrison v. Dixon*, Op. No. 5378, 19 P3d 1229 (Alaska 2001).

Where there is no dispute about the reasonableness of attorney's fees awarded under Civil Rights 68, the factors listed in this rule cannot be applied to reduce the award. *Kellis v. Crites*, Op. No. 5380, 20 P3d 1112 (Alaska 2001).

Where defendant prevails on state law claims brought in state court that are integrally related to federal civil rights claims, defendant is entitled to award of attorney's fees without showing that plaintiff's claims were frivolous, unreasonable or without foundation. *Sengupta v. University of Alaska*, Op. No. 5397, 21 P3d 1240 (Alaska 2001).

In action for reformation of recorded easement, this rule, which provides for award of partial attorney's fees to prevailing party, was overridden by provision in easement agreement calling for "reasonable attorney's fees," which was interpreted as meaning full reasonable attorney's fees. *Gamble v. Northshore Partnership*, Op. No. 5445, 22 P3d 457 (Alaska 2001).

This rule only applies to "costs of action," not attorney's fees incurred in conduct of prior arbitration. *Holderness v. State Farm Fire and Casualty Co.*, Op. No. 5425, 24 P3d 1235 (Alaska 2001).

Alaska R. Civ. P. 82(a) provides for an award of attorney's fees to the prevailing party "except as otherwise provided by law." If a specific statutory scheme for attorney's fees or costs exists, Alaska R. Civ. P. 79 and 82 do not apply. *Enders v. Parker*, Op. No. 5446, 28 P3d 280 (Alaska 2001).

Court can award costs and attorney's fees even after it concludes that it lacks subject matter jurisdiction over a party's claims. *Foster v. State*, Op. No. 5504, 34 P3d 1288 (Alaska 2001).

Accepting a motion for attorney's fees despite the fact that it was one day past the Alaska R. Civ. P. 82(c) deadline was well within the superior court's discretion. *Kaiser v. Sakata*, Op. No. 5526, 40 P3d 800 (Alaska 2002).

II. Prevailing Party

Even though there has not been a final determination on the merits in the case, where the complaint has been dismissed for failure to comply with an order to produce corporate records, the defendant is the "prevailing party," and as such is entitled to attorney fees as costs. *Hart v. Wolff*, Op. No. 724, 489 P2d 114 (Alaska 1971).

A party may be the "prevailing party" within this rule if he is successful with regard to the main issues in the action. *Corper v. Carlson*, Op. No. 907, 511 P2d 1305 (Alaska 1973).

The prevailing party in each case should not automatically be awarded the full amount of attorney fees incurred. *Malvo v. J.C. Penney Co., Inc.*, Op. No. 901, 512 P2d 575 (Alaska 1973).

The purpose of this rule is to partially compensate the prevailing party for the costs and fees incurred where such compensation is justified, not to penalize a party for litigating a goodfaith claim. *Malvo v. J. C. Penney Co., Inc.*, Op. No. 901, 512 P2d 575 (Alaska 1973).

The purpose of this rule is to compensate partially a prevailing party for costs which he has incurred in litigation. *City of Valdez v. Valdez Development Company*, Op. No. 1051, 523 P2d 177 (Alaska 1974).

It is not the purpose of this rule to penalize a party for litigating goodfaith claim but rather partially to compensate the prevailing party where such compensation is justified. *Gilbert v. State*, Op. No. 1085, 526 P2d 1131 (Alaska 1974).

Generally, for purposes of awarding costs and attorney fees to the prevailing party, the "prevailing party" is considered to be the party who has successfully prosecuted or defended against the action — the one who is successful on the main issue of the action and in whose favor the decision or verdict is rendered and the judgment entered. Adoption of *v. M.C.*, Op. No. 1103, 528 P2d 788 (Alaska 1974).

Determination of prevailing party does not automatically follow if party receives an affirmative recovery, but is grounded in which party prevails on the main issues. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

Litigant may be prevailing party if he is successful with regard to the main issue in the action, even if other side receives some affirmative recovery. *Alaska Placer Co. v. Lee*, Op. No. 1294, 553 P2d 54 (Alaska 1976).

When trial court does not award attorney's fees to a prevailing party who was not awarded a money judgment, it must state the basis for its decision. *Stordahl v. Government Employees Insurance Co.*, Op. No. 1422, 564 P2d 63 (Alaska 1977).

Attorney's fees are to be awarded to plaintiff who prevails in public interest case, although they would not be assessed against him if he did not prevail. *Anchorage v. McCabe*, Op. No. 1490, 511 P2d 986 (Alaska 1977).

The trial court retains discretion to refrain from characterizing either party as "prevailing" for purposes of awarding attorney's fees. *Tobeluk v. Lind*, Op. No. 1781, 589 P2d 873 (Alaska 1979).

The purpose of Civil Rule 82 is to compensate a prevailing party partially, not fully, for costs and attorney's fees incurred. *Stepanov v. Gavrilovich*, Op. No. 1823, 594 P2d 30 (Alaska 1979).

Where jury assessed damages against principal, failure to assess damages against agent did not convert agent into prevailing party entitled to attorney's fees in discretion of court. *Dowling Supply & Equipment v. Gardner*, Op. No. 1974, 602 P2d 1250 (Alaska 1979).

Two teachers who brought suit against their school district for a salary increase allegedly due them did not meet the "public interest" exception to the normal rule permitting a discretionary award of attorney's fees to the prevailing party. *Rouse v. Anchorage School Dist.*, Op. No. 2106, 613 P2d 263 (Alaska 1980).

If a debtor raises a claim under the Truth-in-Lending Act as a partial defense, the debtor may be awarded a reasonable attorney's fee pursuant to the provisions of that act for successful assertion of his claim; however, success on one claim does not necessarily make the debtor the prevailing party in the entire action, and need not preclude the court from awarding offsetting attorney's fees to the prevailing party under this rule. *Hayer v. National Bank of Alaska*, Op. No. 2211, 619 P2d 474 (Alaska 1980).

The party who obtains an affirmative recovery is not necessarily the prevailing party within the meaning of this rule, and it is error for a court to rely solely on that factor in awarding attorney's fees. *Hayer v. National Bank of Alaska*, Op. No. 2211, 619 P2d 474 (Alaska 1980).

A dispute between the state and three individuals concerning valuable private property seized for violating state laws regulating a commercial enterprise does not fall within the "public interest" exception to the normal award of attorney's fees to the prevailing party. *F/V American Eagle v. State*, Op. No. 2227, 620 P2d 657 (Alaska 1980).

Where disposition of issues presented on appeal clearly established husband as the prevailing party, award of attorney's fees to wife, who initiated action seeking modification of terms of property settlement incorporated into divorce decree, was properly vacated and remanded to afford husband an opportunity to seek award of attorney's fees. *Stone v. Stone*, Op. No. 2522, 647 P2d 582 (Alaska 1982).

Class action against state and borough asserting that service area provisions of statute violated constitutional rights of all borough residents was public interest litigation, thus court's failure to award attorney's fees to the borough as prevailing party was not error. *Falke v. Fairbanks North Star Borough*, Op. No. 2530, 648 P2d 597 (Alaska 1982).

Plaintiff had sufficient private economic reasons to litigate decision by Alaska Department of Health and Social Services, which allowed a "certificate of need" for a hospital facility to remain in effect indefinitely, to justify superior court's award of attorney's fees to defendant as the prevailing party, against plaintiff's contention that the case came within the public interest litigation exception to this rule. *Sisters of Providence v. Dept. of Health, Etc.*, Op. No. 2536, 648 P2d 970 (Alaska 1982).

In applying the public interest exception to this rule, it makes no difference whether the defendant is a private rather than a public entity. *Southeast Alaska Conservation Council v. State*, Op. No. 2662, 665 P2d 544 (Alaska 1983).

In action by a private conservation council against the state challenging on constitutional and statutory grounds a timber sales contract entered into between the state and a timber company, it was a violation of the public interest exception to this rule for the court to award attorney's fees against the conservation council. *Southeast Alaska Conservation Council v. State*, Op. No. 2662, 665 P2d 544 (Alaska 1983).

Where grant of summary judgment against corporations for violating implied duty of good faith and fair dealing in employment contract was reversed, award of attorneys' fees to the corporations was vacated even though the corporations prevailed with respect to other related issues. *Mitford v. de Lasala*, Op. No. 2679, 666 P2d 1000 (Alaska 1983).

If a condemnee asserts counterclaims that are basically common law actions, such as negligence, the condemnor can be awarded costs and attorney's fees if it is the prevailing party

on those issues. *Stewart v. State, Dept. of Transportation*, Op. No. 2895, 693 P2d 827 (Alaska 1984).

Once the State agreed to dismissal of condemnation act, condemnation was no longer an issue, thus State was entitled attorney's fees thereafter incurred in successfully defending against condemnee's counterclaims seeking to prevent the State from removing trees and building a retaining wall on State's own property. *Stewart v. State, Dept. of Transportation*, Op. No. 2895, 693 P2d 827 (Alaska 1984).

Unsuccessful challenger to a rezoning decision on ground that open meetings act was violated qualified as a public interest litigant under this rule. *Brookwood Area Homeowners v. Anchorage*, Op. No. 2953, 702 P2d 1317 (Alaska 1985).

In a divorce action, the "prevailing party" standard of rule does not apply. *H.P.A. v. S.C.A.*, Op. No. 2961, 704 P2d 205 (Alaska 1985).

Unsuccessful suit by Labor Federation to enforce the requirements of the Little Davis-Bacon Act was motivated principally by private rather than public concerns, hence Federation was not a public interest litigant; therefore, court's award of attorney fees to the prevailing party was an abuse of discretion. *Alaska State Federation of Laborers v. State*, Op. No. 3014, 713 P2d 1208 (Alaska 1986).

In contested marriage and partnership dissolution proceeding, trial court did not abuse its discretion in awarding prevailing party actual attorney's fees of \$21,032 due vexatious conduct by the losing party. *Horton v. Hansen*, Op. No. 3072, 722 P2d 211 (Alaska 1986).

Generally, since a dismissal with prejudice is an adjudication on the merits, a "prevailing party" determination possible for purposes of this rule. *Municipality of Anchorage v. Baugh Const.*, Op. No. 3083, 722 P2d 919 (Alaska 1986).

Defendant was clearly the prevailing party even if two other affirmative defenses were rejected. *Municipality of Anchorage v. Baugh Const.*, Op. No. 3083, 722 P2d 919 (Alaska 1986).

Trial court did not abuse its discretion in awarding prevailing party \$12,000 for attorney fees instead of \$22,594 actually incurred, since although the losing party's case was weak, it was not vexatious or brought in bad faith. *Wickwire v. Arctic Circle Air Services*, Op. No. 3084, 722 P2d 930 (Alaska 1986).

Where taxpayer paid the challenged tax under protest, then sued for a refund on constitutional grounds and lost, judgment merely upheld the constitutionality of the tax statute and did not result in a money judgment, thus the state as prevailing party was only entitled to attorney fees "in a reasonable amount" rather than attorney fees "commensurate with amount and value of legal services rendered." *Atlantic Refining Co. v. State*, Op. No. 3096, 723 P2d 1249 (Alaska 1986).

A contribution-claim defendant is not a prevailing party entitled to costs and attorney's fees when it secures summary judgment against the contribution-claimant by settling with injured plaintiff. *Foss Alaska Line, Inc. v. Northland Services*, Op. No. 3112, 724 P2d 523 (Alaska 1986).

A party who successfully defeats a claim of great potential liability may be the prevailing party even if the other side is successful in receiving an affirmative recovery. *Hutchins v. Schwartz*, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

Defendant, who faced a potential liability of \$275,000 was required to pay only \$1,937 less 40 percent, was

prevailing party. *Hutchins v. Schwartz*, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

The "prevailing party" standard and the divorce action judgment exception to this rule are inappropriate standards for determining the question of attorney's fees in connection with motions to amend or enforce child custody orders. *L.L.M. v. P.M.*, Op. No. 3323, 754 P2d 262 (Alaska 1988).

The statutory standard of "willfully and without just excuse" is appropriate for determining the question of attorney's fees after a motion to amend or enforce a custody or visitation order is adjudicated; in this way any unsuccessful party who reasonably, and in good faith, believes that his or her action was justified by the best interests of the children will not be deterred from action by the possibility of an award of fees and costs. *L.L.M. v. P.M.*, Op. No. 3323, 754 P2d 262 (Alaska 1988).

The prevailing party rule used for determining attorney's fees awards under this rule does not apply to fee awards in divorces. *Rhodes v. Rhodes*, Op. No. 3339, 754 P2d 1333 (Alaska 1988).

As long as defense costs are reasonable, a successful defendant may recover whatever portion the trial court in its sound discretion sees fit to award; attorney's fees which prevailing defendants may recover are not limited as a matter of law by the amount of damages the unsuccessful plaintiff sought. *Stevens By Park View Corp. v. Richardson*, Op. No. 3313, 755 P2d 389 (Alaska 1988).

Plaintiff, who successfully prosecuted his action against defendant for moneys owed from the 1984 fishing season and defeated defendant's counterclaim for damages, was the prevailing party despite failing on his claim for moneys owed from the 1982 season and on his claim that he was defendant's employee rather than an independent contractor. *Day v. Moore*, Op. No. 3422, 771 P2d 436 (Alaska 1989).

For purposes of awarding fees pursuant to this rule, the general rule is that the prevailing party is the one who has successfully prosecuted or defended against the action, the one who is successful on the main issue of the action and in whose favor the decision or verdict is rendered and the judgment entered. *Day v. Moore*, Op. No. 3422, 771 P2d 436 (Alaska 1989).

A party does not have to prevail on all the issues in the case to be a "prevailing party"; one who defeats a claim of great potential liability may be the prevailing party even though the other side receives an affirmative recovery. *Day v. Moore*, Op. No. 3422, 771 P2d 436 (Alaska 1989).

In personal injury action by plaintiffs against helicopter owner following plaintiff's settlement with the helicopter component manufacturers, where defendant ultimately did not have to pay plaintiffs anything after the verdict in the plaintiff's favor was reduced by the amount of their previous settlements, the trial court did not abuse its discretion in holding that the defendant was the prevailing party. *Buoy v. ERA Helicopters, Inc.*, Op. No. 3423, 771 P2d 439 (Alaska 1989).

Trial court did not abuse its discretion in concluding that each side should bear its own costs and attorney fees since each side prevailed in substantial areas of the litigation. *Orksmith v. Brusich*, Op. No. 3434, 774 P2d 191 (Alaska 1989).

The divorce judgment exception to this rule does not apply to post-judgment modification and enforcement motions; accordingly, fees in such cases are awarded under the prevailing party standard of this rule for post-judgment money and

property issues, under which the parties' relative economic positions are irrelevant. *Lowe v. Lowe*, Op. No. 3726, 817 P2d 453 (Alaska 1991).

Estate of deceased minor, which prevailed in action for damages against store that illegally sold alcohol to the minor, did not satisfy the "public interest" litigant criteria, thus was not entitled to actual attorney fees. *Loeb v. Rasmussen*, Op. No. 3786, 822 P2d 914 (Alaska 1991).

The four criteria for determining whether a particular lawsuit involves the public interest are: (1) Is the case designed to effectuate strong public policies? (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit? (3) Can only a private party have been expected to bring the suit? (4) Would the purported public interest litigant have sufficient economic incentive to file suit even if the action involved only narrow issues lacking general importance? *Anchorage Daily News v. Anchorage School Dist.*, Op. No. 3652, 803 P2d 402 (Alaska 1990); *Citizens Coalition v. McAlpine*, Op. No. 3686, 810 P2d 162 (Alaska 1991); *Loeb v. Rasmussen*, Op. No. 3786, 822 P2d 914 (Alaska 1991).

Where insureds prevailed on their claim of policy coverage and received \$50,000 on that claim, but failed on their claim of bad faith against insurance company, trial court erred in designating insurance company rather than insureds as prevailing party. *Hudson v. Nationwide Mut. Fire Ins. Co.*, Op. No. 3971, 855 P2d 1321 (Alaska 1993).

Public interest litigant's general prevailing party status did not mean litigant should recover fees incurred in bringing or defending petitions for review on which it did not prevail. *Hickel v. Southeast Conference*, Op. No. 4055, 868 P2d 919 (Alaska 1994).

Plaintiff, whose recovery was slight compared to \$700,000 in damages requested, but who succeeded in obtaining full damages requested for past medical expenses and \$16,000 for past and future physical impairment and pain and suffering, was prevailing party. *Blumenshine v. Baptiste*, Op. No. 4060, 869 P2d 470 (Alaska 1994).

The "prevailing party" is the party who is successful with regard to the main issues in the action, even if the other party receives some affirmative recovery. *Bowman v. Blair*, Op. No. 4169, 889 P2d 1069 (Alaska 1995).

Party who retained ownership of the majority of the disputed items in a probate case was the prevailing party for purposes of awarding attorney's fees. *Bowman v. Blair*, Op. No. 4169, 889 P2d 1069 (Alaska 1995).

Trustee bank was neutral party in action concerning whether sale of trust property would be in best interest of all trust beneficiaries; as such, beneficiary input regarding proposed course of action could not be contrary to trustee's interests, thus award of fees against beneficiary and to trustee was unjustified. *Barber v. Barber*, Op. No. 4345, 915 P2d 1204 (Alaska 1996).

In state court action by merchant mariners against ship owners and asbestos manufacturers for injuries and wrongful deaths caused by exposure to asbestos which was dismissed on forum non conveniens grounds, court did not err in awarding attorney fees and costs to defendants as prevailing parties, nor did such award conflict with admiralty law. *Hughes v. Foster*, Op. No. 4790, 932 P2d 784 (Alaska 1997).

Alaska Wage and Hour Act, prior to its amendment in August 1995, did not permit award of attorney fees and costs to