DEPARTMENT OF COMMUNITY DEVELOPMENT
Joan Davenport, AICP, Director

Planning Division
Joseph Calhoun, Manager
129 North Second Street, 2nd Floor, Yakima, WA 98901
ask.planning@yakimawa.gov · www.yakimawa.gov/services/planning

NOTIFICATION OF APPEAL
HEARING EXAMINER'S DECISION
December 13, 2019

City File APP#003-19

This notice is being provided to parties of record and the appellant that a timely appeal was filed by Robert Noe, on behalf of the Yakima School District on November 22, 2019 regarding the Hearing Examiner's Decision on CL3#008-19, ADJ#016-19, and VAR#003-19. Copies of the Notice of Appeal and any written argument or memorandum of authorities accompanying the Notice of Appeal may be obtained from the Planning Division.

In accordance with YMC § 16.08.025(B)(2), **"All parties named in the appeal of the hearing examiner's decision wishing to respond to the appeal may submit a written argument or memorandum to the legislative body within thirty days from the date that the notice is mailed; and any written argument or memorandum shall not include the presentation of new evidence and shall be based only upon the facts presented to the examiner."**

Please submit written argument or memorandum of authority to:

Joan Davenport, AICP, Community Development Director
City of Yakima, Department of Community Development
129 N. 2nd St.
Yakima, WA 98901

Upon completion of the thirty-day submittal period for submission of any written argument or memorandum, the appellant at their expense may obtain copies of any such submissions, and shall be provided a fifteen-day rebuttal period, starting on the thirty-first day from the date of mailing of the notice of the filed appeal.

Please be certain to reference the file number or appellant's name in your correspondence. (APP#003-19 –Yakima School District – Eisenhower High School)

Public Notice Meeting on Appeal:
Subsequent to the submission and rebuttal periods discussed above and outlined below, the record will be transferred to the Legislative Body. A separate notice to identify the date and time of the City Council's public meeting to consider the appeal will be sent to the appellant and parties of record.

For further information or assistance you may contact Trevor Martin, Associate Planner, at (509) 575-6162, or email to: trevor.martin@yakimawa.gov.

Trevor Martin
Associate Planner

Applicable Dates:
Date of Mailing: December 13, 2019
30-day submittal for written argument or memorandum ends: January 13, 2020 at 5:00 pm
15-day rebuttal period begins: January 14, 2020
15-day rebuttal period ends: January 29, 2020 at 5:00 pm

Enclosures: Notice of Appeal

DEPARTMENTO DE DESARROLLO COMUNITARIO
Joan Davenport, AICP, Directora

Division de Planificación
Joseph Calhoun, Gerente
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AVISO DE APELACIÓN
DE LA DECISIÓN DEL EXAMINADOR DE AUDIENCIAS

13 DE DICIEMBRE, 2019

NO. DE ARCHIVO: APP#003-19

Esta notificación se proporciona al apelante, el solicitante, y personas registradas para avisarles que Robert Noe, en nombre del Distrito Escolar de Yakima, presento una apelación oportuna el día 22 de noviembre 2019 sobre la decisión del Examinador de Audiencias del archivo CL3#008-19, ADJ#016-19. Se pueden obtener copias del Aviso de Apelación y cualquier argumento escrito o memorando de autoridades que acompañe el aviso en las oficinas de la Division de Planificación.

De acuerdo al Código Municipal YMC § 16.08.025(B)(2), *"Todas las personas nombradas en la apelación de la decisión del examinador de audiencias que deseen responder a la apelación pueden presentar un argumento o memorando por escrito al cuerpo legislativo dentro de los treinta días a partir de la fecha de envió de la notificación de apelación; y cualquier argumento o memorando escrito no incluirá la presentación de nuevas pruebas y se basara solo en los hechos presentados al examinador."*

Por favor de presentar argumento escrito o memorando de autoridad a:

Joan Davenport, AICP, Directora de Desarrollo Comunitario
City of Yakima, Departamento de Desarrollo Comunitario
129 N. 2nd St.
Yakima, WA 98901

Una vez completado el periodo de treinta días para la presentación de cualquier argumento o memorando escrito, el apelante por cuenta propia puede obtener copias de tales presentaciones, y se le proporcionara un periodo de refutación de quince días, a partir del trigésimo primer día de la fecha de envió del aviso de la apelación.

Aviso de Reunión Publica sobre la Apelación:
Después de los periodos de presentación y refutación mencionados anteriormente y descritos a continuación, el archivo será transferido al Cuerpo Legislativo. Se enviara un aviso por separado para informar la fecha y hora de la reunión pública del Concejo de la Ciudad para considerar la apelación al apelante y todas las personas registradas.

Para más información o asistencia puede contactar a la Oficina de Planificación al (509) 575-6183 o por correo electrónico al: ask.planning@yakimawa.gov.

Trevor Martin
Planificador Asociado

Fechas Aplicables
Fecha de Envió: 13 de diciembre 2019
Periodo de treinta (30) días para presentar argumento escrito o memorando termina: 13 de enero 2020 a las 5:00 p.m.
Periodo de quince (15) días de refutación comienza: 14 de enero 2020
Periodo de quince (15) días de refutación termina: 29 de enero 2020

Adjuntos: Aplicación de Apelación

LAND USE APPLICATION

CITY OF YAKIMA, DEPARTMENT OF COMMUNITY DEVELOPMENT

129 NORTH SECOND STREET, 2ND FLOOR, YAKIMA, WA 98901

PHONE: (509) 575-6183 EMAIL: ask.planning@yakimawa.gov

INSTRUCTIONS – PLEASE READ FIRST Please type or print your answers clearly.

Answer all questions completely. If you have any questions about this form or the application process, please ask a Planner. Remember to bring all necessary attachments and the required filing fee when the application is submitted. The Planning Division cannot accept an application unless it is complete and the filing fee paid. Filing fees are not refundable. This application consists of three parts. PART I - GENERAL INFORMATION AND PART III – CERTIFICATION are on this page. PART II contains additional information specific to your appeal and MUST be attached to this page to complete the application.

PART I – GENERAL INFORMATION

1. Appellant's Information:	Name:	Yakima School District No. 7 (Robert F. Noe, Chief Legal Counsel)						
	Mailing Address:	Central Services, 104 N. 4th Ave.						
	City:	Yakima	St:	WA	Zip:	98902	Phone:	(509)573-7039
	E-Mail:	noe.robert@yakimaschools.org						

Any additional appellant parties may be listed on a separate page

2. Site Address of the Proposal Being Appealed: Eisehower H.S (Zaepfel Stadium) 611 S. 44th Ave., Yakima, WA 98908

PART II – SUPPLEMENTAL APPLICATION (SEE ATTACHED SHEET)

PART III – CERTIFICATION

3. I certify that the information on this application and the required attachments are true and correct to the best of my knowledge.

Appellant's Signature CHIEF LEGAL COUNSEL YSD ROBERT F. NOE WSBA 19730 — November 22, 2019 Date

FILE/APPLICATION(S)#: APP #003-19

DATE FEE PAID:	RECEIVED BY:	AMOUNT PAID:	RECEIPT NO:
11/22/19	A. NUÑEZ	$340.00	CR-19-007051

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Supplemental Application For:

APPEAL

Yakima Urban Area Zoning Ordinance Chapter 15.16/Chapter 16.08

PART II – SUPPLEMENTAL APPLICATION

1. THIS APPLICATION IS AN APPEAL OF:

- ☐ Administrative Official's Decision
- ☑ Hearing Examiner's Decision
- ☐ Subdivision Administrator's Decision
- ☐ SEPA Determination
- ☐ Other: _____

2. FILE NUMBER(S) OF PROPOSAL BEING APPEALED: CL(3)#008-19, VAR#003-19, ADJ#016-19

3. DESCRIPTION OF ACTION BEING APPEALED:
Appeal of Permit denial to install replacement scoreboard at Zaepel Stadium (Eisenhower High School). Appeal of Denial on Request for Administrative Adjustment and Variance.

4. REASON FOR APPEAL - Describe the specific error(s) or issues(s) upon which the appeal is based, including an explanation of why the decision is not consistent with the Yakima Urban Area Plan, The Yakima Urban Area Zoning Ordinance, or other provisions of law. (Reference the section, paragraph, and page of the provision(s) cited.) (Attach if lengthy):

See the Attached Appeal of Hearing Examiner Decision

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CITY COUNCIL
CITY OF YAKIMA
STATE OF WASHINGTON

YAKIMA SCHOOL DISTRICT NO. 7, Applicant/Appellant, vs. CITY OF YAKIMA, Respondent.	NO. CL(3)#008-19 VAR#003-19 ADJ#016-19 **APPEAL OF HEARING EXAMINER DECISION**

COMES NOW Yakima School District No. 7 ("YSD") and submits its appeal of the City of Yakima Hearing Examiner's decision denying YSD's application for a permit to install an updated scoreboard at Zaepfel Stadium which is part of the Eisenhower High School.

I. **Background.**

YSD's application for a permit was submitted for Type 3 Review. The City's Planning Department then required YSD to submit a request for Administrative Adjustment to permit the scoreboard within a residential zone and a request for a Variance to allow for deviation from sign code standards. Those processes are inapplicable to YSD's application. The scoreboard already exists as a Class 3 use as an accessory to the school. Further, the sign code does not apply to the scoreboard and no variance is needed. Despite this, the City's Planning Department and the City's Hearing Examiner both erroneously applied those standards (and

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other inapplicable standards) and used them to unlawfully deny the permit and deny YSD with the ability to upgrade an outdated and obsolete 50 year old scoreboard.

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The Planning Department and the Hearing Examiner both improperly treated the scoreboard as a sign. The scoreboard and the stadium are accessory uses to a Class 3 approved school. Upgrading the scoreboard is an improvement to the accessory use. The scoreboard is not intended to convey advertising or other messages to the general public. It is intended to provide information concerning athletic events taking place in the stadium (and things like video replay) to participants and persons in attendance at the stadium on school grounds.

Because the Planning Department and the Hearing Examiner wrongly treated the scoreboard as a sign, they erroneously applied the City's sign code to the permit application. The sign code has no provisions or standards within it that are applicable to a scoreboard. Both the Planning Department and the Hearing Examiner engaged in mental gymnastics to manipulate the City's sign code in order to support a denial of the permit application. Where such regulations do not clearly apply to the proposed project, it is illegal to force their application on the project to achieve a denial. The Hearing Examiner also applied an ordinance that has no bearing on the scoreboard and for which no notice was provided to YSD that it was required to meet any such standards. This constitutes an unconstitutional denial of due process.

Even if the scoreboard is a sign, signs convey constitutionally protected speech and prohibiting that speech by denying a permit under circumstances where code provisions do not clearly apply is unconstitutional. Further, in order to prohibit or restrain free speech, the City must show that a substantial and compelling governmental interest is served by doing so. The

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City staff and Hearing Examiner maintained that the City has an interest in ensuring traffic safety. There is, however, no evidence in the record demonstrating that this interest is compelling. The City staff offered old traffic collision information bearing no relationship to signage (or a scoreboard), but which consisted of rear-end accident statistics without any connection to the issue. Further, the City staff offered three studies where research and analysis was conducted to determine whether signs with video imaging present a traffic hazard concern. The City's staff disingenuously described these studies as "inconclusive" as to whether such signs pose an increase in traffic accidents. Strikingly, the studies actually find that there is no evidence of an increase in traffic accidents due to such signs. Where there is no evidence that such signs will impact traffic safety, it is improper to force the application of regulations that are not applicable to the scoreboard, to deny the permit to address a nonexistent safety concern.

II. The Scoreboard is not a Sign.

The City's sign code does not apply. The request for a permit was processed by the City as an Administrative Adjustment to the zoning code and as a Variance to the sign code. The City staff's underlying assumption in using this process is that the scoreboard is a "sign" and is, therefore, regulated under the City's sign code. The underlying assumption is not correct.

The scoreboard is part of the accessory use for a permitted school use. The school was permitted and constructed in the late 50's. Later, as part of the school, as an accessory to it, the stadium, its bleachers, and its scoreboard were permitted in 1969.[1] There was no need for a

[1] YSD has made a request for public records to the City requesting records related to the original Class 3 permit issued for the school and the stadium and scoreboard. YSD has not received the records but is advised that it can expect the records by December 6, 2019. One wonders why this information was not provided to the Hearing Examiner as part of this process.

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sign permit, as the scoreboard was not considered a sign, but rather an accessory use to the school and its stadium. The intent of the scoreboard is to convey information and images to athletic event participants and attendees. Exhibit E-2.

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The Yakima Municipal Code at YMC 15.08.020 defines sign as " . . . letters, figures, symbols or logos, with or without illumination, on any medium, including its structural component parts, <u>used or intended</u> <u>to attract attention to the subject matter that identifies, advertises, and/or promotes a product, good, service, place, person, firm, merchandise, point of sale or business</u>. A sign also includes any item attached to sign structures, such as balloons, streamers, pennants, flags, inflatables or similar devices intended to attract attention". (Emphasis supplied). This scoreboard does not fall within this definition. As indicated, the scoreboard is "used or intended" to convey information and video imaging to participants and attendees of athletic events in the stadium. Its intended use is not to attract attention to "identify, advertise and/or promote" anything. At best the definition is ambiguous as to its application to the scoreboard and an ambiguous code provision cannot be used as a legal basis for regulating (this is discussed further below).

If the scoreboard falls within the definition of sign, the sign code is still not applicable to the scoreboard as there are no regulations that address a scoreboard. The regulations for a "digital sign" clearly do not apply to it. The City staff and the Hearing Examiner asserted that since the scoreboard is a sign and does not fall within the definition of digital sign under YMC 15.08.135 and cannot meet the standards for a digital sign, the permit application must be denied. This approach is unconstitutional and improper (discussed further below).

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Because the scoreboard is not a sign and is a long-time approved use, it should be permitted. Regarding the type of "use" that the scoreboard represents, the City's staff conceded that the scoreboard is an accessory use to the school and stadium, but then argued that the replacement scoreboard would no longer be an accessory use, but that "[t]he proposed scoreboard has now taken the position where it is no longer an accessory feature, but a primary feature, which is a use that is not allowed or compatible with a residential zoning district". App. A to the Hearing Examiner's Decision, Page 2. This argument is not based on anything in the City's code, not based on anything in the record, and is simply the arbitrary construct of the City Planning staff.

The code defines a "*use*" as ". . . the activity or purpose for which land or structures or a combination of land and structures is designed, arranged, occupied, or maintained together with any associated site improvements. . . ." The use at issue here is clearly a combination of land use and structures; the school, the stadium and its scoreboard. The City's code defines a principal or primary use as follows "*use, principal*" means " . . . the primary or predominant use to which a structure, part of a structure, or lot is or may be devoted." It also defines "*accessory use*" as ". . . a use that is subordinate and incidental to a principal use."

Here the principal use of the site is a high school and its campus, which includes the athletic facility. The scoreboard is a use that is accessory to the school and stadium. The City's staff has asserted that, if the scoreboard is permitted, the school and stadium will no longer be the primary use for the site, but instead the scoreboard will become the primary use. The City Council should note that the scoreboard will only be used in conjunction with athletic events and its use would not supplant or surpass the primary and regular use of the school and stadium

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by hundreds of students. Not much further needs to be discussed regarding this clearly erroneous assertion.

Moreover, the Hearing Examiner agreed that the scoreboard is not a sign regulated under the City's sign code. The Hearing Examiner repeatedly commented in his Decision that the City's sign code does not have standards applicable to the video medium that the scoreboard provides. He stated in his Decision, "[t]he record does not indicate when the current City sign ordinance provisions were adopted by the City Council. The record also does not disclose the reason why the current sign ordinance lacks special provisions for athletic field scoreboards . . ." Hearing Examiner Decision pages 3-4. He then speculated that "[t]he omissions may be based upon traffic safety considerations . . ." He then discussed that promoting traffic safety is an underlying theme or purpose of the sign code. He then suggested that the sign ordinance be amended to address the scoreboard and the video imaging it provides because the current code does not address scoreboards. Hearing Examiner Decision page 4. He suggested that the standards for digital signs under the sign code be amended to address the video that the scoreboard would present. He stated, "[a]ny standards for video signage recommended by the City Planning Commission and/or considered by the City Council must include amendment of the current digital sign definition . . ." Hearing Examiner Decision page 4. Clearly, the Hearing Examiner acknowledged that the scoreboard does not meet the current definition of digital sign (and that the definition has to be amended to address the scoreboard). If the scoreboard does not meet the definition of a digital sign, how can the City staff and the Hearing Examiner apply the standards for digital signs to the scoreboard and use those standards as a basis to deny the permit? They cannot legally do so.

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Because there are no standards within the sign code that apply to the scoreboard, the Hearing Examiner then asserted that, if he permitted the new scoreboard, he would be creating a "new definition or use". Hearing Examiner Decision, Page 4. Here the Hearing Examiner committed an error in his analysis because the use (the scoreboard) already exists and he would not be creating anything new. The scoreboard was previously authorized and permitted as part of the school and its stadium. It is an existing use accessory to those principal uses. In terms of creating a new "definition", however, he has essentially done so by forcing the standards for a digital sign on to the scoreboard and using that provision (which by definition does not cover scoreboards) to deny a permit for the scoreboard.

The problem inherent with the City staff's rationale and with the Hearing Examiner's decision is that they both struggle with the fact that the scoreboard is not a sign. This struggle is evidenced by the Hearing Examiner's convoluted decision where he, on the one hand, asserted that the scoreboard is not a sign addressed under the digital sign provisions of the sign code while, on the other hand, he used those same standards to deny the permit application.

III. Applying the Sign Code to the Scoreboard results in Unconstitutional Restraint of Free Speech.

A. Stretching the Sign Code Provisions to make them apply to the Scoreboard is Unconstitutional.

The information and video images that the scoreboard will provide to participants and attendees at the stadium is considered first amendment speech. Regulations prohibiting or regulating free speech must be clear, unambiguous, and not overreaching. Such regulations must be narrowly tailored to serve a demonstrated substantial and compelling governmental purpose.

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Here, as indicated above, the broad general definition of sign does not clearly apply to the scoreboard. It is ambiguous at best. In the context of protected first amendment speech, this ambiguity must be resolved in favor of the YSD and the scoreboard cannot be treated as sign.

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Here further, the sign code regulations do not specifically apply to the scoreboard (this is acknowledged repeatedly by the Hearing Examiner). Stretching the provisions of the code to make them apply to the scoreboard is a classic example of overreach (stretching a regulation and making it apply to a situation to which it does not clearly apply). Stretching such regulations to deny a permit effectively denies the free speech before it is ever communicated. This is known as a "prior restraint" under constitutional law analysis. Prior restraints are abhorrent to the law under both the federal Constitution and the Washington State Constitution. Our courts have struck down prior restraints in most contexts, allowing only post publication sanctions to punish the abuse of free speech rights. See, e.g., State v. Coe, 101 Wash.2d 364, 374-75, 679 P.2d 353 (1984). The strict standard for evaluating prior restraints under the State Constitution lies in the plain language of Const. Art. I, § 5 which "seems to rule out prior restraints under any circumstances." Bering v. Share, 106 Wash.2d at 242, 721 P.2d 918 (1986)(quoting Coe, 101 Wash.2d at 374, 679 P.2d 353).

B. No Compelling Governmental Interest.

Before constitutionally protected speech can be restricted (in this case completely prohibited by a denial of the permit) there must be a showing that there is a compelling governmental interest that justifies the prohibition. Both the City staff and the Hearing Examiner asserted that the prevention of a safety hazard supplies that compelling governmental purpose. They asserted that distracted drivers will be involved in accidents and that the

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scoreboard will distract drivers. The City provided traffic collision reports as part of the record, but those are removed in time (several years old) and do not relate in any fashion to signage and the impact signage had on those particular accidents. Certainly it has no relationship to a scoreboard and impacts a scoreboard has on traffic. Exhibit A-1, Ex. A.

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The City staff submitted studies as part of the record and asserted that the studies stand for the proposition that something like the scoreboard will cause additional traffic accidents. Exhibit A-1, Ex. B-d attached. The City's staff characterized the findings of the studies as follows: ". . . all came to a similar conclusion, due to the constantly changing nature of the sign industry, and the inconsistencies between driver tendencies, a direct correlation between distracted driving and the type of sign is not conclusive." Exhibit A-1, page 10. Despite this conclusion in its Staff Report, the City staff asserted "the proposed scoreboard will have a video element, and will be facing the intersection of Tieton Dr. and 40th Ave. A portion of Zaepfel Stadium may block a direct view of the scoreboard, but portions of the scoreboard will be directly visible shortly after moving through the intersection. The City is concerned the position of the scoreboard and movement through the intersection will lead to an increase in distracted driving." Staff Report, pages 10-11. The assertion is contrary to the evidence in the record.

Further, in the City's presentation to the Hearing Examiner on the issue, the City staff stated, ""and the City researched some articles talking about the correlation between distracted drivers and the safety impacts of signs and eye movements related to active signs, and those can be found within the staff report for the record." Hearing Examiner Decision, App. A, page 3. Apparently the Hearing Examiner relied on the misleading characterization of the studies supplied in the Staff Report and did not review the studies independently.

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A review of the studies divulges the following findings:

In the first study submitted, the researchers there concluded, "[b]ased on the available evidence, it is not possible to conclude that there is a direct relationship between the driving behavior changes that can be attributed to roadside advertising and subsequent road crashes." Exhibit A-1, Ex. B, page 92.

In the second study submitted, the researchers concluded, "Finally, the researchers performed an analysis of variance for the sign factors of color, size and type of business and found no statistically significant difference in the mean safety index values for individual factors. The results of the study provide scientifically based data that indicate that the installation of digital on-premise signs does not lead to a statistically significant increase in crashes on major roads." Exhibit A-1. Ex.C, page viii. The authors conclude, "Based on the analysis performed for this research effort, the authors are able to conclude that there is no statistically significant evidence that installation of on-premise signs at the locations evaluated in this research led to an increase in crashes." Exhibit A-1. Ex. C, page 35. 135 different locations were evaluated in the study.

The third study concluded, "[i]n most situations, visual behavior measures did not seem to indicate that drivers were dangerously distracted by billboards. Billboards do not appear to affect the overall percentage of time spent glancing at the forward roadway, and drivers seemed able to self-regulate their attention to billboards when they realized that the demands of the driving task had increased, for example, to attend to lead vehicles or to view navigation-related, regulatory, or warning signs." Exhibit A-1, Ex. D, page 7

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Thus, the City staff cannot assert that there is a compelling safety concern justifying a denial of free speech – particularly where the City staff is stretching a code provision that does not apply to the scoreboard to reach a permit denial. Where there is no compelling governmental interest justifying the restriction, restricting speech by denying the permit is unconstitutional.

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A stark example of the unreasonable and arbitrary nature of the City staff's position regarding the scoreboard is City staff's closing statement to the Hearing Examiner addressing the scoreboard as follows, " . . . and the scoreboard shall not be visible from the street. And, yes, the scoreboard shall not be visible from the street. Thank you." Hearing Examiner Decision, App. A, page 3-4. What other signs in the City are required to "not be visible from the street"? This is an absurd requirement that is not supported in the code. Signs are regulated because they are visible. If they are not visible, there is no reason to regulate them as signs. If a sign is not visible from the street, it is expressly exempt from the sign code – YMC 15.08.045(2) provides:

> The following signs are exempt from the permitting requirements of this chapter:
>
> . . . (1) On-premises signs not readable from the public right-of-way . . .

YSD submitted numerous photos of signs currently existing that front Tieton Drive. Exhibit H-2. If the City Council drives west on Tieton Drive from downtown to 56th Avenue it will experience many of these signs including illuminated and animated displays. These signs are immediate and right next to the roadway. The scoreboard will be set back hundreds of feet next to the stadium and is not adjacent to the roadway. Its visual impact is not immediate and

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forefront. "But with regards to traffic, the new scoreboard is not visible from the intersection of Tieton. We submitted renderings that illustrate that point. You would have to go approximately 250 feet west of the intersection. When you get past the grandstands, the scoreboard would be visible. If you're traveling on 40th Street, the sign would be visible, but we have screening on the fence that blocks that, and, again there's illustrations in our packet that show that the scoreboard is obscured along 40th. The site does have landscaping in place. There are trees along 40th that, as they mature, will aid in screening this." Hearing Examiner Decision, App. A, page 5 and Exhibit E-g.

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The scoreboard can only be viewed for a very short time period on Tieton Drive while traveling west, a matter of seconds. The site screening along 40th includes over 100 linear feet of fencing. Hearing Examiner Decision, App. A, page 6. In terms of driver distraction, the signs immediately adjacent to the roadway pose much more of an impact. Those can be viewed for extended periods of times as motorists approach. The scoreboard will be, at minimum 400 feet or significantly farther, from the edge of the school property, and there is also additional separation from the property's edge to the roadways.

IV. Even if the Scoreboard is a Sign, nothing the Sign Code is Applicable to it.

The scoreboard, if considered a sign, is nevertheless not addressed in City's sign code. Aside from the constitutional issues addressed above, general land use law does not permit a denial under these circumstances. Where there are no standards in place, the City cannot deny the permit application. The City's sign code, as part of its zoning code must be clear and specific. There can be no ambiguity over whether a provision of the code applies or does not. Sign codes are development regulations, which are the "the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances . . .". RCW

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36.70A.030(7). The City's generalized land use plans anticipate zoning ordinances for guidance. Use of a generalized--or even an area specific--comprehensive plan leads to "ad hoc case-by-case policymaking" judicially condemned in the case Anderson v. City of Issaquah, 70 Wn.App. 64, 851 P.2d 744 (1993).

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Here the City staff and the Hearing Examiner have engaged in ad hoc decision making without any applicable regulations to support the decision. "The idea underlying zoning ordinances is that unrestricted discretion should not be given to the administrative bodies or city officials who are charged with land use planning. And it is for that reason that they must be specific". Indian Trail Prop. Owner's Ass'n v. City of Spokane, 76 Wn.App. 430, 437, 886 P.2d 209 (1994).

In the present matter, it cannot be ascertained that the scoreboard is a sign subject to the sign code. If it is a sign, there are no code provisions that apply to it. The City staff and the Hearing Examiner rely on the "purpose" provision of the sign code to support the denial. YMC 15.08.010 provides:

> Purpose.
>
> The purpose of this chapter is to promote the public health, safety and welfare through a comprehensive system of reasonable, effective, consistent, content-neutral and nondiscriminatory sign standards and requirements. It has also been adopted to promote the following:
>
> 1. Minimum standards in order to promote traffic safety;
>
> 2. Recognition of free speech rights by regulating signs in a content-neutral manner;
>
> 3. The free flow of traffic and to protect pedestrians and motorists from injury and property damage caused by, or attributable to, cluttered, distracting and/or illegible signs;
>
> 4. Provide consistent and compatible sign design standards; and

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> 5. Adopt understandable regulations which enable the fair and consistent enforcement of this chapter.
>
> This chapter is not intended to restrict speech on the basis of its content, viewpoint or message. Any classification of signs herein which purports to permit speech by reason of the type of sign, identity of the sign user or otherwise, should be interpreted to allow commercial or noncommercial speech on the sign. Nothing in this chapter should be construed to favor commercial speech over noncommercial speech.

The concepts set forth in YMC 15.08.010, as the stated purpose for the sign code, are just that--concepts. They are not, nor were they ever intended to be, the specific regulations necessary to give "effective or meaningful guidance to applicants, to design professionals, or to the public officials ... who are responsible for enforcing the code." Anderson v. City of Issaquah, at page 76.

Land use regulations are unconstitutionally vague if they empower an administrative agency to make discretionary, arbitrary decisions based on standards which are vague, unarticulated, and unpublished. Anderson v. City of Issaquah, at page 75. And that is precisely what is going on here. There is nothing in the sign code addressing the scoreboard, as a consequence, the City and the Hearing Examiner have arbitrarily applied the code provision regarding digital signs to it, and this is done is the face of the Hearing Examiner's own admission that the scoreboard does not fall within the definition of digital sign. They rationalize using the digital sign standards as consistent with the purpose behind the sign code – the broad goals set forth in YMC 18.05.010. Imposing the provisions of a code section that does not apply to the scoreboard is arbitrary and capricious and then relying upon a broad general purpose provision to support that position demonstrates that this is, in fact, a discretionary and arbitrary decision (precisely the type of decision that has been held to be unlawful). The purpose of the vagueness

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doctrine is to limit arbitrary and discretionary enforcement of the law such as that manifested here. Burien Bark Supply v. King County, 106 Wash.2d 868, 871, 725 P.2d 994 (1986).

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Regarding the scoreboard, City staff sheds light on the arbitrary, ad hoc (case by case determination), nature of its decision in its presentation to the Hearing Examiner. City staff stated, "as far as the scoreboard goes, versus a sign and not a sign, the Municipal Code references the closest applicable criteria in which the proposal falls, and in this case, this instance, it's a typical sign within the City of Yakima, which means a changeable copy with LED or other similar light, text, or graphics, or symbols over a non-illuminated background. Digital signs are also known as electronic message centers. That's how we interpreted it." (Emphasis supplied). Hearing Examiner Decision, App. A, page 16. The "closest applicable criteria"? Applying those standards that do not apply to the scoreboard is discretionary and arbitrary. In terms of the "closest applicable criteria" City Council should take a look at YMC 15.08.045 related to exemptions. Isn't YMC 15.08.045(1) actually the "closest applicable criteria"? It provides:

> The following signs are exempt from the permitting requirements of this chapter.
>
> . . . 2. On-premises signs not readable from the public right-of-way, i.e. menu boards, interior signs, etc.

YSD proposed this to the Hearing Examiner because any lettering on the scoreboard would not be readable from the roadway. Hearing Examiner Decision, App. A, page 4. This section could have just as easily been applied to the scoreboard to find it exempt from the permitting requirement.

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Then, further demonstrating the height to which the City staff is willing to impose vague, inapplicable and unenforceable standards on the scoreboard, is the following discussion provided by City staff to the Hearing Examiner (see if you can identify what the applicable standards are and how the YSD failed to meet those standards):

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> "Let's see here. Going back to the zoning. So, another reason this decision has come out the way it has come out is written the way the decision is written is that – and this goes, again, back to the point of zoning – is that the application did not necessarily address the relationship between the surrounding commercial uses and the neighborhood. We felt that there could have been a more substantial argument built upon this, and thus the application being reviewed as it was. The same goes with the relationship between all activities that go on with the school and with the school's stadium and the surrounding context of, maybe, some commercial uses that have been permitted. Just the argument, I don't think was built upon enough in the application, prompting the staff's decision. That's what I have for you. That being said, the applicant has provided new, additional information here today, I think we've heard a lot of new information here today that has not been reviewed as part of the application, and there may be new criteria that may have been submitted to maybe move this forward with mitigation."
>
> (Emphasis supplied – to highlight subjective nature of the City's position).

Hearing Examiner Decision, App. A, page 17.

The situation here is strikingly similar to the case the Washington Supreme Court considered Anderson v. City of Issaquah, which is cited above. There a developer sought a permit to build a commercial building with spaces available for retail leasing. That developer was faced with roadblock after roadblock due to the arbitrary and subjective standards imposed on the proposed development.

The Court found Issaquah's development standards to be unconstitutional. It noted:

> Looking first at the face of the building design sections of IMC 16.16.060, we note that an ordinary citizen reading these sections would learn only that a given building project should bear a good relationship with the Issaquah Valley and surrounding mountains; its windows, doors, eaves and parapets should be of "appropriate proportions", its colors should be "harmonious" and seldom "bright" or "brilliant" its mechanical equipment should be screened from public

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view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." The project should also be "interesting". IMC 16.16.060(D)(1)-(6). If the building is not "compatible" with adjacent buildings, it should be "made compatible" by the use of screens and site breaks "or other suitable methods and materials." "Harmony in texture, lines, and masses [is] encouraged." The landscaping should provide an "attractive ... transition" to adjoining properties. IMC 16.16.060(B)(1)-(3).

As is stated in the brief of amici curiae, we conclude that these code sections "do not give effective or meaningful guidance" to applicants, to design professionals, or to the public officials of Issaquah who are responsible for enforcing the code. Although it is clear from the code sections here at issue that mechanical equipment must be screened from public view and that, probably, earth tones or pastels located within the cool and muted ranges of the color wheel are going to be preferred, there is nothing in the code from which an applicant can determine whether his or her project is going to be seen by the Development Commission as "interesting" versus "monotonous" and as "harmonious" with the valley and the mountains. Neither is it clear from the code just what else, besides the valley and the mountains, a particular project is supposed to be harmonious with, although "[h]armony in texture, lines, and masses" is certainly encouraged. IMC 16.16.060(B)(2).

In attempting to interpret and apply this code, the commissioners charged with that task were left with only their own individual, subjective "feelings" about the "image of Issaquah" and as to whether this project was "compatible" or "interesting". The commissioners stated that the City was "making a statement" on its "signature street" and invited Anderson to take a drive up and down Gilman Boulevard and "look at good and bad examples of what has been done with flat facades." One commissioner drove up and down Gilman, taking notes, in a no doubt sincere effort to define that which is left undefined in the code.

The point we make here is that neither Anderson nor the commissioners may constitutionally be required or allowed to guess at the meaning of the code's building design requirements by driving up and down Gilman Boulevard looking at "good and bad" examples of what has been done with other buildings, recently or in the past. We hold that the code sections here at issue are unconstitutionally vague on their face. The words employed are not technical words which are commonly understood within the professional building design industry. Neither do these words have a settled common law meaning.

As they were applied to Anderson, it is also clear the code sections at issue fail to pass constitutional muster. Because the commissioners themselves had no objective guidelines to follow, they necessarily had to resort to their own subjective "feelings". The "statement" Issaquah is apparently trying to make on its "signature street" is not written in the code. In order to be enforceable, that "statement" must be written down in the code, in understandable terms. See, e.g., Morristown Road Assocs. v. Mayor & Common Council & Planning Bd., 163 N.J.Super. 58, 394 A.2d 157 (1978). The unacceptable alternative is what

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> happened here. The commissioners enforced not a building design code but their own arbitrary concept of the provisions of an unwritten "statement" to be made on Gilman Boulevard. The commissioners' individual concepts were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law.
>
> Councilwoman McHenry said it very well during the appeal to the City Council:
>
> [M]aybe we haven't done a good job in ... communicating what kind of image we want. We all want an image. I bet you if I stated my image it would be certainly different from everyone of you here and everyone in the audience.... [I]f we want a specific design, I agree with proponent's counsel, and that is that we come up with a specific district design ... We don't have such a design requirement. So we all have to rely on some gut feel. And often times this gut feel gets us into trouble because it could be misinterpreted or misconstrued . . .

In yet another example of unfettered discretion and arbitrary decision making City staff argued that the proposed scoreboard is larger than is necessary. This argument is made in a vacuum, devoid of any standards. In the YSD's presentation to the Hearing Examiner, the need for the scoreboard, in the size that is proposed, is set forth in convincing and unrefuted, fashion:

> " . . . it is the smallest stadium board that serves the need of that stadium. And let me – let me explain why. Twelve-inch letters, say – and I will use "track and field" because that's what I'm most familiar with – 12 inch letters, and using the standard code of, for every inch height in a letter you can see it for 40 feet. The farthest viewable point would be 480 feet [for 12 inch lettering]. 480 feet. The farthest seat in that stadium is 470 feet, so if you are standing on the rail way on the edge of the track, and you are further than 480 feet, which you can be inside the stadium, you will not be able to read the digital display in, on the board, and, of course, that's one of the key points, is to be able to read what's displayed on the video board. So, again, this is the smallest viewable board that fits the stadium. Throughout the report by the staff, they continually say that the board is too large for the stadium. Hopefully, the results I just gave you will put that finally to rest, and we don't have to hear it anymore, because it's blatantly untrue."

Hearing Examiner Decision, App. A, page 7.

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Where there are no standards the City staff and Hearing Examiner are left to subjectively make decisions. When decisions are made without resort to standards and based on "feelings" or other subjective criteria, then those decisions are arbitrary and capricious and cannot be upheld.

V. <u>If the City Council believes that the scoreboard is a sign and that the YDS must obtain an administrative adjustment and a variance, those standards have been met</u>.

If the City Council believes that the scoreboard is a sign and that the sign code provisions for digital signs apply to it, YSD can, nevertheless, meet all the criteria necessary to establish entitlement to an administrative adjustment and a variance. The standards that must be met to obtain an Administrative Adjustment are set forth in YMC 15.10. The standards that must be met to obtain a Variance are set forth in YMC 15.21.

The City Council should take note that the Administrative Adjustment process the City utilized is rife with the problems identified by the Supreme Court in the <u>Anderson v. Issaquah</u> case discussed above. Regarding Administrative Adjustment, YMC 15.10 provides:

> 15.10.020 Administrative adjustment of some development standards authorized.
>
> The purpose of this section is to provide flexibility by allowing certain development standards in YMC Chapters 15.05 through 15.08 to be administratively adjusted. A particular standard may be reduced or modified, so long as the administrative official determines that the adjustment and/or reduction is consistent with the intent and purpose of the standards, and will accomplish one or more of the following objectives:
>
> A. Allow buildings to be sited in a manner which maximizes solar access;
>
> B. Allow zero lot line or common wall construction in conformance with the provisions;
>
> C. Coordinate development with adjacent land uses and the physical features;

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> D. Permit flexibility in the design and placement of structures and other site improvements that is the minimum adjustment necessary to accommodate the proposed structure or site improvement; or
>
> E. Allow development consistent with a specific subarea plan adopted by the appropriate jurisdiction.
>
> Administrative adjustments of development standards shall be processed under the provisions for modifications for all Class (1) and Class (2) uses which meet the provisions of YMC 15.17.020, and under Type (3) review for Class (3) uses.

As can be seen, there are no specific criteria set forth that an applicant must meet in order to obtain an administrative adjustment. The provision vests broad discretion to the City's staff and to the Hearing Examiner. The provision does indicate that "administrative adjustments shall be processed under the provisions for modifications for all Class (1) and Class (2) uses which meet the provisions of YMC 15.17.020, and under Type (3) review for Class (3) uses."

The provisions for processing Class 3 uses are found at YMC 15.15, but that Chapter also provides no standards or criteria upon which to consider a request for an administrative adjustment. It provides:

> 15.15.030 Application for Type (3) review.
>
> Applications for Type (3) review for Class (3) uses shall be made in writing to the planning division <u>on forms supplied by the department</u>. A detailed site plan conforming to the provisions of YMC 15.11.040 shall accompany the application for Type (3) review. The planning division shall forward the application and site plan to the hearing examiner for review in accordance with YMC Title 16. The planning division or hearing examiner may request any additional information necessary to clarify the application or determine compliance with this title.

The City simply has no codified standards applicable to Administrative Adjustments for Class 3 uses. It, therefore, has no laws or standards to apply to a request for an Administrative Adjustment. Instead, on the "form supplied by the department" there are questions, and

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depending upon how those questions are answered, an application may be approved or denied. The questions are as follows:

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1. How would the strict enforcement of the current standard affect your project?
2. How is the proposal compatible with neighboring properties? Have other adjustments been granted nearby?
3. How is the proposal consistent with current zoning of your property?
4. How is the proposal consistent with uses and zoning of neighboring properties?
5. How is your proposal in the best interest of the community?

Whether an answer to these questions is sufficient requires a subjective and discretionary analysis. These are the type of criteria that the Court in Anderson found unconstitutional. The answers YSD provided to these questions are found in the record before the Hearing Examiner. These questions provide the City staff with the ability to exercise discretion in an arbitrary manner. As indicated above, the City's staff "felt" that responses to these questions were not good enough and that, according to City staff, "Just the argument, I don't think was built upon enough in the application, prompting the staff's decision".

Here is what the YSD provided in response to questions 2 – 5, which seems to be of concern to the City staff:

> 2. How is the proposal compatible with neighboring properties? Have other adjustments been granted nearby? The neighboring properties are a mix of commercial and multi-family residential. Many of the adjacent properties have signage of various types and sizes along the street frontages. Due to distance to adjacent properties from the proposed scoreboard location, we believe that the new scoreboard would be compatible with neighboring uses and would not be detrimental to those properties that would be able to see it.

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There are no single-family residences that are directly adjacent to the proposed sign location.

3. How is the proposal consistent with current zoning of your property? The current zoning for the subject site is R-1. The school and related stadium are allowed in this zoning due to a conditional use designation, as there is no specific zoning designation for schools. The Future Land Use designation of the area is Mixed Residential. Given this designation and current use of the properties bordering the proposed sign locations, we believe this modification would be consistent with the desired land use.

4. How is the proposal consistent with uses and zoning of neighboring properties? As noted in #2 and #3 above, the neighboring properties are a mix of commercial and multi-family residential. The proposed site is zoned R-1 with the adjacent land uses and zoning including R-2, R-3, B-1 and SCC. Many of the adjacent properties have signage of various types and sizes along street frontages.

5. How is your proposal in the best interest of the community? Zaepfel Stadium and Don Holder Track is used by Davis and Eisenhower High Schools, YSD middle schools, the community, and is also rented to outside entities. The existing display was placed in 1969 with a few refurbishments since that time and is outdated. The new display will modernize Zaepfel Stadium and Don Holder Track and add a brand new dimension to any activity at the stadium with features such as instant playback, finish line imagery, community support advertisements, and school spirit messaging which will improve the fan experience. It will also provide career training opportunities for Yakima School District students in the field of video production and event operations. In addition, this scoreboard will be a key element to bringing larger-scale engagements to the Yakima community, creating additional income for the city.

Exhibit E-2.

The City's staff "felt" that responses to these questions were not good enough but are unable to cite to any objective standard that has not been met through the responses. City staff commented at one point in the presentation to the Hearing Examiner, "[t]he applicant has not demonstrated that the proposed scoreboard is contextually appropriate for the surrounding neighborhood . . . ". Hearing Examiner Decision, App. A, page 2. This is completely subjective, what does "contextually appropriate" mean. The Hearing Examiner does not even address these standards, but instead denies the permit based on the sign code alone (and based on an inapplicable chapter – discussed further below).

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The Hearing Examiner, however, acknowledges the depth to which the YSD and other persons who testified in support of the scoreboard provided information responsive to the criteria. The Hearing Examiner noted ". . . the necessity and benefits of the proposed scoreboard which were detailed by knowledgeable and passionate persons at the hearing are set forth in Appendix A for the benefit of the City Planning Commission and/or City Council and any other interested persons who may wish to review all of the facts and arguments in the context in which they were presented at the hearing . . . ". Hearing Examiner Decision, page 2. He further provided: "The transcript of the testimony at the public hearing attached hereto as Appendix A which details the need for the proposed replacement scoreboard and the benefits it would provide is intended to facilitate a possible legislative consideration of the current digital sign provisions of the City's sign ordinance if this Decision is appealed or if the City Council is otherwise persuaded to do so." Hearing Examiner Decision, page 9.

The City Council should note that the "neighborhood" was provided notice of the proposed scoreboard and that all comments received have been in favor of the proposed scoreboard. There is quite literally no opposition to the proposed scoreboard, other than City's staff. This seems to address whether the scoreboard is "contextually appropriate for the surrounding neighborhood".

The City Council is encouraged to review the materials and testimony submitted on YSD's behalf addressing the questions found on the City's form. Each criterion is fully met and the City Council will be fully informed as to scope of the responses provided by YSD and supporters.

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With regard to the Variance, YMC 15.21 governs that process. It only applies to this situation, if a variance to the sign code standards is necessary. As indicated above, the sign code cannot be applied in this matter to the scoreboard. If the City Council does believe, however, that the sign code does apply, the variance requested should be granted. YMC 15.21.030 sets fort the criteria that must be met for a variance to be granted. It provides:

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> Criteria for variance approval.
>
> A variance shall be granted only when the applicant demonstrates that the variance will not be contrary to the public interest, is not self-created, and that practical difficulty and unnecessary hardship will result if it is not granted. The applicant must clearly establish and substantiate that the request for variance conforms to all the requirements and standards listed below:
>
> A. That granting the variance will be consistent with the general purpose and intent of this title and will not be injurious to the neighborhood or otherwise detrimental to the public welfare;
>
> B. That granting the variance will not permit the establishment of any use not permitted in a particular zoning district;
>
> C. That unique circumstances exist. There must exist special circumstances or conditions, fully described in the findings, applicable to the land or structures for which the variance is sought. The special circumstances or conditions must be peculiar to such land or structures and not generally applicable to land or structures in the neighborhood. The special circumstances or conditions must also be such that the strict application of the provisions of this title would deprive the applicant of reasonable use of such land or structure;
>
> D. That an unnecessary hardship exists. It is not sufficient proof of hardship to show that lesser cost would result if the variance were granted. Furthermore, the hardship complained of cannot be self-created; nor can it be established on this basis by one who purchases without knowledge of the restrictions. It must result from the application of this title to the land or structure. It must be suffered directly by the property in question, and evidence of variance granted under similar circumstances shall not be considered. Neither nonconforming uses nor neighboring lands or structures, nor buildings in other zoning districts, shall be considered as controlling factors for the issuance of a variance;
>
> E. That granting of the variance is necessary for the reasonable use of the land or structure; and
>
> F. That the variance as granted by the hearing examiner is the minimum variance that will accomplish this purpose.

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YSD responded to and complied with each criteria – please see Exhibit E. Also, as indicated above, please review the materials and testimony presented to the Hearing Examiner. Every criterion is discussed and met.

The Hearing Examiner never considered the request for a variance and the criteria. He committed error because he failed to consider any of the criteria set forth under the Variance provisions in his decision. If the scoreboard is a sign, it was error for the Hearing Examiner to completely disregard this aspect of the application. There are no findings made concerning the variance criteria, in fact, the record demonstrates that the Hearing Examiner, neither analyzed nor considered any of this criteria in rendering his decision.

Instead, the Hearing Examiner engaged in an analysis under YMC 16.06, Consistency with Development Regulations and SEPA Integration, which is totally inapplicable to the permit application for the scoreboard. Further, YSD was never placed on notice that it must show compliance with the provisions of YMC 16.06. Failure to apprise YSD of what standards it must meet constitutes an unconstitutional denial of due process.

The due process clause of the Fourteenth Amendment provides that no state [or state entity] may "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. YSD has the right to use its property in its approved Class 3 status. Denial of the permit for the scoreboard impacts and deprives YSD of that protected interest. The right to due process has both procedural and substantive components. "[P]rocedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation" of a protected interest. To determine whether a particular procedure for providing notice and an opportunity to be heard is constitutionally

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adequate, [a court] must assess the risk of erroneous deprivation in light of the competing interests at stake. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Here, as indicated, YSD had no notice that it had to meet standards set forth in YMC 16.06020(B).

Responding now, YSD asserts that the Hearing Examiner cannot apply YMC 16.06.020(B) to YSD's permit application and to do so is an error of law. YMC 16.06.020 (B) "Development Regulations/Comprehensive Plan Consideration" provides:

> . . . B. Development Regulations/Comprehensive Plan Considerations. Pursuant to RCW 36.70B.030(2), during project review, the city, or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations, the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of:
>
> 1. The type(s) of land use(s) permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for approval of planned unit developments or conditional or special uses are satisfied;
>
> 2. The density of residential development in the urban growth area or the level of development such as units per acre or other measures of density;
>
> 3. The availability and adequacy of infrastructure and public facilities identified in the adopted comprehensive plan, if the adopted plan or development regulations provide for funding of these facilities as required by Chapter 36.70A RCW; and
>
> C. The project considerations identified in subsection A of this section shall all be considered in relation to the development regulations/comprehensive plan considerations identified in subsection B of this section;
>
> D. Pursuant to RCW 36.70B.040(2), in determining consistency, the determinations made pursuant to subsection B of this section shall be controlling.

(Emphasis supplied)

This section of the Yakima Municipal Code does not set forth the criteria that an applicant must meet in order to obtain a permit. Instead, the section provides what must be

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included in the City's development regulations that it will seek to apply to a proposed project to ensure comprehensive plan consistency. These are not permit application criteria and the Hearing Examiner committed error in applying these against the YSD application and in using them as a basis upon which to deny the permit application to the YSD.

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VI. Legislative Cure.

The Hearing Examiner details what he believes are necessary amendments to the sign code in order to address and ultimately allow a permit to issue for the installation of the scoreboard. He suggests throughout his Decision that the legislature (City Council) should fix this problem. Notwithstanding his suggestions, YSD wishes to identify a very simple legislative solution to the problem. The scoreboard, as indicated, was intended to be, and has been used as, an accessory use to the stadium and high school. Because scoreboards are not intended to be used as signs, scoreboards should simply be exempted from the provisions of the sign code. Installation of the scoreboard should, however, still meet structural building and electrical standards, but regulating it as a sign is not appropriate. Numerous jurisdictions have already taken such measures, for example (a very cursory internet search produced these results – and there are many more examples):

a). City of Buffalo, N.Y.

9.4.1 Permanent Exempt Signs

The following permanent signs do not require a sign permit, but must still follow applicable requirements:

. . . B. Athletic Field Sign. An athletic field sign is a sign that is incorporated into and designed as part of an athletic field, frequently attached to a scoreboard or outfield fence or wall, and is oriented toward the athletic field. 1. A scoreboard sign may contain an electronic message center (EMC), irrespective of the zone, but the EMC may be in operation only when the athletic facility is in use.

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b). Middleton, WI

22.11 SIGNS EXEMPT FROM PERMIT

. . . (2) Athletic Field Signage

Signs, banners, and scoreboards designed solely for view from spectator areas and displayed on interior walls, fences, or other structures located inside an enclosed athletic field at a school, park, or other public or private athletic complex.

c). Laredo, TX

Section 28-25 Signs Not Requiring Permits

. . . j) Athletic signs and scoreboards.

d). Cleburne, TX

15. Exempted Signs

The following signs are exempt from the regulations of this Chapter:

. . . e. Athletic signs. Signs used as scoreboards in athletic stadiums.

e). McLean County, IL

1008 EXEMPTIONS.

G. Scoreboards in athletic stadiums.

f). City of San Ramon, CA

D3-45 - Exempt Signs - Signs Not Requiring a Sign Permit

The following signs are exempted from ARB, the Zoning Administrator, and/or Commission review unless otherwise noted, or unless authorized as part of a Master Sign Program in compliance with Section D3-52, below:

. . . R. Scoreboard changeable copy signs. Electronically activated or fixed message changeable copy signs for scoreboards on public school properties.

g). Euless, TX

. . . (83) SCOREBOARD - A scoreboard is a structurally-engineered sign erected at an athletic field or stadium and which is generally used to maintain the score or

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time expired in an event at the field or stadium. This definition includes signs mounted or applied to the outfield wall within a baseball field.

a) Time - No sign permit required. No restrictions.

b) Place - Scoreboards shall be erected within or adjacent to an athletic field or stadium.

c) Manner - No restrictions.

h). Grapevine, TX

E. EXEMPTION.

1. The following signs shall be exempt from the requirements of this section:

. . . (e) Scoreboards in athletic stadiums.

If the City Council sees fit to address this matter legislatively, the YSD urges the adoption of an exemption to the permitting requirements of the sign code for scoreboards.

VII. Relief Sought.

YSD requests that the City Council find that the Hearing Examiner (1) failed to follow applicable procedures in reaching the decision (failed to apply the proper criteria – sign code does not apply, failed to provide any consideration on the variance request, and improperly applied YMC 16.06); (2) committed an error of law (applied improper or inapplicable standards resulting in unconstitutional deprivation of free speech and the unconstitutional application of vague, ambiguous, or inapplicable standards to the permit application); and, (3) committed an error of law (applied inapplicable standards without notice to YSD constituting a due process violation); and, YSD requests that the City Council find that the Hearing Examiner's decision acts to divest YSD of the benefit of a use that was permitted to it decades ago without any legal basis for that deprivation.

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YSD further requests that the City Council find that the findings, conclusions and decision prepared by the Hearing Examiner are not supported by substantial evidence in the record (decision based on subjective and not objective criteria and competent evidence) and that the evidence presented demonstrates no support for the Hearing Examiner's purported safety concern – an increase in traffic accidents.

Relief from the Hearing Examiner's Decision is necessary because the decision is arbitrary, capricious, unlawful, or exceeds lawful authority.[2]

Under YMC 16.08.030, the City Council can "affirm the decision of the examiner, remand the matter back to the hearing examiner with appropriate directions, or may reverse or modify the hearing examiner decision". Based on the foregoing significant concerns about the decision and based on the identified errors in the decision, YSD requests that the City Council **REVERSE** the decision of the Hearing Examiner, find that the scoreboard is not a sign, that the sign code is not applicable to the scoreboard, and that it direct City staff to issue a building permit to YSD so the scoreboard can be installed.

Alternatively, YSD requests that the City Council **REVERSE** the decision of the Hearing Examiner and find that YSD has met the criteria for an Administrative Adjustment (under YMC

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[2] RCW 64.40.020
Applicant for permit—Actions for damages from governmental actions.
(1) Owners of a property interest who have filed an application for a permit have an action for damages to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority, or relief from a failure to act within time limits established by law: PROVIDED, That the action is unlawful or in excess of lawful authority only if the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.
(2) The prevailing party in an action brought pursuant to this chapter may be entitled to reasonable costs and attorney's fees.
(3) No cause of action is created for relief from unintentional procedural or ministerial errors of an agency.
(4) Invalidation of any regulation in effect prior to the date an application for a permit is filed with the agency shall not constitute a cause of action under this chapter.

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15.10 and 15.15) and for a Variance (under YMC 15.21) and that it direct City staff to issue a building permit to YSD so the scoreboard can be installed.

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Alternatively, if the City Council deems that a legislative cure to this problem is necessary, YSD requests that the City Council **REVERSE** the Hearing Examiner and then direct City staff to draft an ordinance providing for an exemption to the sign code and its permitting requirements for school athletic field scoreboards.

Respectfully submitted this 22nd day of November, 2019.

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CITY COUNCIL
CITY OF YAKIMA
STATE OF WASHINGTON

YAKIMA SCHOOL DISTRICT NO. 7, Applicant/Appellant, vs. CITY OF YAKIMA, Respondent.	NO. 17-2-04115-39 **ERRATA TO APPEAL OF HEARING EXAMINER'S DECISION**

Yakima School District No. 7 provides the following as an Errata to its Appeal of Hearing Examiner Decision filed on November 22, 2019 to correct a typographical error:

1. At page 12, line 10 of the Appeal of Hearing Examiner Decision, the words "100 linear feet" should be replaced with the words "1000 linear feet".

Respectfully submitted this 22nd day of November, 2019.

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