

DISTRICT COURT, ARAPAHOE COUNTY,
COLORADO

Arapahoe County Justice Center
7325 South Potomac Street
Englewood, Colorado 80112

Plaintiff:

MIKE MAHANEY,

v.

Defendant:

CITY OF ENGLEWOOD, a Colorado municipal
corporation.

Thomas Macdonald, #11394
mac@ottenjohnson.com
James T. Johnson, #31953
jjohnson@ottenjohnson.com
Otten, Johnson, Robinson, Neff & Ragonetti, P.C.
950 Seventeenth Street, Suite 1600
Denver, CO 80202
Telephone: 303 825 8400
Facsimile: 303 825 6525
In cooperation with the American Civil Liberties Union
Foundation of Colorado

Mark Silverstein, #26979
Legal Director
American Civil Liberties Union
Foundation of Colorado
400 Corona Street
Denver, CO 80218
Telephone: 303 777-5482
Fax: 303 777-1773
Email: msilver2@worldnet.att.net

▲ COURT USE ONLY ▲

Civil Action No.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Mike Mahaney, by and through his undersigned counsel, states and alleges the following as his Complaint against Defendant, the City of Englewood (the “City”):

INTRODUCTION

1. Plaintiff owns Headed West, which sells pipes and smoking accessories in Englewood, Colorado. After Plaintiff hired local artists to paint murals on two sides of his business, representatives of the City threatened to prosecute him for alleged violations of the Englewood Sign Code (the “Sign Code”). In this action, Plaintiff seeks a declaration that the City’s Sign Code violates the First Amendment and Article II, Section 10 of the Colorado Constitution, both facially and as applied to the Headed West murals.

JURISDICTION AND VENUE

2. This is an action to redress, by declaratory and injunctive relief, the deprivation of rights guaranteed under the First Amendment of the United States Constitution and Article II, Section 10 of the Colorado Constitution. This court’s jurisdiction is invoked pursuant to Rules 57(b) and 65 of the Colorado Rules of Civil Procedure.

3. Venue is proper in this court in accordance with Rule 98 of the Colorado Rules of Civil Procedure, because the Defendant is found in Arapahoe County, and the events or omissions giving rise to the claims occurred in Arapahoe County.

PARTIES

4. Plaintiff is a citizen of the United States and a resident of the City. He owns and operates Headed West, which sells pipes and smoking accessories. Headed West is located in the City at 4811 South Broadway.

5. Defendant, City, is a municipality located in Arapahoe County, Colorado. The City is a body politic and corporate, incorporated under the Colorado statutes, with the power to sue and be sued. In all cases described herein, the actions and threatened actions of the City and its employees were carried out under color of state law.

ENGLEWOOD SIGN CODE

6. The City’s comprehensive Sign Code purports to apply to “all signs permitted within all zone districts established” by the City. Englewood Municipal Code (“E.M.C.”) 16-6-13(C)(1). A copy of the Sign Code is attached as **Exhibit A** and incorporated herein by reference.

7. Section 16-11-2 broadly defines a “sign” as “any object . . . situated outdoors or indoors, which is used to . . . direct or attract . . . attention . . . by any means” E.M.C. 16-11-2.

8. The Sign Code requires a permit for certain signs. E.M.C. 16-6-13(D). The City must issue an approval or denial of a permit application within five working days. E.M.C. 16-6-13(D)(2)(a).

9. The Sign Code exempts certain signs from the permitting requirement. E.M.C. 16-6-13(E). The exemption includes “works of art that in no way identify a product.” E.M.C. 16-6-13(E)(14). Section 16-11-2 defines “works of art” as

All forms of original creations of visual art, including but not limited to: (1) sculpture, in any material or combination of materials, whether in the round, bas-relief, high relief, mobile, fountain, kinetic, or electronic; or (2) painting, whether portable or permanently fixed, **as in the case of murals**; or (3) mosaics; or (4) photographs; or (5) crafts made from clay, fiber and textiles, wood, glass, metal, plastics, or any other material, or any combination thereof; or (6) calligraphy; or (7) mixed media composed of any combination of forms or media; or (8) unique architectural stylings or embellishments, including architectural crafts; or (9) environmental landscaping; or (10) restoration or renovation of existing works of art of historical significance. (Emphasis added).

10. The determination as to whether a sign is subject to the permitting requirements requires a review of the content of the sign. E.M.C. 16-6-13(E). Accordingly, the Sign Code regulates signs based on their content.

11. Although the express definition of “works of art,” which require no permit, includes wall murals, another provision of the Sign Code purports to prohibit wall murals anywhere in the City, except for the South Broadway sign area. E.M.C. 16-6-13(G)(2)(D). Section 16-11-2 defines “wall mural” as

A picture painted on any exterior wall of a principal building other than the front wall of the building, **which (1) does not directly or indirectly advertise or call attention to any product**, or (2) restores a previously existing wall painting at least forty (40) years old (regardless of whether such wall painting advertised or called attention to a product). A wall mural may include a sign of no more than two (2) square feet identifying the artist and/or the sponsor of the wall mural. (Emphasis added).

12. The determination as to whether a sign satisfies the definition for “wall mural” requires consideration of whether the mural “directly or indirectly advertise[s] or call[s] attention to any product.” E.M.C. 16-11-2. Such a determination requires consideration of the content of the sign. Accordingly, the mural restrictions regulate signs based on their content.

13. Section 16-11-2 defines the “South Broadway sign area” as “a specialized sign area whose boundaries are within [the City] and have property fronting South Broadway.” E.M.C. 16-11-2.

14. In the South Broadway sign area, persons can maintain a single wall mural per principle structure only if they first gain the approval of the City Manager or designee. E.M.C. 16-6-13(K)(3). The Sign Code does not provide guidelines for the City Manager or designee to follow when deciding whether to permit a particular mural, nor does it provide a time frame in which the City Manager or designee must approve or deny an application. E.M.C. 16-6-13(D)(2)(a).

FACTS

15. Headed West is a two-story brick building located within the South Broadway sign area with large facades on its north and south faces.

16. Since opening Headed West four years ago, Plaintiff has repeatedly encountered problems with unwanted graffiti. Under current law business owners have three days to remove the unwanted graffiti or they are subject to a fine. This is a costly and time consuming burden for Plaintiff.

17. Graffiti task force agencies in Philadelphia and other major cities have proven that professional artwork eliminates graffiti because graffiti artists will not “tag” over other artists’ work.

18. In the first week of April 2007, professional artists painted a mural on the south side of the Headed West building. The mural depicts the iconic musicians Janis Joplin, Jim Morrison, Jerry Garcia, Bob Marley and Jimi Hendrix. A photograph of this mural is attached as **Exhibit B** and incorporated herein by reference.

19. A few weeks later, the artists added another mural to the north side of the Headed West building. The mural depicts a scene from Alice in Wonderland. This scene includes the caterpillar sitting on top of a mushroom smoking from a hookah and a pill on the white rabbit’s tongue (the pill has since been painted over). A photograph of this mural is attached as **Exhibit C** and incorporated herein by reference.

20. Neither mural contains the name of the business.

21. Since the murals were created, Headed West has had no instances of unwanted graffiti upon its building.

22. After the artists painted the second mural, City officials received phone calls complaining about its content. According to the complaints, the mural “promoted” the use of illegal drugs.

23. On May 4, 2007, the City served Headed West with an enforcement notice alleging that the murals violated three different Sign Code provisions. The violations included (1) failure to obtain a permit for the murals in violation of E.M.C. 16-6-13(D)(1); (2) having two murals instead of the allowed one in violation of E.M.C. 16-6-13(K)(6); and (3) exceeding the maximum sign area on both murals in violation of E.M.C. 16-6-13.7. The notice required Headed West to abate the violations within fourteen days. The notice also stated that if Headed West failed to abate, the City may issue a summons and complaint directing an appearance in the City's Municipal Court to answer the charges. A copy of the enforcement notice is attached as **Exhibit D** and incorporated herein by reference.

24. On May 7, 2007, Plaintiff and other concerned citizens attended a meeting of the Englewood City Council (the "City Council") to petition the City for relief from the Sign Code. The meeting highlighted concerns about the Sign Code's vagueness, however, the City Council took no action.

25. At the meeting, a citizen asked about the legality of a large mural located within the South Broadway sign area at 4415 S. Broadway. The mural is painted on the side of the Liquor Barn; it depicts Budweiser Clydesdale horses and includes the name of the business. Senior City Planner Langdon stated that the mural is grandfathered because it was painted prior to the enactment of the current Sign Code. A photograph of the Liquor Barn mural is attached as **Exhibit E** and incorporated herein by reference.

26. On May 21, 2007, after Headed West did not remove the murals, the City served Michael Allard, the store manager of Headed West, with a summons charging him with violating the Sign Code. A copy of the summons is attached as **Exhibit F** and incorporated herein by reference.

27. On May 21, 2007, concerned citizens once again attended a City Council meeting to petition the City to stop the enforcement of the Sign Code. At the meeting, City Attorney Brotzman noted that the City can choose to cite Headed West for each day it is in violation of the Sign Code. The City Council considered putting a moratorium on the enforcement of the Sign Code, but decided to take no action.

28. City officials have threatened to file charges against Plaintiff for alleged violations of the Sign Code. Although Plaintiff has not yet been charged with violating the Sign Code, he faces an imminent risk of being charged in the immediate future.

FIRST CAUSE OF ACTION **FIRST AMENDMENT; FREE SPEECH**

29. Plaintiff incorporates by reference the allegations set forth in paragraphs 1 through 28 of this complaint.

30. The Free Speech Clause of the First Amendment to the United States Constitution (the “Free Speech Clause”), as incorporated pursuant to the Fourteenth Amendment, prohibits a state or any political subdivision thereof from abridging the freedom of speech.

31. Plaintiff’s murals, which depict iconic musicians and a scene from a literary work, constitute artistic speech entitled to heightened protection under the First Amendment.

32. The City’s requirement that a City Manager or designee must review and approve all murals located in the South Broadway sign area imposes an unconstitutional prior restraint on protected speech. The Sign Code does not provide a time frame in which the City Manager or designee must approve the request for a mural, nor does the Sign Code provide specific guidelines for the City Manager or designee to follow. This requirement vests unbridled discretion in City officials and risks the indefinite suppression of speech.

33. The City’s Sign Code is unconstitutionally overbroad because it prohibits a substantial amount of protected speech in relation to its plainly legitimate sweep. The definition of “sign” sweeps in almost all forms of written speech and subjects them to restrictions and prior restraints. In many cases, the Sign Code establishes a blanket prohibition of entire categories of signs, including banners, portable signs, and wall murals. This sweeping prohibition neither advances a compelling government interest nor is it narrowly tailored to advance such an interest.

34. The City’s interpretation of the Sign Code to grandfather the Liquor Barn mural, while prohibiting the Headed West murals, impermissibly discriminates on the basis of past speech.

35. Through its definition of “wall mural” and its permit requirements the city impermissibly regulates speech on the basis of content. This discrimination does not advance a compelling government interest nor is it narrowly tailored to advance such an interest.

36. The City did in fact discriminate against the content of Plaintiff’s speech in the interpretation, enforcement and threatened enforcement of its overly vague Sign Code.

37. The Sign Code is impermissibly vague in delineating between “works of art,” which require no permit, and a “wall mural,” which is subject to review by the City Manager or designee. The Sign Code conflates these terms and the resulting vagueness allows city officials to discriminate based on the content of the speech. This vagueness creates uncertainty and insecurity with respect to Plaintiff’s right to engage in artistic speech.

38. The City’s vague and overbroad Sign Code has a chilling effect on the speech of all citizens who might otherwise engage in similar acts of expression.

39. Plaintiff is threatened with the imminent loss of his First Amendment rights as a result of the City’s discriminatory interpretation of its vague and overbroad Sign Code.

40. An actual and immediate controversy exists between Plaintiff and the City. Plaintiff contends that the Sign Code violates his rights under the Free Speech Clause. The City contends that the Sign Code complies with the constitutional provision.

41. For the reasons stated herein, the City's Sign Code, both facially and as applied to the Headed West murals, violates the First Amendment to the United States Constitution.

42. Pursuant to Rule 57(b) of the Colorado Rules of Civil Procedure, Plaintiff is entitled to declaratory judgment that the Sign Code and the City's actions with respect to the Headed West murals have violated and threaten to violate Plaintiff's First Amendment rights and may not be enforced against Plaintiff to force removal of the murals.

43. The City intends to enforce the Sign Code against Plaintiff and, thereby, deprive him of his constitutional right to communicate an artistic message.

44. Plaintiff is suffering irreparable injury as a result of the existence, operation and implementation of the Sign Code.

45. Enforcement of the unconstitutional Sign Code will cause Plaintiff further irreparable harm, from which there is no plain, adequate or speedy remedy at law.

46. Accordingly, Plaintiff is entitled to an injunction prohibiting the City from enforcing the Sign Code against Plaintiff to force removal of the murals.

47. Plaintiff has suffered and will continue to suffer damages as a result of the City's violation of the Free Speech Clause, including, without limitation, the costs of responding to the City's enforcement notice.

SECOND CAUSE OF ACTION
COLORADO CONSTITUTION ARTICLE II, SECTION 10; FREE SPEECH

48. Plaintiff incorporates by reference the allegations set forth in paragraphs 1 through 47 above.

49. The Colorado Free Speech Clause provides that "[n]o law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject"

50. The Colorado Free Speech Clause is broader in its protection of speech and expressive conduct than the Free Speech Clause.

51. The actions of the City and the infirmities of the Sign Code, as set forth above, have violated Plaintiff's rights under the Colorado Free Speech Clause in the same manner as set forth above with respect to violations of the Free Speech Clause. Additionally, the City's actions and the Sign Code infringe upon Plaintiff's rights to engage in speech and expressive conduct,

without serving a compelling state interest and without using the least restrictive means to serve any state interest addressed by the Sign Code.

52. Plaintiff is threatened with the imminent loss of his right to engage in speech and expressive conduct as a result of the City's discriminatory interpretation of its vague and overbroad Sign Code.

53. An actual and immediate controversy exists between Plaintiff and the City. Plaintiff contends that the Sign Code violates his rights under the Colorado Free Speech Clause. The City contends that the Sign Code complies with the constitutional provision.

54. For the reasons stated herein, the City's Sign Code, both facially and as applied to the Headed West murals, violates Article II, Section 10 of the Colorado Constitution.

55. Pursuant to Rule 57(b) of the Colorado Rules of Civil Procedure, Plaintiff is entitled to declaratory judgment that the Sign Code and the City's actions with respect to the Headed West murals have violated and threaten to violate Plaintiff's rights under the Colorado Free Speech Clause and may not be enforced against Plaintiff to force removal of the murals.

56. Plaintiff is further entitled to an injunction prohibiting the City from enforcing the Sign Code against Plaintiff to force removal of the murals.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court:

- (1) Declare that the City's Sign Code, both facially and as applied to Plaintiff, violates the free speech protections of the United States and Colorado Constitutions;
- (2) Permanently enjoin the City from enforcing its Sign Code against Plaintiff to force removal of the murals;
- (3) Award Plaintiff nominal damages in the amount of one dollar for the City's violation of the First Amendment of the United States Constitution;
- (4) Grant to Plaintiff his reasonable attorneys' fees and costs; and
- (5) Grant such other and further relief as may be just and proper.

Respectfully submitted this 16th day of July, 2007

By: 

Thomas Macdonald, #11394

Jim Johnson, #31953

Otten, Johnson, Robinson, Neff

& Ragonetti, P.C.

950 Seventeenth Street, Suite 1600

Denver, CO 80202

Telephone: 303 825 8400

Facsimile: 303 825 6525

mac@ottenjohnson.com

In cooperation with the American Civil
Liberties Union Foundation of Colorado

Mark Silverstein

Legal Director

American Civil Liberties Union

Foundation of Colorado

400 Corona Street

Denver, CO 80218

Telephone: 303 777-5482

Fax: 303 777-1773

Email: msilver2@worldnet.att.net

**ATTORNEYS FOR PLAINTIFF
MIKE MAHANEY**