SUPREME COURT OF YUKON

Citation: *Whiskey Flats Investment Corporation v. Council of the City of Whitehorse et al.*, 2010 YKSC 27

Date: 20100609
S.C. No. 09-A0029
Registry: Whitehorse

Between:

WHISKEY FLATS INVESTMENT CORPORATION

Petitioner

And

COUNCIL OF THE CITY OF WHITEHORSE and THE CITY OF WHITEHORSE

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Peter Sandiford — Counsel for the Petitioner
Lori A. Lavoie — Counsel for the Respondents

REASONS FOR JUDGMENT

1. INTRODUCTION

[1] This is an application under Rule 54 of the *Rules of Court*, for judicial review of a decision of the municipal council for the City of Whitehorse (the "Council") that required the petitioner to remove a free-standing sign on its property on Fourth Avenue (the "property"). Specifically, the petitioner seeks to quash the decision on the basis that Council incorrectly interpreted s. 8.5.3 of the City's *Zoning Bylaw*, *2006-01* ("*Zoning Bylaw*"). The petitioner also wants a declaration that its signage use is in compliance with that section. Both the motion to quash (*certiorari*) and the motion for a declaration

are contemplated by Rule 54(1). For the reasons which follow, I grant both forms of relief.

2. BACKGROUND

[2] A City Development Officer issued a "Notice of Violation" to the petitioner on January 14, 2009. It stated that "Since no principal use exists on the subject property, the free-standing sign which is located on the property is prohibited under Section 8.3.1 and 8.5.3." Section 8.3.1 of the *Zoning Bylaw* is simply a general prohibition against signs which are not expressly permitted by the *Zoning Bylaw*, whereas s. 8.5.3 is more specific and reads:

> "All signs shall be related to the principal use or uses of the site and serve to identify the name of the business and advertise the products or services offered." (my emphasis)

[3] The petitioner challenged the Notice of Violation by letter of January 21, 2009. This letter raised the definition of "use" in s. 2.2 of the *Zoning Bylaw*, which includes "the purposes for which land … is arranged or intended." The petitioner argued that the sign, which advertised Pepsi products, related to the petitioner's intention to set up an eating and drinking establishment on the property. Further, the petitioner submitted that an eating and drinking establishment was an acceptable principal use within the zone the property was in. Thus, the petitioner claimed the sign related to a principal use or uses of the property, and complied with s. 8.5.3 of the *Zoning Bylaw*. In addition, the petitioner pointed out that the sign did not require any type of permit under the *Zoning Bylaw*, as it was free-standing and did not overhand public property (s. 8.2.1).

[4] The City's Land Development Supervisor issued an "Order to Remove" the sign on March 9, 2009. The first paragraph of that Order stated: "This letter is further to our

"Notice of Violation" letter of January 14, 2009 …" The Order went on to require the petitioner to remove the sign or face further legal action and potential penalties.

[5] The petitioner appealed the "Order to Remove" to Council, which met to consider the issue on March 25, April 6 and April 14, 2009. On the last date, Council confirmed the Order to Remove.

[6] I agree with the petitioner's counsel that the only issue on this judicial review is whether Council correctly interpreted s. 8.5.3 of the *Zoning Bylaw*. Counsel for the City urged me to additionally consider whether there are other provisions in the *Bylaw* which might justify Council's decision, even if Council erred in its interpretation of s. 8.5.3. For example, there are provisions in s. 8.9.8 regarding size and placement restrictions on free-standing signs which potentially could apply to the subject sign. However, I am persuaded by the petitioner's counsel that the Order to Remove was expressly "further to" the City's Notice of Violation, which made no reference whatsoever to any other alleged violations of the *Zoning Bylaw* beyond the one identified by s.8.5.3. Therefore, when Council decided to confirm the Order to Remove, it could only have done so on the basis of its interpretation of s. 8.5.3. Further, in the minutes of the Council meeting held on April 6, 2009, the City's Manager of Planning and Development clearly asked that Council restrict its consideration to the arguments related to s. 8.5.3.[1]

3. ISSUE

[7] The particular issue on this judicial review is whether Council erred in finding that the sign did not comply with s. 8.5.3 of the *Zoning Bylaw*, either because it did not relate to the petitioner's intended use of the property, or because it did not serve to identify the

[1] Petitioner's Notice to Admit, dated January 5, 2010, at lines 242-246.

name of the petitioner's intended business and advertise the products or services to be offered.

4. FACTS

[8] There are no substantial facts in dispute and most, if not all, are now a matter of record.

[9] Since 1941, the property has been used in association with the production, marketing, distribution and sale of Pepsi products. Not surprisingly, the building on the property was commonly known as the "Pepsi Building".

[10] The petitioner is the sole shareholder of Northland Beverages (2002) Limited ("Northland Beverages"), which holds the exclusive rights to the distribution of Pepsi products throughout the Yukon and in parts of northern British Columbia. The controlling shareholder of the petitioner, Francis Conrad ("Con") Lattin, has directly or indirectly owned the property since 1979.

[11] In November 2005, a fire destroyed the petitioner's building on the property.

[12] For a period of time prior to the fire, the building was leased to the Midnight Sun Café and was used as an eating and drinking establishment. It was a term of the lease that the soft drinks and refreshment products sold by the café would be exclusively Pepsi products.

[13] In February 2006, the petitioner paid for a feasibility study on the potential construction of a two storey office building on the property. Approximately one quarter of the space in the design for the premises was reserved to be leased for restaurant usage. As with the Midnight Sun Café, the petitioner intended to make an arrangement with any prospective restaurateur that their refreshment products would be exclusively

provided by Pepsi. However, to date, the petitioner has determined that construction is not economically feasible.

[14] On or about September 15, 2008, the petitioner erected a sign on the property that advertised Northland Beverages, Pepsi, and a list of community organizations that had received the support of Northland Beverages over the past 50 years. Around the end of October 2008, that sign was replaced by the subject sign. This sign displayed the word “Pepsi” together with the Pepsi logo at the top; immediately below that were the words “Proud Community Supporter”; immediately below that were the words “Gatorade Thirst Quencher” together with the Gatorade logo; and immediately below that at the bottom of the sign were the words “Aquafina The Taste of Purity” together with the Aquafina logo. The exact dimensions of the sign are unknown but the photograph of it tendered in evidence suggests it was approximately one and a half storeys tall and about eight feet wide. It appears to have been supported by an interlocking brace-type structure and was vertically free-standing, entirely within the boundaries of the property.

[15] On a number of occasions between October and December 2008, City officers contacted the petitioner, alleging that the sign was placed in contravention of the *Zoning Bylaw*. Then, as stated, on January 14, 2009, a Development Officer issued the Notice of Violation.

[16] Notwithstanding the petitioner’s response, detailed above at para. 3, the Order to Remove was issued and, pursuant to s. 349 of the *Municipal Act*, R.S.Y. 2002, c. 154, the petitioner requested that Council review the Order. That section provides:

> “349(1) A person who receives a written order under section 348 may request the council to review the order by written notice within 14 days

> after the date the order is received, or any longer period that a bylaw specifies.
>
> (2) After reviewing the order, the council may confirm, vary, substitute, or cancel the order."

[17] On March 25, 2009, Council convened a meeting with the City's Senior Management and received submissions. City officials submitted that, as the site was vacant, the use of the sign was not consistent with any principal use on the property. Further, said the City officials, the term "intended use" must mean a use supported by an existing or pending development permit. The petitioner argued that there was an intended use for the property, authorized for that zone, and that the sign related to that intended use and served to identify the name of the business and advertise the products to be offered. Accordingly, the sign complied with s. 8.5.3 of the *Zoning Bylaw*. As well, the petitioner submitted that no development permit was required here in any event, as the sign was erected on private property and did not overhang public property.

[18] The review was put over to a meeting of Council on April 6, 2009, where, as I said earlier, the City's Manager of Planning and Development clearly invited Council to limit its consideration to the alleged contravention of s. 8.5.3.

[19] On April 14, 2009, Council made its decision to confirm the Order to Remove. Although Council gave no reasons for its decision, it is apparent from reading the minutes of the Council meetings of April 6 and 14, that it ultimately agreed with the submissions of the City's Land Development Department. However, interestingly, in the formal minutes of its April 14 meeting, Council referred to its concern regarding the "ambiguity of certain sections of the Zoning Bylaw" in relation to the arguments made, and requested that "clarifying amendments for the Zoning Bylaw be brought forward."

[20] The petitioner removed the sign pending the outcome of this application for judicial review.

5. LAW

[21] Counsel are agreed that the standard of review on this application is correctness. Accordingly, this Court should give no deference to Council's reasoning process, but rather undertake its own analysis in an attempt to reach the correct result. As the Supreme Court of Canada said in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at para. 50:

> "… When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct."

[22] On the question of statutory interpretation, in *Rizzo & Rizzo Shoes Ltd. (Re.)*, [1998] 1 S.C.R. 27, the Supreme Court of Canada, quoted and adopted the following passage from Elmer Driedger in *Construction of Statutes* (2nd. ed.) (Toronto: Butterworths ,1983) at p. 87:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (at para. 21, *Rizzo*)

[23] Further, s. 10 the *Interpretation Act*, R.S.Y. 2002, c. 125, requires that every provision of every enactment "… shall be given the fair, large, and liberal interpretation that best insures the attainment of its objectives."

[24] With respect to the rights of private property holders, one of the leading cases is *City of Prince George* v. *Payne*, [1978] 1 S.C.R. 458, where Dickson J. speaking for the Supreme Court, said, at p. 463:

> "The common law right of the individual freely to carry on his business and use his property can be taken away only by statute in plain language or by necessary implication."

[25] The Supreme Court of British Columbia in *Dragonwood Enterprises Ltd.* v. *Burnaby (City)*, 2009 BCSC 1236, applied the *Prince George* case in the context of landowners who petitioned for an order compelling the City of Burnaby to issue business licences to seven of the landowners' tenants. The petitioners owned and operated a 14 acre industrial park on which the tenants' businesses were located. The City refused the tenants' applications for new business licenses on the basis that a Preliminary Plan Approval ("PPA") was required before a recommendation would be made to the municipal council on whether to issue a business license to any or all of tenants. The petitioners maintained that the preparation of a PPA was not required, would cost tens of thousands of dollars and would take months of work. Section 7.3(1) of the City's zoning bylaw read:

> "Any person wishing to undertake a development shall apply for and receive preliminary plan approval from the Director of Planning before the issuance of a building permit."

"Development" was defined elsewhere in the bylaw as meaning "a change in the use of any land…".

[26] At paras. 71 through 77, Willcock J. referred to the passage I quoted above from the *Prince George* case and concluded that the bylaw did not clearly require an owner

who intends to change the use of their property to apply for a PPA, unless they were also seeking a building permit:

> "71 The City can only impose an obstacle upon businesses and upon the use of land by doing so in plain language…
>
> 72 As noted above, s. 7.3(1) of the *Zoning Bylaw* provides that those wishing to undertake a development shall obtain PPA before the issuance of a building permit. Reading the definition of "development" into s. 7.3(1) leads to the result that any person wishing to undertake a change in use must apply for and receive PPA from the Director of Planning before the issuance of a building permit. Section 7.3(1) does not clearly require any measure to be taken by a person who does not seek the issuance of a building permit.
>
> …
>
> 76 There is no apparent requirement for those intending to change the use of their property without building anything to make an application for development. Such an application is required to obtain PPA and that is only expressly required if one requires a building permit.
>
> 77 The *Zoning Bylaw* does not clearly impose a requirement that property owners who intend to change the use of their property obtain PPA. I therefore conclude that the City cannot require tenants to obtain PPA before their applications for business licenses are considered."
>
> (my emphasis)

6. ANALYSIS

[27] There was disagreement between counsel as to whether the *Zoning Bylaw* presumptively permits or prohibits signage. One view is that the fourteen categories of signs not requiring permits in s. 8.2 of the *Bylaw* is evidence that, in many cases, signs are presumptively permitted. The contrary view arises from a combined reading of ss. 8.3.1 and 8.5.1 of the *Bylaw*. The former states: "Signs not expressly permitted in this bylaw are prohibited"; and the latter that: "All signs shall be regulated as accessory structures." However, it is not necessary for me to resolve that debate in order to decide whether Council correctly interpreted s. 8.5.3.

[28] For convenience, I repeat that s. 8.5.3 reads:

> "All signs shall be related to the principal use or uses of the site and serve to identify the name of the business and advertise the products or services offered."

Further, s. 2.2 of the *Zoning Bylaw* states:

> "USE" means the purpose for which land or a building is <u>arranged or intended</u>, or for which either land or building is, or may be, occupied and maintained." (my emphasis)

[29] I agree with the petitioner's counsel that, if a party is found to have a good faith future intention to use land in a particular way, and the sign relates to that intended use, then the sign satisfies the first element of s. 8.5.3.[2] In order to constitute a "use" under the *Zoning Bylaw*, that use must be "arranged or intended". Applying the basic interpretive principle that one must seek to attribute meaning to all the words used in a statutory provision[3], I am to give meaning to both of these words and assume that they mean different things. Otherwise, the City would have employed one or the other only. It follows that, to prove a compliant "intended" use, one does not require any evidence of an "arranged" use. It also seems to me that the City's argument that a development permit should be in hand or under application in order to establish a *legitimate* intention to use property for a permissible purpose, relates more to a situation of an "arranged" use than an "intended" one.

[30] In her written outline, the City's counsel also submitted that even with an expanded definition of principal use to include <u>intended</u> principal use, the requirements of s. 8.5.3 "cannot be satisfied because a contemplated intention to use a property in a

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[2] There did not seem to be any dispute either before Council or on this judicial review about the petitioner's good faith, given its long history of using the property in connection with the production, marketing, distribution and sales of Pepsi products.

[3] *Her Majesty the Queen* v. *Barnier*, [1980] 1 S.C.R., 1124 at 1135.

particular way is not enough to support an intended principal use" and that "only when a development permit application has been made, and a development permit issued, is an intended use of the site established." (my emphasis). This language suggests there is some type of evidentiary threshold which a landowner/user must get over in order to comply with s. 8.5.3, which is not supported by the wording of any of the relevant provisions in the *Zoning Bylaw*. Further, the argument runs contrary to the common law principle from *Prince George* that individuals should be free to carry on their business and use their property as they see fit, unless those rights are taken away by "plain language or by necessary implication."

[31] The second element of s. 8.5.3 is that the sign must "serve to" identify the name of the business and advertise the products or services offered. In this context, "serve" is used in the intransitive sense to mean "avail" or "suffice": *Concise Oxford Dictionary of Current English*, 8th ed. (Clarendon and Press: Oxford, 1990). "Avail", when used in the intransitive sense, means "provide help" or "be of use, value or profit". "Suffice", in the intransitive sense, means "be enough or adequate". Thus, I do not interpret the second element of s. 8.5.3 to mean that all signs must specifically and completely identify the name of the intended business and advertise all the products or services offered. Rather, a sign only need assist or be of use in identifying the business or advertising the products or services offered.

[32] This interpretation avoids the absurdity following from the one urged by the City's counsel, which was far more literal. As I understood her, she argued that the sign must specifically identify the name of the business and advertise all of the products or services offered, in every instance, in order to comply with s. 8.5.3. I challenged this

argument by raising the following example: Whitehorse Motors is a Ford dealership also located along Fourth Avenue. If the owner placed a sign on its property merely advertising the sale of one model of Ford automobile without additionally naming the business and every other model of vehicle available for sale, then the sign would contravene s. 8.5.3. To me, that would be an absurd result.

[33] The City's counsel also challenged the extent to which the petitioner intended to use the property for the sale of Pepsi products, arguing that the space allotted for the rental of a restaurant in the proposed new office building only occupied about one quarter or less of the total square footage of the building. Therefore, counsel argued, the intention to use the property by leasing this space to a restaurateur could not constitute a "principal use" of the property, since it would not be the predominant use. However, s. 8.5.3 specifically refers to the principal "use <u>or uses</u> of the site", which makes it clear that there can be more than one principal use. If so, one use need not be predominant over another in order to retain its characteristic as a "principal use".

[34] Admittedly, the words "the main purpose" in the definition of "principal use" in s. 2.2 of the *Zoning Bylaw* does suggest that the principal use should be the predominant purpose. Section 2.2 states:

> '"PRINCIPAL USE" means the use of land, buildings or structures that is provided for in the schedule of zones of this bylaw for which a permit when applied for, shall be granted with or without conditions, where the use applied for conforms to the requirements of this bylaw. As the context requires, it means <u>the main purpose</u> for which land, buildings or structures are ordinarily used."' (my emphasis)

However, s. 8.5.3 clearly states that there can be more than one principal use. Thus, it must be possible to have multiple "main" purposes for the land. In any event, to the

extent the two provisions are inconsistent, pursuant to the principle in *Prince George* (para. 24 above), the inconsistency should be resolved in favour of the petitioner, as the private landholder.

[35] It is also interesting to note that the definition of "principal use" includes a reference to the use of the land "for which a permit <u>when applied for</u> shall be granted with or without conditions". That suggests to me that the use may well be an intended future use, for which an application for a permit has yet to be made. That, of course, would also be consistent with one aspect of the definition of "use" in the *Zoning Bylaw*, i.e. "…the purpose for which land…is intended…".

[36] The City's counsel further argued that s. 8.1.1 of the *Zoning Bylaw* requires that an application for a development permit must be made for <u>all</u> signs in <u>all</u> cases, whether or not the *Bylaw* specifically states they are exempt. Her position was that the City's Development Officers would then determine whether a given sign is exempt under s. 8.2.1 of the *Bylaw*.

[37] Section 8.1.1 states:

> "A development permit is required for the erection, display, alteration, replacement, or relocation of a sign <u>unless exempted by section 8.2.</u>"
> (my emphasis)

Section 8.2.1 then creates fourteen specific categories of exemptions from the requirement for a development permit.[4] These are introduced with the following language:

> "The following signs are exempt from obtaining a permit provided they comply with all the regulations of this bylaw:"

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[4] See Appendix "A".

Included among the fourteen categories is s. 8.2.1(a) which exempts “signs that do not overhang public property”.

[38] Without deciding the issue, in my view, it is not surprising that development permits would not be required for the various categories of signs in s. 8.2.1 of the *Zoning Bylaw*, given the very nature of those signs. In many cases the categories relate to private business interests, political interests or community interests, which do not obviously require regulation or oversight, and likely include communications which are protected by the fundamental freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. It would be an absurd result and contrary to the principles underlying *Prince George*, to expect that, for example, every time an individual wishes to put a campaign sign on their lawn during an election (s.8.2.1.(k)), they are required to apply for a development permit. I would be inclined to interpret ss. 8.1.1 and 8.2.1 of the *Bylaw* as meaning that exempt signs may be erected and displayed without the need to apply for a development permit. If the sign is otherwise in contravention of the *Zoning Bylaw*, then that becomes an enforcement issue for the City.[5]

7. CONCLUSION

[39] I conclude that Council, in confirming the Order to Remove, must have done so on the basis of the argument by the City’s Development Officers that, in order to establish a legitimate intended principal use, the petitioner had to prove either that it had a development permit for the erection of the sign, or that it had applied for one. No other rationale was provided in argument to Council to support its confirmation of the Order. In

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[5] Incidentally, this may also have been the understanding of at least one of the City Councilors, who stated at the April 14, 2009 Council meeting:

> “Section 8 of the zoning bylaw is worth reading over and over and over again as it’s very explicit but only enforceable under complaint issues.” (Councilor Roberts, transcript, p. 2, lines 60 and 61.)

my respectful view, that rationale is clearly wrong, as it is unsupported and even contradicted by the wording of the various provisions of the *Zoning Bylaw* which I have discussed above. Rather, the words “when applied for”, within the definition of “principal use”, and the presumed distinction between the words “arranged or intended”, within the definition of “use” in s. 2.2 of the *Bylaw*, both suggest a possible future use for which a development permit application has not yet been made or arranged.

[40] Therefore, it is appropriate to quash Council’s decision confirming the Order to Remove.

[41] Counsel for the City submitted that, if I were to quash Council’s decision in that regard, the Order to Remove would remain in force and effect. Therefore, I should consider whether to direct Council to re-conduct its review of the Order to Remove, (pursuant to s. 349 of the *Municipal Act*) or encourage the petitioner to again request such a review. That would seem to me to be an unduly onerous, time-consuming and inefficient way of resolving this conflict, especially given that I have the power to order declaratory relief, pursuant to Rule 54(1) of the *Rules of Court*. Rather, it would be more appropriate in the circumstances to make a declaration that the petitioner’s impugned use of the property is in compliance with s.8.5.3 of the *Zoning Bylaw*. It is my intention that this declaration will vitiate the Order to Remove and, hopefully, bring this dispute to an end.

[42] In her final submission, the City’s counsel stated that making the above declaration would not deal with the other issues raised by the City’s Land Development Department regarding the size, dimensions and structural integrity of the sign. She therefore urged me to direct that the petitioner make an application to the City,

presumably for a development permit, before re-erecting any further signs on the property. In my view, I have no jurisdiction to make such a direction.

[43] As counsel did not specifically address the issue of costs, I am reluctant to make a specific order in that regard. If costs cannot be agreed upon, I will remain seized of this matter so that the parties may return before me to argue the point.

____
Gower J.

Appendix "A"

Excerpt from City of Whitehorse, Bylaw No. 2006-01, *Zoning Bylaw*, s. 8:

"8.2.1 The following signs are exempt from obtaining a permit provided they comply with all the regulations of this bylaw:

a) signs that do not overhang public property;
b) advertisements displayed within a building, or on enclosed land where they are not readily visible from a public roadway;
c) building or property identification signs including building occupant directories, door-bars and kick-plates describing the name of the building or tenant(s) provided that:
   (1) each notice or name plate in a commercial or industrial zone does not exceed 0.25 m^2 and no more than one such sign shall be erected at each building entrance; and
   (2) property address identification signs in all zones shall be affixed to the building and not exceed an area of 0.25 m^2. Where such signage would not be visible from the adjacent road, a freestanding sign may be erected at the entrance to the property to which it refers.
d) advertisements displayed within and on buses or bus shelters, public benches or street furniture under contract to, or approved by the City;
e) decal or painted window signs with a combined area of less than 30% of the window area;
f) a neon sign, advertising either a particular product brand, service, or business state, in one window of the premises to which it refers;
g) normal maintenance, including painting and repair but excluding structural alteration, the replacement of plastic sign faces with the same advertiser required because of breakage or deterioration, and the changing of copy on a permitted changeable copy sign does not require a permit;
h) signs required to be maintained or posted by law including traffic and directional signage installed by the City, danger, hazard, no trespassing, or other similar warning or advisory signs not exceeding 0.25 m^2 ;
i) freestanding, on-site directional signs not exceeding 2.25 m^2 in area and 2.0 m in height for the control of pedestrian and vehicular movement in parking lots;
j) real estate and contractor signs provided that:
   (1) the signs do not exceed a size of 1.0 m^2 in a residential zone or 3.0 m^2 in a commercial or industrial zone;
   (2) the signs are not illuminated;
   (3) there is not more than one sign per frontage or flanking street; and
   (4) the display of such signs shall be limited to the duration of the activity to which it refers.
k) temporary election campaign signs on private property relating specifically to a pending election, provided that they shall be removed seven days after the election;

l) signs on land or buildings used for religious, educational, cultural, recreational, medical or similar public or quasi-public purposes, and related to the use of the land or buildings on which they are displayed; or a building identification sign for residential of commercial buildings, provided that:

  (1) each sign shall not exceed 2.25 m² in area or 3.0 m in height; and
  (2) there is no more than one sign per frontage or flanking street.

m) Community event signs advertising local non-profit organizations shall be permitted in all non-residential zones provided that:

  (1) a sign shall not exceed 3.0 m²
  (2) there is no interference with traffic visibility or movement
  (3) the signs are erected for not more than 21 days, and are removed immediately following the event to which they refer
  (4) they are not to be attached to any tree, power pole or light standard unless specifically authorised by the City Engineer, and
  (5) the sign shall be free standing and it shall be constructed so that it has a base that can be weighted to prevent the sign from being blown or knocked over.

n) murals, which may include commercial advertising, are permitted in commercial and industrial zones.”