



**Historic Preservation Commission Regular Meeting  
November 17, 2021**

**PROPOSED AGENDA**

**I. CALL TO ORDER**

- **Welcome**
- **Determination of Quorum**

**II. ADOPTION OF AGENDA**

- **Motion:** To adopt the agenda as presented [or as amended]

**III. ADOPTION OF MINUTES**

- **Motion:** To adopt the minutes of October 20, 2021 as written [or as amended]

**IV. OLD BUSINESS**

**V. NEW BUSINESS**

- Certificate of Appropriateness Request – 105 Cherry Street
- Mikkel Hansen – 112 Hilltop Road
- Discussion of Mural Regulations/Rules/Standards
- Discussion of Chamber of Commerce Proposed Downtown Project

**VI. COMMUNICATION FROM HISTORIC PRESERVATION COMMISSION**

**VII. COMMUNICATION FROM STAFF**

**VIII. ADJOURNMENT**



## **PUBLIC NOTICE** **AVISO PÚBLICO**

### **BLACK MOUNTAIN HISTORIC PRESERVATION COMMISSION**

#### **REGULAR MEETING** **REUNIÓN ORDINARIA**

**Wednesday, November 17, 2021, at 6:00 p.m.**  
**Miércoles 17 de Noviembre de 2021, a las 6:00 p.m.**

The Black Mountain Historic Preservation Commission will meet for their regular monthly meeting on **Wednesday, November 17, 2021, at 6:00 p.m.** at Town Hall, 160 Midland Avenue, Black Mountain, NC.

La Comisión de Preservación Histórica de Black Mountain realizará su meeting mensual regular **el miércoles 17 de Noviembre de 2021 a las 6:00 p.m.** en el Ayuntamiento, 160 Midland Avenue, Black Mountain, NC.

The meeting is open to the public. Masks are required.  
La reunión está abierta al público. Se requieren máscaras.

A Zoom link is available for citizens who cannot attend the meeting.  
Un enlace de Zoom está disponible para los ciudadanos que no pueden asistir a la reunión.  
<https://us02web.zoom.us/j/83823217239>

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**Jennifer Tipton**  
**Senior Admin**

The Town of Black Mountain is committed to providing accessible facilities, programs and services for all people in compliance with the Americans with Disabilities Act (ADA). Should you need assistance or a particular accommodation for this meeting please contact Jennifer Tipton at (828) 419-9371 or by email at [Jennifer.tipton@tobm.org](mailto:Jennifer.tipton@tobm.org).

La ciudad de Black Mountain se compromete a proporcionar instalaciones, programas y servicios accesibles para todas las personas en cumplimiento con la Ley de Estadounidenses con Discapacidades (ADA). Si necesita ayuda o un alojamiento en particular para esta reunión, comuníquese con Jennifer Tipton al (828) 419-9371 o por correo electrónico a [Jennifer.tipton@tobm.org](mailto:Jennifer.tipton@tobm.org).

*Posted to the Town Bulletin Board 11/01/2021*  
[www.townofblackmountain.org](http://www.townofblackmountain.org)





## TOWN OF BLACK MOUNTAIN

160 Midland Avenue ♦ Black Mountain ♦ N.C. ♦ 28711

Phone: (828) 419-9300 ♦ Fax: (828) 669-2030

### MEMORANDUM

To: Town of Black Mountain Historic Preservation Commission  
From: Jennifer Tipton, Senior Admin  
Re: Agenda Packet for November 17, 2021  
Date: November 8, 2021

The **Town of Black Mountain Historic Preservation Commission** will meet on **Wednesday, November 17, 2021, at 6:00 p.m.** in Town Hall at 160 Midland Avenue.

Please find the following items for your information and use at the meeting:

1. The proposed agenda;
2. Draft minutes from October 20, 2021;
3. Certificate of Appropriateness Request – 105 Cherry Street;
4. Mikkel Hansen – 112 Hilltop Road;
5. Discussion of Mural Regulations/Rules/Standards; and
6. Discussion of Chamber of Commerce Proposed Downtown Project.

Please let Jennifer Tipton know if you are **unable** to attend this meeting.  
[jennifer.tipton@tobm.org](mailto:jennifer.tipton@tobm.org) or (828) 419-9371.

The Town of Black Mountain is committed to providing accessible facilities, programs and services for all people in compliance with the American with Disabilities Act. Should you need assistance or a particular accommodation for this meeting, please inform Jennifer Tipton at (828) 419-9371 or by email at [jennifer.tipton@tobm.org](mailto:jennifer.tipton@tobm.org).

CC: Jessica Trotman, Planning Director  
Jake Hair, Planner 1/Zoning Administrator  
Ron Sneed, Town Attorney  
Anna Stearns, Town Attorney

**TOWN OF BLACK MOUNTAIN  
HISTORIC PRESERVATION COMMISSION**

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The Black Mountain Historic Preservation Commission held its regular meeting on Wednesday, October 20, 2021, at 6:00 p.m. electronically via Zoom.

**I. CALL TO ORDER**

The meeting was called to order at p.m. with the following members present:

Matthew Turner, Vice Chair

Absent:

Susan Leive, Chair

Ron Collins

Jay Parmar

Staff:

Jennifer Tipton, Senior Admin

Others Present:

Jennifer Tipton declared that a quorum was not present and no business was discussed. The meeting adjourned at 6:07 p.m.

Prepared by:

\_\_\_\_\_  
Susan Leive, Chair

\_\_\_\_\_  
Jennifer Tipton, Senior Admin

# TOWN OF BLACK MOUNTAIN PLANNING AND DEVELOPMENT SERVICES

## CERTIFICATE OF APPROPRIATENESS APPLICATION

[www.townofblackmountain.org](http://www.townofblackmountain.org)

| PROPERTY INFORMATION                                                                                                                                    |                                          |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------|
| Address:<br>105 Cherry Street, Black Mountain                                                                                                           | PIN #:                                   |
| Property Owner:<br>Sarah M. vekasi / 105 Cherry Street LLC                                                                                              |                                          |
| Address:<br>118 Beech St, Black Mtn, NC 28711                                                                                                           | Phone #:<br>828-333-1884                 |
| APPLICANT INFORMATION                                                                                                                                   |                                          |
| Name:<br>Sarah Vekasi                                                                                                                                   | Phone #:<br>828-333-1884                 |
| Address:<br>118 Beech Street, Blk Mtn.                                                                                                                  | Email:<br>sarahsunshinepottery@gmail.com |
| PROJECT INFORMATION                                                                                                                                     |                                          |
| <input type="checkbox"/> Administrative Review <input checked="" type="checkbox"/> Certificate of Appropriateness                                       |                                          |
| <input type="checkbox"/> Minor Works Committee Review <input type="checkbox"/> Conservation District Review                                             |                                          |
| Description of Project:<br>Tear down old decrepit deck in the back of 105 Cherry Street, and replace with new one.                                      |                                          |
| Site plan, sketches, drawings, photographs, specifications and other information attached.                                                              |                                          |
| ACKNOWLEDGEMENT                                                                                                                                         |                                          |
| I certify that all of the information presented by the undersigned of this application is accurate to the best of my knowledge, information and belief. |                                          |
| Sarah M. Vekasi<br>Print Name                                                                                                                           | Sarah M. Vekasi<br>Signature             |
|                                                                                                                                                         | Nov. 1, 2021<br>Date                     |
| OFFICE USE ONLY                                                                                                                                         |                                          |
| Date Received: 10/29/21                                                                                                                                 | Fee: 50                                  |
| Date Paid: 10/29/21                                                                                                                                     | Meeting Date: 11/17/21                   |
| Cash: _____ Check: <input checked="" type="checkbox"/> Credit: _____                                                                                    |                                          |

Town of Black Mountain  
 160 Midland Avenue, Black Mountain, NC 28711  
 Phone: 828-419-9300 ~ Fax: 828-669-2030  
[www.townofblackmountain.org](http://www.townofblackmountain.org)

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## Innate Woodworking

Nick Biggs  
104 Eastside Dr. Suite 316  
Black Mountain, NC 28711  
innatewoodworking@gmail.com  
(904) 888-5472

# Sarah Sunshine Pottery New Deck

**Sarah Vekasi, MDiv.**

sarahsunshinepottery@gmail.com

(828) 333-1884

www.sarahsunshinepottery.com

105 Cherry St. Black Mountain, NC 28711

## OVERVIEW

We are submitting an application to build a new deck in the back entrance of 105 Cherry Street. The current deck is unusable and unsafe. In building a new deck, we hope to add to the functionality of the business, as well as contribute to the beauty of our town. Thank you for your consideration.

## Materials and Specifications

The deck will be a 14'x14' square with a cantilever support at 12 feet. A direct stair set will run along the right side of the structure. Due to the older nature of the existing brick, this deck will be a stand alone structure, not directly connected to the building.

Footers- Six Posts @ 6"x6" connected to post brackets into graded concrete with appropriate bolts

Stair Stringers- 2"x12" material within the coded dimensions of a 7" maximum rise and an 11" minimum run.

Framing Materials- Exterior Grade KDAT Pressure Treated Pine Lumber

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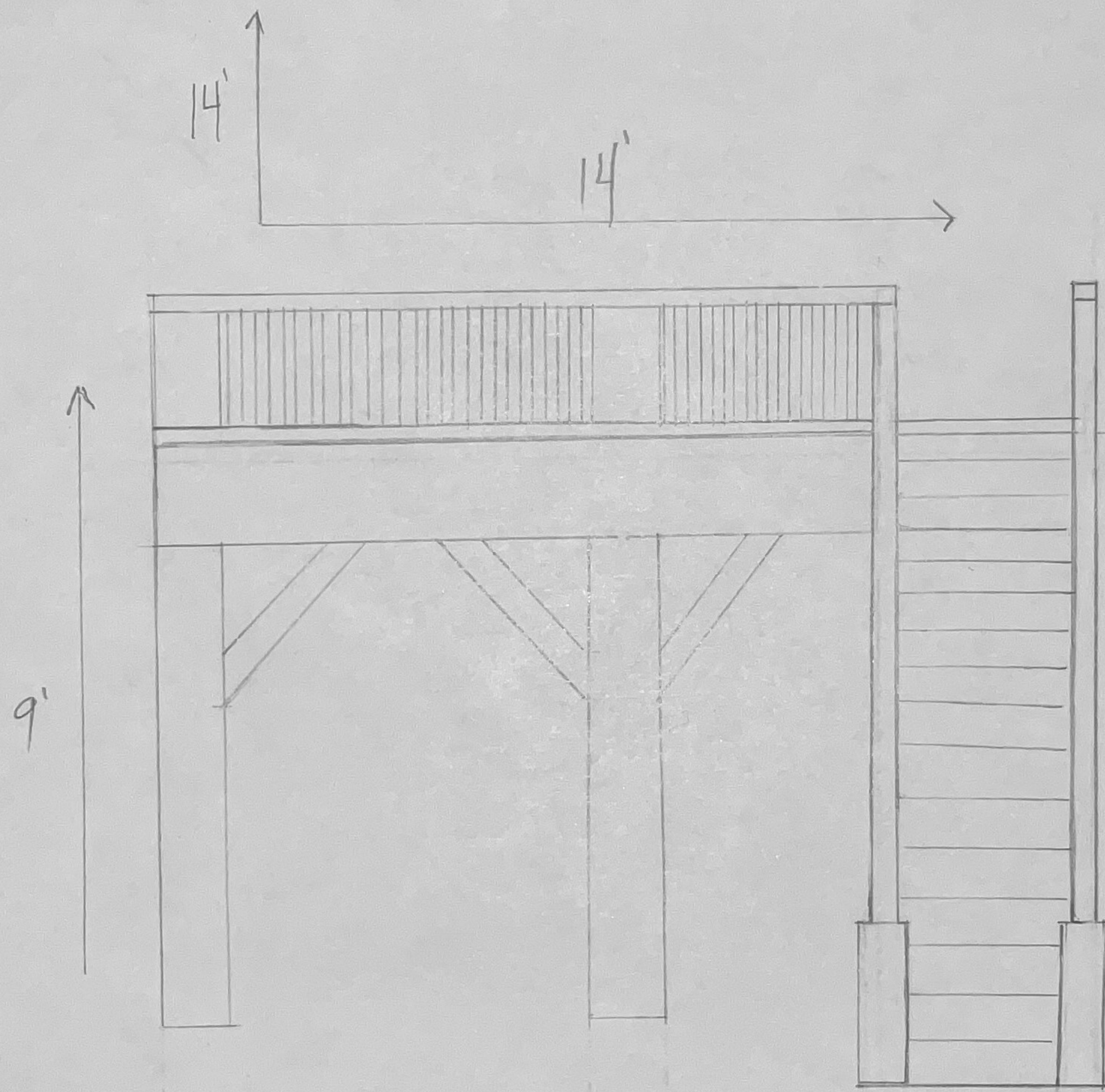
Fasteners- Exterior grade metal screws and bolts

Hardware- Joist hangers, L-brackets, Post brackets

## **Cost**

The total cost of this project is estimated to be \$10,520.

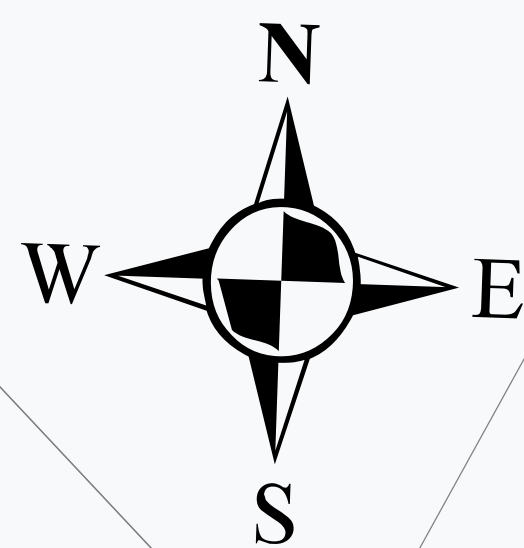






# 105 Cherry Street Buffer Map

Swannanoa Ingles





| Name                                       | Address                 | City           | State | Zip   | PIN #        |               |
|--------------------------------------------|-------------------------|----------------|-------|-------|--------------|---------------|
| 150 Cherry Street LLC                      | 118 Beech St            | Black Mountain | NC    | 28711 | 0619-36-2052 |               |
| Shirtmandude Co                            | 103 Cherry Street       | Black Mountain | NC    | 28711 | 0619-36-2055 |               |
| Pei-Ling T Becker                          | 101A Cherry Street      | Black Mountain | NC    | 28711 | 0619-36-2057 |               |
| Johanna Maytin Trustee                     | 6278 N Federal Hwy #405 | Ft Lauderdale  | FL    | 33308 | 0619-36-2049 |               |
| Lawrence J Brandon; Ruth Brandon           | PO Box 788              | Black Mountain | NC    | 28711 | 0619-36-2141 |               |
| Town Corner Properties LLC                 | 103 W State Street      | Black Mountain | NC    | 28711 | 0619-36-2154 |               |
| Town Corner Properties LLC                 | 103 W State Street      | Black Mountain | NC    | 28711 | 0619-36-2175 |               |
| Town Corner Properties LLC                 | 103 W State Street      | Black Mountain | NC    | 28711 | 0619-36-2197 |               |
| Daniel H Wall IV (LE); Barbara S Wall (LE) | 117 Forest Hill Drive   | Black Mountain | NC    | 28711 | 0619-36-3121 |               |
| David A Ruland; Kirby H Ruland             | 95 Booter Rd            | Fairview       | NC    | 28730 | 0619-36-3048 |               |
| 108 Broadway LLC                           | 1586 Haven Heights Dr   | Marion         | NC    | 28752 | 0619-36-3056 |               |
| Dragonfly3 Building LLC                    | 1586 Haven Heights Dr   | Marion         | NC    | 28752 | 0619-36-3064 |               |
| Town of Black Mountain                     | 160 Midland Avenue      | Black Mountain | NC    | 28711 | 0619-35-3989 |               |
| Town of Black Mountain                     | 160 Midland Avenue      | Black Mountain | NC    | 28711 | 0619-35-2993 |               |
| Town of Black Mountain                     | 160 Midland Avenue      | Black Mountain | NC    | 28711 | 0619-35-3907 |               |
| Kim Caraway; Cheryl D Caraway              | 80 Oak Cir              | Marion         | NC    | 28752 | 0619-35-2999 |               |
| John Lawrence Pellom                       | 410 Melody Cir          | Swannanoa      | NC    | 28778 | 0619-36-2073 | c/o Kaye Laws |
| Loose Dogs LLC                             | 313 Joan Ct             | Beaufort       | NC    | 28516 | 0619-35-1834 |               |
| Montreat College Rentals I LLC             | PO Box 185              | Montreat       | NC    | 28757 | 0619-35-1975 |               |
| Roberto E Vengoechea; June B Vengoechea    | 100 Cherry Street       | Black Mountain | NC    | 28711 | 0619-35-1979 |               |
| DAAJ Investments LLC                       | 15 Alpine Way           | Swannanoa      | NC    | 28778 | 0619-35-1946 |               |





# Town of Black Mountain

160 MIDLAND AVENUE • BLACK MOUNTAIN, NORTH CAROLINA • 28711 Phone (828) 419-9300  
PLANNING & DEVELOPMENT Fax (828) 669-2030  
TDD 1-800-735-2962

## NOTICE OF REQUEST FOR A CERTIFICATE OF APPROPRIATENESS FOR A MAJOR WORK WITHIN THE HISTORIC DISTRICT

DATE: **November 1, 2021**

TO: **Current Property Owner**

FROM: **TOWN OF BLACK MOUNTAIN  
PLANNING & DEVELOPMENT**

PROPERTY DESCRIPTION/PIN #: **105 Cherry Street  
0619-36-2052.00000**

An application for a Certificate of Appropriateness has been applied for by: **Sarah Vekasi**

This Certificate of Appropriateness is requested to allow the property owner to: **Replace/repair rear deck at 105 Cherry Street.**

***An Evidentiary Hearing will be held Wednesday, November 7, 2021 @ 6:00 P. M. in the Council Room of Town Hall, 160 Midland Avenue, Black Mountain, NC 28711. A Zoom link is also provided for any citizen who is not able to attend.***

**<https://us02web.zoom.us/j/83823217239>**

The purpose of the historic district is to encourage the restoration, preservation, rehabilitation and conservation of historically, architecturally and archaeologically significant structures, buildings, sites, objects and their surroundings, and to review construction design to ensure compatibility with the character of the district. Under Section 4.7.3.14 (B) of the Land Use Code for the Town of Black Mountain, we are informing you as an adjoining property owner that there will be a public hearing to consider a request for a Certificate of Appropriateness for a major work within the District and that you may choose to show cause as to why this request should not be granted. If you have any questions regarding this Notice, please contact the Planning and Development Department at 828-419-9300.



## **LEGAL NOTICE**

### **BLACK MOUNTAIN HISTORIC PRESERVATION COMMISSION**

#### **CERTIFICATE OF APPROPRIATENESS HEARING**

**Thursday, November 17, 2021, at 6:00 p.m.**

The Black Mountain Zoning Board of Adjustment will meet on **Thursday, November 17, 2021, at 6:00 p.m.** in the Board Room in the Town Hall Building, 160 Midland Avenue, Black Mountain, NC. The purpose of this meeting is to hear a Certificate of Appropriateness request for 105 Cherry Street, further identified as PIN #0619-36-2052.00000, to replace the rear deck.

The meeting is open to the public. Masks are required.

A Zoom link is available for citizens who are not available to attend in person.

<https://us02web.zoom.us/j/83823217239>

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**Jennifer Tipton**  
**Senior Admin**

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*Posted to the Town Bulletin Board 11/01/2021*  
*Published in the Black Mountain News 11/4/2021 and 11/11/2021*

[www.townofblackmountain.org](http://www.townofblackmountain.org)



# Preservation North Carolina

*The Historic Preservation Foundation of North Carolina, Inc.*

*Saving historic places important to the diverse people of North Carolina.*



July 9, 2021

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Headquarters, Raleigh  
919-832-3652

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910-251-3700

Eastern Office, Tarboro  
252-563-5288

Piedmont Office, Durham  
919-401-8540

Western Office, Shelby  
704-482-3531

Mikkel R. Hansen  
112 Hilltop Road  
Black Mountain, NC 28711

Dear Mr. Hansen:

Thank you so very much for your wonderful donation of a historic preservation easement on the historic Merrell-Hansen House in Buncombe County on June 25, 2021 to The Historic Preservation Foundation of North Carolina, Inc. Thank you also for your very generous donation of \$6,000.00 on June 29, 2021. Your donation will assist us with the financial commitment necessary for monitoring the covenants on the property.

We are very grateful for your working with Preservation North Carolina to ensure the preservation of the Merrell-Hansen House. We will do our very best to make sure that the property is preserved for generations to come.

If you are planning to take this as a charitable contribution on your taxes, you will need to complete IRS Form 8283 and have it signed by your appraiser. (Your appraiser will be familiar with this process.) Then, send it to us and we will sign acknowledgement of the donation.

Thank you again for your commitment to historic preservation. We are honored that you are a part of our preservation family.

Sincerely,

J. Myrick Howard  
President

*Thanks so very much.  
We are honored to accept  
the responsibility of this easement!  
Best wishes.*

cc: Ted Alexander, Regional Director, Western Office

Unless otherwise noted above, The Historic Preservation Foundation of North Carolina, Inc. provided no goods or services in return for the contribution received.

Tax ID: 56-1445266



1. Retain and preserve historic signs that contribute to the overall historic character of a district property including their functional and decorative features and details.
2. Retain and preserve materials, features, details, and finishes that contribute to the overall historic character of signage.
3. Repair the features, material surfaces, and details of historic signage using repair methods appropriate to the specific material.
4. Replace deteriorated, damaged, or missing signage with new signage that is compatible in design, scale, material, finish, and detail with the historic character of the building and district.
5. Introduce new signage, if necessary, in traditional locations that do not compromise or diminish the overall historic character of the building, site, or district. Design the new signage to be compatible in orientation, location, height, scale, material, and configuration with the historic character of the building, site, and district.
6. Site new freestanding signage in residential areas of the district on low posts or bases that are compatible with the pedestrian scale of district. Mount small identification signs on building facades in locations that do not damage or conceal significant architectural features or details.
7. Fabricate new signage out of traditional materials, such as wood, stone, or non-printed metal, or apply lettering to glass or awning fabric. It is not appropriate to introduce signage in contemporary materials, such as plastics, synthetics, resins, vinyl adhesive backings, or internally lit or flashing signs that are incompatible with the overall historic character of the historic district.



Compatible sandblasted wood sign



Small projecting wood and metal commercial signs offer businesses a way to clearly identify themselves at a pedestrian scale without compromising the character or integrity of the structure or streetscape





Artwork installed at the public library.

The installation of artwork creates community focal points and can vitalize landscaped areas, pedestrian corridors, parks, and other public spaces. Art takes many forms. Art can be cast, carved, built, assembled or painted. In addition to sculpture and murals, art may take a functional form such as landscaping, interpretative signage, or artistic amenities. By its presence alone art can challenge a community to heighten awareness and question assumptions.

Public art is any work of art or design that is created by an artist specifically to be sited in a space intended for public use or public viewing. It invites interaction with the surroundings and has the power to reflect or contribute to a community's character. Public art helps define the community's identity and reveal the unique nature of a specific neighborhood. Private art that is installed outdoors also affects the character of the historic district.

### **Considerations**

The subject or meaning of a piece of art can be interpreted in many ways. Thus, review of art installations within the Historic District are intended to be content-neutral. The COA review is meant to ensure that the location, mass and scale, materials, durability, and manner of installation of the art piece are compatible with the character of the district.

The Historic District Commission is not responsible for reviewing the content or subject matter of a piece of art. Artwork should be cared for and refurbished as required by the nature of the materials to maintain the appropriate appearance and safety of the piece. Artwork should also be installed in a manner that considers safety of the general public.

## Jennifer Tipton

---

**From:** SchellyM@newbernnc.gov <ncpres@listserv.unc.edu> on behalf of SchellyM@newbernnc.gov  
**Sent:** Friday, June 11, 2021 11:39 AM  
**To:** NC Preservation Commissions and Staff  
**Subject:** RE: [ncpres] Mural Regulations

Hello, Jennifer,

1) We do not regulate paint color, so wherever paint is allowed, a painted mural is beyond the HPC's decision. No CoA is required.

2) If it is a mounted mural, then we would do a CoA like a sign (mount into masonry joints, etc.) and a CoA is required:

**Guidelines for Signage**

2.8.1 Signage shall incorporate proportions and dimensional details of the surrounding architectural facade. ...

2.8.2 Drive fasteners for signs in mortar joints to prevent damage to the masonry units.

3) Public art is part of the following guideline:

**Guidelines for Public and Open Spaces**

2.2.1 Introduce public art, statuary, artifacts, memorials, and fountains as focal points in spaces that do not obscure historic buildings or their architectural features. Consider the scale and historic context of art features when determining the setting and location.

Matt



**Matthew Schelly, AICP, Reg. Arch. (CA), CZO, CFM**

City Planner, Historic Preservation Administrator

City of New Bern, Development Services Department  
303 First Street  
New Bern, NC 28560  
Office: 252-639-7583  
[schellym@newbernnc.gov](mailto:schellym@newbernnc.gov)

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**From:** jennifer.tipton@townofblackmountain.org <ncpres@listserv.unc.edu>  
**Sent:** Friday, June 11, 2021 11:04 AM  
**To:** NC Preservation Commissions and Staff <ncpres@listserv.unc.edu>  
**Subject:** [ncpres] Mural Regulations

Good Morning and Happy Friday!

I am looking to see if any other Historic Commissions regulate murals in their local historic districts and if so, would you mind sharing those regulations with me?

Thank you and I hope everyone has a great weekend!



*Jennifer Tipton*

Senior Admin

Town of Black Mountain

160 Midland Avenue

Black Mountain, NC 28711

(828) 419-9300 ext. 371

(828) 669-2030 (fax)

[www.townofblackmountain.org](http://www.townofblackmountain.org)

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**(remove quotes before sending)**

# De-“coding” the Visual Landscape: Municipal Sign Ordinances, Murals, and the First Amendment.

By: Shannon T. O'Connor, Esq., Goldberg Segalla, LLP, Syracuse, New York



## INTRODUCTION

Murals or other works of creative expression on public walls can be classified as signs, artwork, or both, presenting challenges for municipal lawmakers and counsel. Regulation of murals and outdoor artwork is increasingly becoming an issue for municipalities, particularly as localities launch mural programs to create cultural identity, preserve history, promote economic development, focus revitalization efforts, address blight,

encourage and foster community engagement, and contribute to long-term community planning.

This article will examine the regulation of murals, beginning with a brief background into municipal sign law and the various ways in which local control of signs raises First Amendment challenges. Cases addressing whether a mural falls within the provisions of local sign laws will be reviewed and analyzed, and the legal implications of various municipal mural programs will be addressed.

## Purpose of Sign Ordinances and Regulations

With the birth of modern zoning acts shortly after the turn of the 20th century, municipalities assumed the right to determine what constituted a valid use of their police powers. At first, the local government role in health, safety, morals, and welfare was narrowly defined.<sup>1</sup> As a result, aesthetic concerns did not typically instigate an exercise of police powers.<sup>2</sup> This changed in the late 1920s as courts became more progressive and began to allow for regulation of visual elements so long as the laws in question promoted other goals such as health, safety, and morals.<sup>3</sup> Courts began to give great deference to legislative determinations as to whether a local ordinance was a valid use of its police powers.<sup>4</sup> As a result, sign ordinances proliferated, covering an abundance of visual mediums under the police power justifications of safety and, more interestingly, aesthetics.<sup>5</sup>

### A. How Much Do These Ordinances and Regulations Cover?

Sign ordinances as a comprehensive legislative scheme may cover not only the physical characteristics of the sign but also the message it communicates. Physical elements subject to regulation include size, height, shape, number and location or placement of the sign — which can be further broken down into categories of on-premise or off-premise, private property or public property, and attached (to a structure) or detached. Given that sign regulations also often restrict content, through either the manner of its display or the message itself, such ordinances unfailingly come under judicial review for potential violations of the First Amendment.

Despite being a somewhat modern extension of zoning laws, sign ordinances have grown to cover a vast amount of content and mediums.<sup>6</sup> Typically, municipalities tailor sign ordinances around their own municipal needs, governing body/elected official's preference, zoning code organization, and even legal counsel recommendations.<sup>7</sup> The result is that most sign ordinances cover billboards, awnings, directional signs, monuments, projectors, vehicular signs, window signs, projectors, and most



curiously, murals.<sup>8</sup> Within that coverage, sign ordinances address the number of signs, their height, size, weight, location, lighting, and illumination, with the specific details dependent on each municipality.<sup>9</sup> However, creating a sign ordinance is not as simple as picking a type of sign and plugging in restrictions. There must be a sufficiently sensible justification for each restriction, especially as municipalities attempt to enforce such ordinances.

#### *B. Municipal Justifications for Sign Ordinances and Regulations*

One of the most common challenges in sign regulation is subjectivity. This is particularly the case when dealing with murals. What constitutes art is subjective; what is good art or appropriate art is even more so. Thus, the logical question becomes: How can municipalities regulate signs given the very subjective nature of what they are regulating? To the extent that there is an answer to this question, it is found in a municipality's police powers — where safety and general welfare have long been held as valid justifications for implementing sign laws.<sup>10</sup> The takeaway for municipalities reviewing longstanding zoning ordinances is to ensure that the statement of purpose for the regulatory scheme clearly explains the justifications, goals, and objectives of the legislative enactment. As the Second Circuit noted in *National Advertising Co. v. Town of Babylon*, it could not find a case where “a court has taken judicial notice of an unstated and unexplained legislative purpose for an ordinance that restricts speech.”<sup>11</sup> In contrast, the Ninth Circuit found, in *Outdoors II, LLC v. City of San Diego*,<sup>12</sup> that the sign ordinance's statement of purpose “to optimize communication and quality of signs while protecting the public and the aesthetic character of the City” sufficed to establish the requisite governmental interest.

Governments often rely on two interests to support the position that a sign regulation is a valid exercise of its police powers—traffic safety and community aesthetics.<sup>13</sup> The Supreme Court upheld these two elements as significant governmental interests sufficient to satisfy intermediate scrutiny in its analysis of sign ordinances in *Metromedia, Inc. v. City of San Diego*, stating “[n]or can there be substantial

doubt that the twin goals that the ordinance seeks to further — traffic safety and the appearance of the city are substantial government goals.”<sup>14</sup>

Following *Metromedia*, it has become standard practice for municipalities to recite in their sign ordinance statements of purpose that the regulatory interests at stake are safety and community aesthetics. These have often been augmented with other legitimate municipal concerns. For example, other regulatory interests could include economic development, encouragement of free speech, blight prevention, community enhancement, and even protection of property values.

#### *C. Areas Where Local Governments Regulate Artwork*

Although beyond the scope of this article, it is worth noting that municipalities potentially regulate artwork in many areas of daily operations. Some common areas of such regulation exist in nuisance abatement controls, such as graffiti abatement, bidding and procurement processes for improvements to public buildings or parks that include art installations, or zoning codes addressing sculptures. As such, these may be other areas of government activity subject to First Amendment or other constitutional challenges.

### **II. Constitutional Rights: The First Amendment**

The First Amendment states in relevant part, “Congress shall make no law... abridging the freedom of speech.” Courts, including the Supreme Court, continue to grapple with the extent to which local governments can restrict signs — whether digital, artistic, or traditional signage — without violating the free speech protections afforded by the First Amendment. Courts continue to use different analytical approaches and levels of scrutiny, which in turn results in a lack of clarity and predictability with few bright-line rules. As discussed further below, when the cases involve murals, these different analytical approaches seem to result in inconsistent outcomes, which are difficult to reconcile.

Any regulation that implicates the First Amendment must balance

carefully on a tightrope between regulating too much speech and not regulating enough. Regulate too much speech, and a court will be more likely to find the law violates the First Amendment for not providing sufficient means and manner of communication; regulate too little, and a court will be more likely to find that enforcement is biased toward or favors one particular type of speech.

#### *A. Judicial Review and Constitutional Law Scrutiny Levels*

In order to determine how well a regulation walks that tightrope, courts will apply one of three scrutiny frameworks to challenged regulations: rational basis (the least demanding standard), intermediate scrutiny (the middle tier of review) and strict scrutiny (the most exacting test). The level of scrutiny applied will heavily influence the outcome of the review. Courts that apply the rational basis framework commonly uphold regulations targeting signs; likewise, courts that apply the strict scrutiny framework commonly strike down or invalidate these laws. As such, a basic understanding of those standards of review is helpful in drafting regulations.

##### *1. Rational Basis Review*

Rational basis review is the default standard when constitutional challenges arise and is generally used unless the question involves fundamental rights or suspect classifications. The rational basis test affords great deference to the government and governmental action, because the ends or objectives of the regulating entity need only promote a “legitimate” governmental purpose.<sup>15</sup> The means adopted by the government to achieve those ends only need to be reasonable. Applying this test requires that a challenger establish the law does not serve any conceivable legitimate purpose and/or is not reasonably related to achieving or attaining the stated ends. Essentially, rational basis review merely prohibits the government from imposing restrictions that are arbitrary, capricious, or irrational and require the court to speculate as to the legitimate interests at stake.<sup>16</sup>

*Continued on page 8*



Thus, courts infrequently invalidate laws when applying this test and local governments are likely to be successful in defending their laws under such a deferential standard.

## 2. Intermediate Scrutiny

The middle level of review, used in only selected contexts, is intermediate scrutiny. It applies to gender-based classifications, restrictions based on illegitimacy, and elements of free speech. In particular, this level of scrutiny is used in the evaluation or analysis of regulation of commercial speech; speech in public forums; content-neutral speech laws; and time, place, and manner restrictions on speech.<sup>17</sup>

To satisfy intermediate scrutiny the regulation must be narrowly tailored to achieve the stated goal. A law reviewed under this standard will be upheld if it is substantially related to a “significant” or “important” government purpose. As the Supreme Court has stated, “[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.”<sup>18</sup> However, satisfying intermediate scrutiny is difficult to pin down, as it seems to float between absolute rigidity (strict scrutiny) and no rigidity at all (rational basis review).<sup>19</sup>

## 3. Strict Scrutiny

Under strict scrutiny, the law must be necessary to achieve a “compelling” governmental purpose. Furthermore, the means chosen must be specifically fashioned to accomplish that purpose. As the most stringent standard of judicial review, strict scrutiny applies when a regulation implicates a suspect classification such as race or nationality, or a fundamental right such as voting or freedom of speech. To survive strict scrutiny, the regulation must be the least restrictive means for achieving the asserted governmental interest — in other words, there exists no other less restrictive method of achieving the regulation’s end. Strict scrutiny is known for being “strict in name, but fatal in practice,” meaning that a regulation subjected to strict scrutiny review is almost always struck down as being unconstitutional.

## B. Murals and First Amendment–Related Challenges

Mural regulations will be subject to the aforementioned trilogy of review standards. Under a generic dictionary definition, a mural is “a painting or other work of art executed directly on a wall.” Based on this definition, and on the applicable case law, it is simple to classify murals as a painting or image on a structure. However, it far less simple to determine whether a “mural” is a “sign” subject to regulation under a municipal ordinance. As one federal court aptly and succinctly noted, “[i]t is truly a Herculean task to wade through the mire of First Amendment opinions to ascertain the state of law relating to sign regulations.”<sup>20</sup>

The Supreme Court addressed the validity of a sign ordinance in *Metromedia*, applying the *Central Hudson* test.<sup>21</sup> The San Diego ordinance in question banned commercial billboards by imposing various restrictions on the erection of “outdoor advertising display signs,”<sup>22</sup> prohibiting all off-premise outdoor advertising display signs and imposing special provisions for on-premise signs. In addition, like most sign ordinances, it contained specified exceptions. In a plurality decision, the Court upheld the billboard ban, but found that the on-premise limitation to commercial advertising and the

no definitive principles can be clearly drawn.”<sup>23</sup> His dissent was prescient: since *Metromedia*, lower courts have applied widely analytical approaches in mural cases — and handed down equally disparate decisions. However, despite the confusion surrounding *Metromedia* and the shaky foundation for sign law it provided, the decision made clear that there are two distinct First Amendment issues relating to sign ordinances that will also arise in the context of murals: commercial versus non-commercial analysis and content neutrality analysis. More importantly, many consider *Metromedia* to be the leading case on the distinction between commercial and noncommercial speech, which is the starting point for analysis with murals related to businesses.

## 1. Commercial Speech vs. Non-Commercial Speech

Determining whether a mural constitutes commercial speech (and is thereby subject to more rigid regulation as a sign by a municipality) or non-commercial speech (and afforded greater protections under the First Amendment) is a fact-based inquiry. Making this determination is rarely simple and courts reach different conclusions in factually similar cases. Moreover, level and framework of judicial scrutiny plays a significant role in whether or not the court will deem government regulations permissible.



exceptions were unconstitutional.

Justice Rehnquist in his dissent described the plurality decision as a “virtual Tower of Babel, from which

For example, in *Complete Angler, LLC v. City of Clearwater*,<sup>24</sup> a Florida bait shop challenged the city’s sign and banner ordinances, both on their face and as



applied, regarding the marine-themed mural on the outside wall of its shop, (as well as the First Amendment banner the owners placed over the mural when the City of Clearwater attempted to order the mural's removal). The court applied strict scrutiny and concluded that the mural was protected non-commercial speech. The ordinance at issue included 26 different categories of signs exempt from the permit process, including "[a]rtwork and/or architectural detail."<sup>25</sup> The court reasoned that the mural's primary purpose was not commercial activity, but rather to promote the local marine environment. Stated differently, the mural qualified as artwork because it contained non-commercial speech. The local artist who had painted the mural, who demonstrated the mural was his impression of the local habitat, and that he intended it to bring attention to endangered species of fish, evidenced this non-commercial character. As a result, the court determined the mural did more than "propose a commercial transaction,"<sup>26</sup> classifying it as artistic expression (non-commercial speech), which enjoys First Amendment protections.

In contrast, the court in *Wag More Dogs, LLC v. Cozart*<sup>27</sup> concluded that a mural on the side of a dog daycare business constituted commercial

of their building that depicted happy cartoon dogs and dog-related imagery. Zoning administrators cited the business and demanded that it cover the cartoon dog mural. The owner filed suit. The court found that many of the cartoon dogs in the mural incorporated the Wag More Dogs, LLC cartoon logo and therefore concluded the mural was commercial speech. The locality's restriction therefore satisfied intermediate scrutiny.

The factual similarities between these two cases make it difficult to reconcile their differing outcomes. Both involved large painted murals which were located on the business-owners' respective shops, and both were commissioned with the goal to bring attention to the related commercial enterprise.

To reconcile these decisions, one must review the Supreme Court's definition of commercial speech. In *Central Hudson*, the Supreme Court characterized commercial speech as an "expression related solely to the economic interests of the speaker and its audience."<sup>28</sup> Further, the court in *United States v. United Foods, Inc.* found that commercial speech typically consists of "speech that does no more than propose a commercial transaction."<sup>29</sup> Thus, when applying the emphasized aspects of these

local environment while the mural in *Wag More Dogs* incorporated elements of a business logo makes all the difference. Hence, while these murals ostensibly served the same purpose, the fact that the message in *Complete Angler* was not solely economically motivated and did more than market a commercial enterprise explains the divergent outcomes in the two cases.

Some may argue that any "secondary purpose" is a matter of semantics and can easily be crafted for the purposes of avoiding the commercial speech label. This may be true, but these cases accurately depict the aforementioned tightrope that lawmakers must walk when sign ordinances and regulations restrict speech.

Another court's interpretation and application of the commercial and noncommercial definitions supports this view. In *Tipp City v. Dakin*,<sup>30</sup> an Ohio municipality obtained an injunction against a business, alleging that its mural violated the local sign ordinance. The mural depicted a mad scientist with beakers and chemical molecules on a building occupied by "Warrior Racing," a business that sold racing fuel additives. The court framed the issue as "whether the expression depicted in the ... mural either extends beyond proposing a commercial transaction or relates to something more than the economic interests of the appellants and their customers," adding "[i]f so, it qualifies as noncommercial speech and is entitled to stronger First Amendment protection."<sup>31</sup> The court concluded that the mural constituted commercial speech since it "plainly is intended to attract attention to Warrior Racing" because "the chemicals and molecules depicted on the sign propose a commercial transaction to racing aficionados and others."<sup>32</sup>

## 2. Content Neutral vs. Non-Content Neutral

A second overriding issue in mural cases is the determination of whether the regulation is content-based. As previously mentioned, regulations must be justified without reference to the content of the mural. While most mural regulations will fall under

*Continued on page 10*



speech. Attempting to capitalize on their location near a dog park, the owners of Wag More Dogs, LLC commissioned a mural on the rear

definitions to *Complete Angler* and *Wag More Dogs* the fact that the artist in *Complete Angler* created the imagery in the mural to bring awareness to the



intermediate scrutiny, if a regulation is content-based it is subject to strict scrutiny and a court is almost certain to find it unconstitutional.

In *Neighborhood Enterprises, Inc. v. City of St. Louis*,<sup>33</sup> an individual who “describe[d] himself as a critic of St. Louis’s use of eminent domain for private development,” painted a mural on a side of a building, stating “End Eminent Domain Abuse” in a red circle with a slash through it. As you can imagine, this caught the attention of code enforcement, who issued a citation on the basis that the mural was an illegal sign for which the owner had not obtained a permit. The owner then sought a permit, which the city’s zoning administrator denied on the basis that the mural did not meet the requirements of the zoning code. Litigation commenced. The *Neighborhood Enterprises* decision is a good example of the steps necessary for a court to determine which scrutiny level to apply. Here, the court first looked at the definition of a “sign” under the St. Louis ordinance to determine whether the mural was subject to regulation, or whether it was a non-sign or exempt under the ordinance. To complete this analysis, the court explained that it “must look at the content of the object.”<sup>34</sup> The stated purposes or justifications for the sign restrictions by the city were “principally on concerns for traffic safety and aesthetics.”<sup>35</sup>

The court concluded that the definition of “‘sign’ [was] impermissibly content-based because ‘the message conveyed determines whether the speech is subject to the restriction.’”<sup>36</sup> Accordingly, strict scrutiny applied and the sign code failed in that it was not narrowly tailored. More specifically, the ordinance failed because its restrictions were not narrowly tailored to accomplish the city’s interests in aesthetics or traffic safety. The court reasoned that the zoning code recited the city’s interests “only at the highest order of abstraction, without ever explaining how they are served by the sign code regulations generally, much less by its content-based exemptions

from those regulations,” and “offers no reason for applying its sign regulations to some types of signs but not to others.”<sup>37</sup>

The content neutrality issue had also been raised in *Complete Angler*. The plaintiff in *Complete Angler* offered evidence of five other similar murals in the area which had been condoned or allowed by the City of Clearwater without enforcement or requiring that those businesses obtain a permit. Thus, the application of the code was not content-neutral and the City of Clearwater could not satisfy strict scrutiny.<sup>38</sup>



### 3. The Prior Restraint Doctrine<sup>39</sup>

In *Mahaney v. City of Englewood*, the plaintiff owned a smoking accessory shop and challenged a provision of the city’s sign ordinance requiring a special review procedure for wall murals. To prevent graffiti, the plaintiff hired artists to paint murals on the north and south exterior walls. The south wall mural consisted of famous musicians including Bob Marley, Jimi Hendrix, Jim Morrison, Jerry Garcia, and Janis Joplin. The north wall mural depicted scenes from *Alice in Wonderland*. Following citizen “inquiries,” which likely meant complaints about the murals, code enforcement cited the plaintiff for various violations of the sign ordinance,

namely failure to obtain a permit, failure to “obtain city manager approval,” having more than one mural, and having murals that exceeded the size permissible under the code.

The *Mahaney* court did not determine whether the murals constituted art under the sign ordinance, which would exempt the murals from regulation. Rather, the court noted that under either the work of art or the wall mural provisions of the sign ordinance, the City of Englewood could not prevail. The court concluded that the special review procedure for murals constituted an impermissible prior restraint on free speech in violation of the

Constitution, requiring strict scrutiny.

The court explained, “[a] municipal ordinance is a prior restraint when it subjects constitutionally protected speech to governmental regulation prior to the time that such speech is to occur.”<sup>40</sup> The availability of judicial review, by itself, was insufficient to render the special review process constitutional because it still lacked the requisite procedural safeguards including a specified period in which the city manager must decide whether to issue a permit. As such, the city’s special review process on its face, and as applied to the plaintiff’s

murals, constituted a “constitutionally impermissible prior restraint on protected speech” and the trial court erred in denying plaintiff’s cross-motion for summary judgment.<sup>41</sup>

### 4. Historic Property or Historic District Ordinances

The inclusion of special zoning districts related to historic properties and murals can raise interesting questions. Notably, these regulations may pose or raise prior restraint problems with the permitting and procedures to decide whether some alteration or proposed development of a historic building is compatible with the neighborhood’s historic character.

Most challenges to historic preservation



ordinances are made under the takings provisions, Due Process Clause, or Equal Protection provisions in the Fourteenth Amendment. However, in *Burke v. City of Charleston*,<sup>38</sup> the plaintiff challenged the city's historic preservation ordinance under the First Amendment in relation to a mural. Plaintiff painted a pop art-style mural in bright colors on the side of a restaurant in a historic district and the city ordered it removed. The mural included a section within the painting for the restaurant to advertise. Despite this fact, the court concluded that the mural constituted noncommercial speech for its First Amendment analysis.

The court held that the ordinance was content-neutral because the government's purpose was not to regulate the mural's content. Rather, the purpose of regulating the size, color, and format was the preservation of the historic district, and the restrictions went no further than necessary to achieve those goals.

#### 5. Recent Mural Case Law

In a recent case, the City of San Diego was granted summary judgment in a case involving art murals. *Architectureart, LLC v. City of San Diego*<sup>43</sup> involved a requirement that signs visible from the right of way or signs on city-owned property obtain a permit. However, the San Diego sign ordinance exempted murals from the permitting process, or, specifically:

[p]ainted graphics that are murals, mosaics, or any type of graphic arts that are painted on a wall or fence and do not contain copy, advertising symbols, lettering, trademarks, or other references to the premises, products or services that are provided on the premises where the graphics are located or any other premises.<sup>44</sup>

The city interpreted its mural exception as applying to "any painted art that is not advertising" and found that the stated purpose of the sign ordinance "is to optimize communication while protecting the aesthetic character of the City."<sup>45</sup> The plaintiff, a mural company, brought a challenge to the ordinance after being issued violations for its murals, which contained lettering. The plaintiff had received approval for previous murals. The plaintiff also

alleged that an annual Comic-Con event received special treatment with its murals and advertising.

The court determined that the speech at issue was commercial, without much elaboration. It analyzed the regulations under the *Central Hudson* test and concluded that the sign regulations were constitutional, reasoning that the City had established that its interests in optimizing communication and community aesthetics were substantial, which justified the restrictions, and those restrictions advanced the City's interests without going further than necessary.

### III. Municipalities and Mural or Public Art Programs

Some municipalities encourage and specifically implement programs to display murals or other forms of public art to address blight, encourage and foster community, develop appreciation of art, and promote aesthetic beauty. However, code enforcement and compliance with zoning regulations are typically not at issue in these circumstances since the municipalities implement mural design guidelines. Municipalities seek to use murals in various ways, such as to promote diversity, enhance or contribute to a neighborhood's identity, and signal that an area is the focus of revitalization efforts. For a review of mural programs in several cities, the City of Savannah, Georgia Metropolitan Planning Commission did a case study, *Mural Art versus Graffiti, Defining Mural Art in the City of Savannah*.

### CONCLUSION

Murals create value in public spaces while at the same time sending a message that the community values the space as a collective. In general, First Amendment protections across all media have expanded over time, and it is unlikely that this trend will change. Meanwhile, murals have become increasingly popular and various, and business owners responding to this trend and commissioning murals on their property can often make credible claims to artistic or non-commercial expression, even when such a commission likely has some commercial motivation. As a result, First Amendment constitutional challenges related to regulations or ordinances restricting murals will likely increase. Additional open questions related to murals

include First Amendment challenges based on local design requirements for murals in public art programs. In addition, potential challenges based on a municipality's restriction on size, height, or color of murals for aesthetic purposes may impermissibly restrict the messages conveyed by the murals. For example, it is not a stretch to see an artist of a mural argue that these types of restrictions regulate the communicative content of the mural.

It would be prudent for municipal entities to review outdated sign ordinances. In that process, keep in mind the competing interests of the First Amendment and governments seeking to regulate protected forms of speech. Free speech principles require a balancing of the constitutional interest in freedom of expression against the government's need to regulate in the public interest.

Some suggestions to keep in mind during the review, revision, or amending process include: focusing on the type of sign being regulated and not its content, articulating a compelling purpose statement while referencing a comprehensive plan or other legislative findings, cleaning up definitions to reduce content-based distinctions, and determining whether the exemptions in the ordinance pose potential for challenges. Any attempt to define artwork in sign ordinances is likely to pose challenges because distinguishing between a sign and art requires an interpretation of the message conveyed, and thereby becomes a content based regulation.

For murals, it appears that the better approach is to implement a mural program. Municipalities can set forth design guidelines to enhance revitalization or beautification efforts in accordance with their goals and objectives, reducing the likelihood of challenge.

### Notes:

1. Robert M. Anderson, *American Law of Zoning* 7.01 (Kenneth H. Young, 4th ed. 1996); see also, Meg Stevenson, *Aesthetic Regulation: A History*, 35 REAL EST. L. J. 519, 521 (2007); Geri Marie Rossano, *Content Neutrality and the Intermediate Scrutiny Test in Wag More Dogs, LLC v. Cozart: A Missed Opportunity to Clarify the Rules of the Fourth Circuit?* 24 GEO. MASON U. CIV. RTS. L. J. 61, 75 (2013).

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## De-“coding” the Landscape Cont'd from page 11

2. See *id.*
3. See *Wulfsohn v. Burden*, 150 N.E. 120 (N.Y. 1925); see also Newman F. Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124 (1927).
4. See e.g. *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion).
5. Christina Chloe Orlando, *Art or Signage?: The Regulation of Outdoor Murals and the First Amendment*, 35 CARDOZO L. REV. 867, n. 21 (2013) citing Alan Weinstein, *Legal Issues in the Regulation of On-Premise Signs*, in *Context-Sensitive Signage Design* 119, 119-120 (Marya Morris et al. 2001).
6. See e.g. *Pennsylvania Land Trust* listing of the types of communication and types of media aid covered in sign ordinances (<http://conservationtools.org/guides/50-sign-ordinance>).
7. *Id.*
8. *Id.*
9. See e.g. <https://www.dos.ny.gov/lg/publications/Municipal%20Control%20of%20Signs.pdf>
10. Christina Chloe Orlando, *supra* note 5.
11. 900 F.2d 551, 555-56 (2d Cir. 1990)
12. 506 F.3d 886 (9th Cir. 2007)
13. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality decision).
14. 453 U.S. 490, 507-08 (1981).
15. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
16. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).
17. See *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980) (commercial speech; Court adopted a four-part balancing test, less than strict scrutiny, but more restrictive than rational review and appears to be an intermediate plus standard;); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (speech in public forums); *United States v. O'Brien*, 391 U.S. 367 (1968) (content-neutral speech laws); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (“erogenous zoning” restrictions affecting speech).
18. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).
19. See *Bowers v. Hardwick*, 478 U.S.

- 186 (1986), contrast to *Lawrence v. Texas*, 539 U.S. 558 (2003); see also *Witt v. Department of the Air Force* 527 F.3d 806 (9th Cir. 2008).
20. *Granite State Outdoor Advertising, Inc. v. Clearwater*, 213 F.Supp.2d 1312, 1327 (M.D. Fla. 2002), affirmed in part and reversed in part, 351 F.3d 1112 (11th Cir. 2003).
21. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality decision)
22. *Id.* at 493
23. *Id.* at 570
24. 607 F. Supp.2d 1326 (M.D. Fla. 2009).
25. *Id.* at 1331.
26. *Id.* at 1331-33.
27. 680 F.3d 359 (4th Cir. 2012).
28. 447 U.S. 557, 561 (1980).
29. 533 U.S. 405, 409 (2001) (emphasis added).
30. 186 Ohio App. 3d 558, 564-65 (Ohio Ct. App. 2010).
31. *Id.* at 573.
32. *Id.*
33. 644 F.3d 728 (8th Cir. 2011).
34. *Id.* at 736.
35. *Id.* at 732.
36. *Id.* at 736
37. *Id.* at 738.
38. 607 F. Supp.2d 1326, 1334 & fn. 9 (M.D. Fla. 2009). See also *Clear Channel Outdoor, Inc. v. City of Portland*, 262 P.3d 782 (Or. Ct. App. 2011) (holding that distinctions between “painted wall decorations” and “painted wall signs” constituted impermissible content-based restrictions).
39. 226 F.3d 1214 (Colo. Ct. App. 2009).
40. *Id.* at 1219.
41. *Id.* at 1220.
42. 893 F. Supp. 589 (D. S. C. 1995), vacated and remanded for lack of standing, 139 F.3d 401 (4th Cir. 1998).
43. 2017 WL1226913 (S.D. Cal. 2017).
44. *Id.* at \*2, 6.
45. *Id.* at \*5. ML



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## The Good, The Bad Cont'd from page 15

control and responsibility in favor of the City or County Attorney.

Early in the representation of a local government, my City Manager decided she was going to choose who represented the City in a litigated matter. There was no consultation nor any discussion about who would perform the services. The whole episode was about control and establishing a pecking order, and to make sure I knew where on that pecking order I belonged. As mentioned briefly above sometimes knowing when not to fight is often more important than knowing when to fight (see *The Art of War*, Sun Tzu, quoted in Sun Tzu's 31 Best Pieces of Leadership Advice, 15.1)<sup>5</sup>, and I elected not to take that battle on at that time.

### Conclusion

Recognizing the need for, then selecting and supervising outside counsel can present a challenge to the City or County Attorney unlike most of the challenges faced on a daily basis. Even when supervision of other lawyer employees is part of the daily routine, supervising peers or lawyers who may have more experience than you or have expertise that far exceeds yours in a particular area can be challenging in the best of times. If the lawyer you hire knows more than you do about employee benefits, how do you know you are getting good advice? However, if you can truly evaluate the advice you receive, why did you need the expert in the first instance? It becomes a bit of a Sisyphean task to ask for, much less receive, quality advice when you need it, if that becomes the standard against which you measure the choices.

1. [goo.gl/SHm65Z](http://goo.gl/SHm65Z) (last accessed August 31, 2017).
2. [goo.gl/A5b5s5](http://goo.gl/A5b5s5) (last accessed on August 31, 2017).
3. See link *supra* and text accompanying note 82.
4. See, e.g., *Bank of America, N.A. v. Superior Court of Orange County*, 212 Cal. App. 4th 1076 (2013).
5. *Forbes.com* (May 24, 2014) [bit.ly/2grzmSt](http://bit.ly/2grzmSt) (last accessed August 31, 2017). ML



January 02, 2017

# Understanding the First Amendment Limitations on Government Regulation of Artwork

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*This article is adapted from portions of "Chapter 4: Government Regulation of Art and Architecture" in the forthcoming book Local Government, Land Use, and the First Amendment: Protecting Free Speech and Expression, edited by Brian J. Connolly and published by ABA Publishing. The book will be released in 2017.*

Local government control of art<sup>1</sup> arises frequently: for example, in the regulation of murals as a form of outdoor signage or advertising, in graffiti abatement, or in government selection of artwork for display in public parks or public buildings. These controls present many familiar First Amendment concerns. Because art has been characterized by the courts as a form of First Amendment-protected speech, regulations pertaining to artwork must be content neutral, contain adequate procedural safeguards, and may not be unconstitutionally vague. Artwork differs from other forms of speech, however, particularly signage, in one critical respect: in the case of artwork, the medium is commonly the message. While a written message on a sign could theoretically be conveyed regardless of the height, size, location, color, materials, or brightness of the sign structure, artwork is different. In many cases, the size, orientation, color, or materials comprising the work are of critical importance to the piece's communicative intent. Thus, while local government aesthetic regulatory interests are implicated in the regulation or control of art, the appropriateness of aesthetic interests in regulating artwork is debatable under the First Amendment.



While the First Amendment broadly applies to artistic media, First Amendment concerns regarding the regulation of architecture are still in an antenatal state. Few court cases have considered First Amendment challenges to local design review requirements, building design mandates, or ordinances that restrict the extent to which buildings may look similar or different from one another. Because First Amendment protections have generally expanded since the Constitution was ratified, First Amendment challenges to architectural controls may increase in the coming years.

This article reviews First Amendment issues associated with regulation of artwork. The government practitioner, however, should review the First Amendment doctrines applicable to regulations of all forms of speech, such as content neutrality. The case law pertaining to local government controls of artwork and architecture is actually quite sparse. Cases generally applicable to speech regulation and, as discussed further herein, the government speech doctrine and public forum law, provide additional guidance in this area.

## Forms of Local Government Regulation of Art and Architecture

Local governments regulate or control artwork in myriad ways. On private property, art regulation frequently arises via zoning codes, sign regulations, and nuisance abatement controls. Murals, paintings, and other two-dimensional

works of art located on private property and that may be affixed to building walls, on signposts, or elsewhere are frequently regulated specially as “murals” or other forms of artwork, or as a form of signs under local sign regulations. Three-dimensional works of art located on private property, including sculptures or statuary, may be regulated by zoning regulations that restrict the placement or size of structures, or by building or fire codes. Additionally, artwork may be regulated by local governments pursuant to their general authority to regulate nuisances; for example, many local governments prohibit graffiti and other nontraditional forms of artwork under their nuisance control codes. In some circumstances, nuisance regulations such as those prohibiting the location of trash or junk cars on private property may limit displays of artwork. Some local governments completely exempt works of art on private property from regulation under zoning or sign codes.

Similarly, local governments may have ordinances or other laws controlling private individuals’ use and placement of objects, including artwork, within public property. Local governments may also control artwork on public property through procurement and selection processes for art displays in public buildings. Some local jurisdictions have additionally initiated programs that *require* public art, or cash payments into public art funds, in connection with private development applications. Some such ordinances require review of private developments’ public art installations by local art committees. Additionally, recognizing the benefits of publicly-accessible art, many local governments have adopted “percent-for-art” ordinances, requiring that governmental expenditures on public works include public art.

## First Amendment Application to and Protections for Art

Courts frequently err in favor of affording artists’ subjective viewpoints significant latitude in determining the First Amendment’s application to artwork.<sup>2</sup> Music, theater, film, and visual art—including paintings, prints, photographs, and sculpture—as well as several other forms of expressive conduct, including tattooing, have been found to merit First Amendment protection.<sup>3</sup> One court observed that “[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.”<sup>4</sup> A particular work need not be immediately and obviously identifiable as a work of art, i.e., it could be fairly abstract, to be protected.<sup>5</sup>

The scope of First Amendment protection for artwork, while expansive, is not boundless. The same carve-outs from First Amendment protection applicable to other media of speech, including for obscenity, fighting words, and incitement, exist with respect to artwork. The First Amendment does not protect obscenity.<sup>6</sup> The Supreme Court has defined obscenity as “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value,” as determined by an “average person, applying contemporary community standards.”<sup>7</sup> The foregoing test does not provide bright-line clarity as to what types of artwork are obscene for constitutional purposes. The Supreme Court has found “hard core” pornography<sup>8</sup> and child pornography<sup>9</sup> to be outside of the scope of First Amendment protection, but courts have struck down local ordinance limitations on speech and expressive conduct as they related to poetry with a sexual content,<sup>10</sup> pornography that may be understood as degrading toward women,<sup>11</sup> depictions of animal cruelty,<sup>12</sup> virtual depictions of child pornography,<sup>13</sup> films or artwork in which obscene images are paired with non-obscene material, and parody material.<sup>14</sup> Artwork that depicts nudity, violence, or thought-provoking portrayals containing sexual content is not likely to fall outside the scope of First Amendment protection. But, to the extent art exhibits material of a vulgar, pornographic nature, it may not enjoy First Amendment protections.

As with artwork of an obscene nature, artwork containing elements of “fighting words,” incitement, or defamation also falls outside the umbrella of First Amendment protection. When a work of art is intended to counsel viewers toward criminal violence, it may lack First Amendment protection. But, when an artist does not intend for her work to provoke unlawful action, and when the risk of such unlawful action is not great, the work would presumably be constitutionally protected.<sup>15</sup>



An artist's free speech rights may be limited additionally by state common law limitations on "verbal torts," including defamation—slander or libel—as well as torts such as intentional infliction of emotional distress.<sup>16</sup> Specifically, when defamatory speech is on a matter of private concern and involves private individuals, the First Amendment generally does not protect the defendant speaker.<sup>17</sup> Conversely, when speech critical of another relates to a matter of public concern<sup>18</sup> or when such speech involves a public figure,<sup>19</sup> the speaker may have a First Amendment defense against a tort claim. Thus, artwork that criticizes a public figure or addresses a matter of public concern would likely carry First Amendment protections that would be unavailable if the work criticized or parodied a private individual on a matter of private concern.

While the foregoing exceptions relate to all speech, another exception to First Amendment protection pertains specifically to artwork. In recent decades, courts have established boundaries between art meriting First Amendment protection and commercial merchandise that is not protected speech.<sup>20</sup> Many of these cases arise in the context of street vendors of clothing or other souvenirs that claim that local licensing requirements interfere with protected speech. Commercial merchandise lacking "a political, religious, philosophical or ideological message" falls outside the scope of the First Amendment's protections.<sup>21</sup>

However, artwork does not lose its First Amendment protection simply because it is commercial in nature.<sup>22</sup> Commercial speech receives First Amendment protection, albeit less than noncommercial speech.<sup>23</sup> Commercial speech has been defined by the Supreme Court as "expression related solely to the economic interests of the speaker and its audience,"<sup>24</sup> or speech that otherwise proposes a commercial transaction.<sup>25</sup> Art in the form of commercial advertising, which bears the logo or trademark of a particular business or firm, or that otherwise proposes a commercial transaction, retains First Amendment protection.

## First Amendment Limits on Regulation of Art

The First Amendment's application to specific works of art is based in large part on the ownership—public or private—of the underlying property where the artwork is being displayed. Regardless of whether artwork is displayed on public or private property, developing code definitions that meet First Amendment limitations is the most important and difficult task in regulating artwork. Many local regulations contain definitional distinctions between signage and artwork. Because it is almost impossible to distinguish between signage and artwork without reference to the content of the message, these provisions defining artwork are likely content based and may be legally questionable following *Reed v. Town of Gilbert*.<sup>26</sup>

### Art on Private Property

Artwork on private property that is subject to local regulation typically falls into two categories: two-dimensional artwork such as wall murals or signage displaying murals or paintings and three-dimensional artwork such as sculpture or statuary. Graffiti is another form of artwork that frequently occurs on private property.

The First Amendment doctrine relating to regulation of artwork located on private property mirrors the doctrine associated more generally with signage on private property. In reviewing local regulations applicable to art, courts will generally look first to whether a regulation of noncommercial artwork on private property is content and viewpoint neutral,<sup>27</sup> and if so, whether it is tailored to serve a significant governmental interest and whether ample alternative channels of communication are available.<sup>28</sup> If the regulation is content based, strict scrutiny applies, requiring a compelling governmental interest and least restrictive means of achieving that interest.<sup>29</sup> For commercial works, courts apply the *Central Hudson* test requiring such regulations to serve a substantial governmental interest, directly advance that regulatory purpose, and not restrict more speech than is necessary.<sup>30</sup>

Other concerns that might arise in the regulation of artwork on private property include whether the regulation effects an unconstitutional prior restraint,<sup>31</sup> or whether the regulation is vague<sup>32</sup> or overbroad.<sup>33</sup> If a local regulation is content based, the government has failed to establish a substantial regulatory interest, or the regulation is not appropriately tailored to the regulatory interest, it will most likely be invalidated.<sup>34</sup> Similarly, if the regulation does

not provide adequate procedural safeguards, such as a concrete review timeframe, or if the regulation leaves administrative officers with unbridled discretion to approve or deny the display of certain artwork, the regulation may be an unconstitutional prior restraint.<sup>35</sup> Moreover, if the regulation is vague or overbroad,<sup>36</sup> or if the regulation suppresses too much speech,<sup>37</sup> it may also be found unconstitutional.

**Avoiding Content Bias: Definitions and Other Problems.** Content concerns arise in many areas of art regulation, but the most common problems relate to definitions of “sign,” “mural,” “art,” or “artwork.” In *Neighborhood Enterprises, Inc. v. City of St. Louis*,<sup>38</sup> the owner of a mural protesting alleged eminent domain abuses by St. Louis, Missouri, challenged the city’s enforcement of its sign ordinance against the mural. The Eighth Circuit held that the city’s definition of “sign,” which exempted from its definition all flags, civic crests, and similar objects, was content based because the code’s application to the mural rested on the message of the mural.<sup>39</sup> A similar problem arose when the Norfolk, Virginia, sign ordinance exempted from regulation “works of art which in no way identify or specifically relate to a product or service.”<sup>40</sup> The Fourth Circuit found, “On its face, the former sign code was content-based because it applied or did not apply as a result of content, that is, ‘the topic discussed or the idea or message expressed.’”<sup>41</sup> The court went on to find that the city’s differential regulation of works of art was not narrowly tailored, since artwork could have the same detrimental impact on community aesthetics or traffic safety that garish signage might have.<sup>42</sup>

Case law also provides an example of content neutral treatment of artwork. In *Peterson v. Village of Downers Grove*,<sup>43</sup> the court upheld a local government’s ban on “painted wall signs.” The court found the ban content neutral because it did not contain references to the message on a given sign.<sup>44</sup> *Peterson* is instructive for local governments regarding the need to establish code definitions that do not create content based distinctions, particularly in the arena of regulating artwork on private property. After *Reed*, it will be challenging for a local government to distinguish between, say, a “mural” and a “sign,” or between a “sculpture” and a “structure,” in a content neutral manner, although it may be possible to identify specific media of artwork in the same manner as was done in *Peterson*.

Content neutral regulations of artwork should focus on the non-communicative aspects of the artwork. Examples of content neutral regulation of art include regulating the size, height, placement, or lighting of works of art.<sup>45</sup> Unlike with signage, however, regulating some of the locational aspects of art may give rise to claims of content discrimination, particularly when a particular work of art is alleged to be context- or location-specific.<sup>46</sup> Similarly, regulation of materials or color may be problematic, as the materials and colors used in the creation of a work of art are often central to the message of the particular work.<sup>47</sup> More broadly, regulating noncommercial artwork differently from other forms of noncommercial speech may violate the First Amendment. When a local sign code contains different size, height, or other display limitations on murals as compared with political signage, that code is at risk of being found to be content based.<sup>48</sup>

**Analysis of Content Neutral Regulations of Artwork.** Content neutral regulations must be supported by a substantial or significant regulatory interest, and the regulation must be narrowly tailored to that interest.<sup>49</sup> In the context of sign and visual display cases, the Supreme Court has found both aesthetic and traffic safety significant and/or substantial as they relate to sign regulation.<sup>50</sup> But there is scant case law on the governmental interests supporting regulation of artwork. While traffic safety may suffice as a governmental interest for purposes of regulating works of art, aesthetics is likely less sound given that the aesthetic concerns of a local government may be at odds with the message of a particular work of art. If the government is in the business of making the community beautiful, can the government prohibit “ugly” artwork whose ugliness is a critical part of its message? A local government’s restriction on the size, height, or color of murals for aesthetic purposes may directly conflict with the central message of a muralist’s work. Similarly, whereas many sign codes regulate the placement of signs within property and with respect to street right-of-ways in order to preserve a particular community character, an artist’s placement of a sculpture or mural—if the artwork is site-specific—may help to articulate the message that the artist wishes to convey with his or her work.<sup>51</sup>

Furthermore, building safety, nuisance control, and other purposes underpinning zoning and building restrictions



have not been widely reviewed for whether they are significant governmental interests in First Amendment litigation. In *Kleinman v. City of San Marcos*,<sup>52</sup> a Texas city had an ordinance prohibiting property owners from keeping junked vehicles on their properties. A novelty store placed a wrecked Oldsmobile 88 in its front lawn, planted it with vegetation, and painted the car colorfully with the message “Make Love Not War.” After ticketing the property owner and the commencement of litigation, the city stipulated to the fact that the car planter had some artistic expressive value. The Fifth Circuit found that the car’s expressive value was secondary to its utility as a junked vehicle.<sup>53</sup> Applying the intermediate scrutiny test for expressive conduct, the court found that the junked vehicle ordinance was content neutral in purpose and narrowly tailored to serve the government’s interest in preventing attractive nuisances to children, prevention of rodents and other pests, and reducing urban blight, vandalism, and depressed property values.<sup>54</sup> While the city’s interests in blight prevention and preserving property values may have had some aesthetic component, the court did not analyze whether aesthetic interests alone could support prohibiting the creative car-planter as a form of artwork.

Narrow tailoring requires that the regulation in question directly advance the interest(s) asserted by the government. In the context of artwork, problems may arise where local codes treat murals differently from other forms of noncommercial speech, and where the regulatory interests at stake are not directly served by the differential treatment.

**Distinguishing Between Non-Commercial and Commercial Artwork.** When a municipal code requires a property owner to obtain a permit for a commercial wall sign, but does not require a permit for a non-commercial mural, how does one address artwork displayed on the wall of a building that contains images of products sold inside the building? Business owners often use blank wall space on the side of a building to advertise products sold inside the building, beautify the premises of their properties, or to convey non-commercial or political messages. Determining whether such images constitute commercial or non-commercial speech is rarely simple.<sup>55</sup>

Case law provides several illustrations of this problem. When a city attempted to prohibit a fuel station owner’s mural depicting “the geography, indigenous plants, and archaeology of Mexico, [the] social advancements of the Mexican people in contemporary society as well as reflections upon a colonial period of Mexican history,” placed in an effort to beautify the property and to attract customers to the station, a California court found the mural to be noncommercial speech.<sup>56</sup> And when a shop that sold fishing equipment, including bait and tackle, displayed a painted wall mural depicting fish and other aquatic plant and animal species, the mural was determined to be noncommercial speech: “[A]s the evidence demonstrate[d] . . . it reflects a local artist’s impression of the natural habitat and waterways surrounding [the subject shop], and also alerts viewers to threatened species of fish.”<sup>57</sup>

Conversely, a mural in Ohio depicting a “mad scientist” outside of a shop that sold nitrous oxide for racing cars was found to constitute commercial speech.<sup>58</sup> In arriving at that conclusion, the court stated, “the crucial inquiry is whether the expression depicted in the appellants’ mural either extends beyond proposing a commercial transaction or relates to something more than the economic interests of the appellants and their customers.”<sup>59</sup> The court found that “[t]he sign plainly is intended to attract attention to [the racing shop], which directly relates to that company’s economic interests.”<sup>60</sup> In another case, a Virginia pet day-care owner displayed a mural depicting dogs playing on the side of the building, in plain view of a dog park. The Fourth Circuit concluded that the mural was commercial speech because the mural was intended to attract attention of potential customers, it depicted images relating to services provided on the premises, and the owner had an economic motivation for displaying the mural.<sup>61</sup>

Courts are generally more deferential to governmental regulations of commercial speech as compared with regulations of non-commercial speech, in part because the commercial speech doctrine does not require an initial determination regarding the content neutrality of the regulation in question. But local governments should take care to define the boundary between commercial and non-commercial speech, using distinctions found in case law applicable to the local government.

**Special Considerations.** An area that has been mostly unexplored in case law relates to local anti-graffiti ordinances.

Many local governments have taken measures to prevent graffiti, based primarily on aesthetic concerns and an interest in preventing vandalism and property-related crime. In a 2007 case, a group of graffitiists challenged New York City's prohibitions on the sale of aerosol paint cans and broad-tipped markers to persons under 21 years of age, and persons under 21 from possessing such objects in public places, which were intended to control unwanted graffiti in the city.<sup>62</sup> The Second Circuit upheld the district court's determination that regulation was content neutral, but also agreed with the conclusion that the ordinance provisions burdened more speech than was necessary to achieve the city's goals.<sup>63</sup> Earlier cases found similar restrictions to pass constitutional muster, although not on First Amendment grounds.<sup>64</sup> To the extent anti-graffiti ordinances regulate in a content neutral manner and do not burden more speech than necessary, they are likely to be upheld by courts. Local governments should beware, however, that many current anti-graffiti ordinances likely contain content based definitions of the term "graffiti." An example of a definition of "graffiti" that likely passes muster is one that references graffiti based on its unauthorized nature.<sup>65</sup>

Another area that has received little judicial attention relates to public art programs in private development projects. Some local governments require that private development projects include public art, require dedications of money or artwork in connection with private development projects, or undergo design review of artwork. The constitutionality of these arrangements has not been fully vetted. In a case originating in Washington state, a federal district court found that the city's requirement that signs be of a Bavarian style was not content based, did not constitute forced speech, and that a design review board charged with reviewing signs and architecture in the community did not constitute an unlawful prior restraint despite having "somewhat elastic" criteria for review.<sup>66</sup> Similarly, the Oregon Court of Appeals held that the City of Portland's design review process as applied to billboards did not constitute an overbroad regulation or unconstitutional prior restraint due to the narrow construction of the design review board's purview.<sup>67</sup>

## Private Art on Public Property

The regulation of artwork on public property carries different considerations than artwork on private property. Two special problems arise in the regulation of artwork on public property: the sale or display of artwork on public property such as parks, sidewalks, or streets and government selection of artwork for public property, including government buildings, plazas, and parks.

**Sale or Display of Private Artwork by Private Individuals on Public Property.** Many local codes prohibit the sale of commercial products or the solicitation of business on public property. Some of these code provisions create express exemptions for nonprofit organizations or other forms of noncommercial speech. In cases addressing such regulations, courts first review where the property falls within the public forum doctrine, i.e., whether the property is a traditional, designated, limited, or non-public forum.<sup>68</sup> If the property is a traditional or designated public forum, restrictions must be content neutral and narrowly tailored to serve significant governmental interests, and these restrictions may regulate only the time, place, and manner of speech.<sup>69</sup> If the property is a limited public forum or a non-public forum, the restrictions must only be viewpoint neutral and reasonable, a far more deferential standard than that which is applied in traditional and designated public fora.<sup>70</sup>

In a 2000 case, St. Augustine, Florida, attempted to enforce its ordinance prohibiting "selling, displaying, offering for sale or peddling any goods, wares or merchandise" on public property, including streets and sidewalks, against a street artist displaying and selling newspapers and art that contained political messages.<sup>71</sup> The code provision exempted nonprofit and religious organizations, but did not contain any exemption for political speech. In a cursory analysis, the court found that the artist's visual art and newspapers were protected by the First Amendment, and found that the public property regulated by the ordinance was a traditional public forum, thus requiring the regulation to be content neutral and narrowly tailored to a significant governmental interest.<sup>72</sup> Because the ordinance favored nonprofit and religious organizations over other forms of non-commercial speech, the court held the restriction content based.<sup>73</sup>



Similarly, a New York City law requiring street vendors to obtain a license for the sale of items on city sidewalks was found not to be narrowly tailored or to provide sufficient alternative channels for communication.<sup>74</sup> The restriction capped the total number of licenses available to sidewalk vendors citywide.<sup>75</sup> After finding that the works being sold by sidewalk vendors were subject to First Amendment protection<sup>76</sup> and that the traditional public forum analysis applied to the case,<sup>77</sup> the Second Circuit found that the license requirement and cap were not narrowly tailored to the city's goals of reducing congestion and ensuring clear passage on the sidewalks.<sup>78</sup> The court reasoned that the city could have employed time, place, and manner restrictions to ensure clear passage on the sidewalks while still offering vendors the opportunity to obtain a license, and that exceptions to the licensing cap called into question the rule's tailoring.<sup>79</sup> The court also found that the restriction did not provide ample alternatives, and that the sale of artwork on the street was more accessible than sales in galleries or elsewhere.<sup>80</sup>

To the extent local governments prohibit the sale or display of commercial products on sidewalks or other public properties, exceptions made for non-commercial speech, including non-commercial artwork, should not distinguish among forms of non-commercial speech. Moreover, an outright ban or severe limitations on the display of non-commercial artwork in traditional public fora, such as streets or sidewalks, is likely to fail the narrow tailoring part of the intermediate scrutiny test. Time, place, and manner restrictions are permissible where necessary to ensure safe passage for pedestrians along public sidewalks, or to limit traffic congestion along public streets. Additionally, where the regulation of artwork is taking place in a limited or nonpublic forum, restrictions and prohibitions can be much broader, so long as they are viewpoint neutral.

**Government Selection of Artwork for Public Property.** Government agencies, from federal agencies to local governments, often beautify public properties through the use of artwork, including murals, sculpture, and other works of art. In some cases, these works of art are commissioned by the government, and in other cases, they are selected through an artwork selection process. Generally, the government has wide latitude to choose artwork for government properties and to relocate or remove that artwork in the event the government chooses to redevelop or otherwise modify government properties.

Cases addressing questions of government acquisition and placement of artwork have generally held that artwork acquired by the government for display on public property becomes the property and expression of the government,<sup>81</sup> or alternatively, that the government's acquisition and display of artwork creates a nonpublic forum, where the acquisition process need only be viewpoint neutral and reasonable.<sup>82</sup> One court found that a sculpture located on the grounds of a federal government building constituted the expression of the government, and could be relocated freely without the consent of the artist.<sup>83</sup> That court additionally found that even if the sculpture's location had been a public forum, the sculpture's relocation was a time, place, and manner restriction because the government's purpose in relocating the sculpture was related to free passage of pedestrians on the plaza where the sculpture was located.<sup>84</sup> Other cases have held that government acquisition of artwork for display in public buildings or galleries creates a nonpublic forum, and government decisions to reject or remove artwork that could be offensive or critical are permissible when the purposes of the forum are undermined by the artwork's offensive or critical nature.<sup>85</sup>

The foregoing judicial approach to government control of artwork on government property was recently reaffirmed by the First Circuit in the case of *Newton v. LePage*.<sup>86</sup> There, the Maine labor department sought to remove a mural from a waiting room within its offices on the grounds that the mural did not depict evenhanded treatment of organized labor issues. In its analysis, the court did not rely on the public forum doctrine, but rather on the government speech doctrine, which was articulated by the Supreme Court just three years earlier.<sup>87</sup> Although the court did not conclude that the mural was government speech, it nonetheless deferred to the government's choice to remove the mural and concluded that there was no First Amendment violation in so doing.<sup>88</sup>

The government speech doctrine, which carves out from First Amendment application any speech promulgated by the government, lends additional support to local governments engaged in the selection and ownership of artwork on public property.<sup>89</sup> With the adoption and expansion of the government speech doctrine by the Supreme Court, it

can be expected that government decisions regarding the acquisition, display, relocation, and removal of works of art on public property will be subject to even lesser scrutiny.<sup>90</sup> The Supreme Court has found that donated monuments in a public park constitute government speech,<sup>91</sup> as do specialty license plates.<sup>92</sup> Given this recent case law, artwork selected by the government for display on public property is likely to be considered by a court to be government speech.

## Conclusion

This article's review of artwork through a First Amendment lens occurs on the frontier of constitutional jurisprudence. Yet as First Amendment protections expand, we may be witnessing an expansion of First Amendment applicability that may sweep up previously unchecked governmental controls on artwork and architecture. Local governments are therefore advised to carefully consider how their zoning codes and other regulations affect the ability of artists and architects to speak through their work and to ensure that local efforts to make regulations content neutral and otherwise consistent with the First Amendment preserve free speech rights of all speakers.

## Endnotes

1. For purposes of this article, "art" or "artwork" primarily means any form of physical artistic media, including for example, print media such as painting or photography, or sculpture, carpentry or other three-dimensional forms of artwork.

2. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 25 (1971).

3. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (film); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (tattooing); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (paintings); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1995) (finding visual art to be entitled to First Amendment protection on par with written or spoken words).

4. *Id.*

5. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995).

6. *Roth v. United States*, 354 U.S. 476, 485 (1957).

7. *Miller v. California*, 413 U.S. 15, 24 (1973).

8. *Id.* at 36.

9. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

10. *See Kois v. Wisconsin*, 408 U.S. 229, 231–32 (1972).

11. *See Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 331–32 (7th Cir. 1985).

12. *See United States v. Stevens*, 559 U.S. 460, 472 (2010).

13. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236 (2002).

14. *See Baker v. Glover*, 776 F. Supp. 1511, 1515 (M.D. Ala. 1991).

15. *See Nelson v. Streeter*, 16 F.3d 145, 150 (7th Cir. 1994).

16. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).
17. *See, e.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–61 (1985).
18. *Snyder v. Phelps*, 562 U.S. 443, 453, 458 (2011).
19. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).
20. *See, e.g.*, *Hunt v. City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011); *White v. City of Sparks*, 500 F.3d 953 (9th Cir. 2007); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 90 (2d Cir. 2006).
21. *City of Sparks*, 341 F. Supp. 2d at 1139.
22. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496–98 (1996).
23. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506 (1981).
24. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980).
25. *See Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989).
26. 135 S. Ct. 2218 (2015).
27. *See id.* at 2226–27.
28. *See Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989).
29. *See Reed*, 135 S. Ct. at 2231.
30. *Cent. Hudson*, 447 U.S. at 564.
31. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223–24 (1990); *Mahaney v. City of Englewood*, 226 P.3d 1214, 1219 (Colo. Ct. App. 2009).
32. *See Buckley v. Valeo*, 424 U.S. 1, 40–41 (1976).
33. *See Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003).
34. *Reed*, 135 S. Ct. at 2226–27.
35. *See FW/PBS*, 493 U.S. at 223–24; *Mahaney*, 226 P.3d at 1219.
36. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 114–15 (1972).
37. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994).
38. 644 F.3d 728 (8th Cir. 2011).
39. *Id.* at 1036.
40. *Cent. Radio Co., Inc. v. City of Norfolk*, 811 F.3d 625, 629 (4th Cir. 2016).
41. *Id.* at 633 (quoting *Reed*, 135 S. Ct. at 2227).



[42.](#) *Id.* at 634.

[43.](#) 150 F. Supp. 3d 910 (N.D. Ill. 2015).

[44.](#) *Id.* at 920.

[45.](#) *See Reed*, 135 S. Ct. at 2232; *id.* at 2233 (Alito, J., concurring).

[46.](#) *See, e.g., Serra v. Gen. Svcs. Admin.*, 847 F.2d 1045, 1047 (2d Cir. 1988).

[47.](#) *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969); *but see Tipp City v. Dakin*, 929 N.E.2d 484, 502 (Ohio Ct. App. 2010).

[48.](#) *See, e.g., Cent. Radio Co., Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016).

[49.](#) *See, e.g., McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

[50.](#) *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08 (1981).

[51.](#) *See, e.g., Serra v. Gen. Servs. Admin.*, 847 F.2d 1045, 1047 (2d Cir. 1988).

[52.](#) 597 F.3d 323 (5th Cir. 2010), *cert. den.*, 562 U.S. 837 (2010).

[53.](#) *Id.* at 327–28.

[54.](#) *Id.* at 328.

[55.](#) *See Kasky v. Nike, Inc.*, 45 P.3d 243, 253–55 (Cal. 2002).

[56.](#) *City of Indio v. Arroyo*, 143 Cal. App. 3d 151, 154 (1983).

[57.](#) *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1328 (M.D. Fla. 2009).

[58.](#) *Tipp City v. Dakin*, 929 N.E.2d 484, 494 (Ohio Ct. App. 2010).

[59.](#) *Id.*

[60.](#) *Id.*

[61.](#) *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 370 (4th Cir. 2012).

[62.](#) *Vincenty v. Bloomberg*, 476 F.3d 74, 84 (2d Cir. 2007).

[63.](#) *Id.* at 87.

[64.](#) *See, e.g., Nat’l Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1127–28 (7th Cir. 1995); *Sherwin-Williams Co. v. City and Cnty. of San Francisco*, 857 F. Supp. 1355, 1371 (N.D. Cal. 1994).

[65.](#) *See, e.g., Indianapolis*, Indiana’s definition:

Graffiti means any *unauthorized* inscription, word, figure, design, painting, writing, drawing or carving that is written, marked, etched, scratched, sprayed, drawn, painted, or engraved on or otherwise affixed on a component of any building, structure, or other facility by any graffiti implement, visible from any public

property, the public right-of-way, or from any private property other than the property on which it exists. There shall be a rebuttable presumption that such inscription, word, figure, painting, or other defacement is unauthorized. This article does not apply to easily removable chalk markings on the public sidewalks and streets.

INDIANAPOLIS—MARION CNTY. CODE § 575-202 (2013) (emphasis added).

[66.](#) Demarest v. City of Leavenworth, 876 F. Supp. 2d 1186, 1195, 1196–97, 1202-03 (E.D. Wash. 2012).

[67.](#) Clear Channel Outdoor, Inc. v. City of Portland, 262 P.3d 782, 165–66 (Or. Ct. App. 2011).

[68.](#) See Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 44 (1983).

[69.](#) See *id.* at 45–46.

[70.](#) See Cornelius v. N.A.A.C.P. Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 808 (1985).

[71.](#) Celli v. City of St. Augustine, 214 F. Supp. 2d 1255 (M.D. Fla. 2000).

[72.](#) *Id.* at 1258–60.

[73.](#) *Id.*

[74.](#) Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996).

[75.](#) *Id.* at 692.

[76.](#) *Id.* at 696.

[77.](#) See *id.* at 696–97.

[78.](#) *Id.* at 698.

[79.](#) *Id.*

[80.](#) *Id.*

[81.](#) See *Serra*, 847 F.2d at 1049.

[82.](#) See *Sefick v. Gardner*, 164 F.3d 370 (7th Cir. 1998).

[83.](#) *Serra*, 847 F.2d at 1049.

[84.](#) *Id.* at 1049–50.

[85.](#) See *Sefick*, 164 F.3d at 372–73.

[86.](#) 700 F.3d 595 (1st Cir. 2012).

[87.](#) *Id.* at 602.

[88.](#) *Id.* at 602–03.

[89.](#) *Serra*, 847 F.2d at 1049.

[90.](#) *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015).

[91.](#) *Pleasant Grove City v. Summum*, 555 U.S. 460, 470–72 (2009).

[92.](#) *Walker*, 135 S. Ct. at 2249.

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