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AGENDA STAFF REPORT

CITY OF THE DALLES

MEETING DATE:	**AGENDA LOCATION**:	**AGENDA REPORT #**
September 22, 2014		

TO: Honorable Mayor and City Council

FROM: Gene E. Parker, City Attorney

THRU: Nolan K. Young, City Manager

DATE: September 21, 2014

ISSUE: Review of Encroachment Permit for right-of-way at the intersection of Third Street, Fourth Street, and Third Place

RELATED CITY COUNCIL GOAL: None

PREVIOUS AGENDA REPORT NUMBERS: None

BACKGROUND: The authority to grant the encroachment permit to Triple W. Properties, LLC ("Triple W. Properties) the owner of the property located at 408 West Third, which is adjacent to a portion of public right-of-way, comes from Section 4 of General Ordinance No. 97-1217, which provides as follows:

> Section 4. City Permission Requirement. No person may occupy or encroach upon a public right-of-way without the permission of the city. The city grants permission to use rights-of-way by franchises, licenses, and permits.

This provision was interpreted to allow the City to grant permission for the continued placement of certain improvements which had been installed in the public right-of-way, to install a hard surface on the right-of way subject to the City's approval, and to control the placement of signs in the designated portion of the public right-of-way. Provisions which apply to the placement of signs have the potential to raise constitutional issues related to freedom of speech. Article 1,

Section 8, of the Oregon Constitution, ("Article 1, Section 8") concerning the regulation of speech, provides as follows:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for the abuse of this right".

At the time of issuance of the encroachment agreement, it was the staff's opinion that a delegation of authority by the City to a private property owner, to control the type of speech that could be reflected in signs displayed upon a portion of public right-of-way adjacent to the private property, could be justified under a theory of law which focused upon an analysis of the type of power being exercised by the city. Whether such a restriction could be challenged on the basis that it violates the Oregon Constitution, depends in part of a determination of whether the local government's action constituted the "passage" of a law for the purposes of Article 1, Section 8.

Under the powers analysis, the first classification is referred to as a "governmental power". The exercise of a governmental power typically involves the exercise of a delegated sovereign power to legislate or regulate. As an example, when the City Council adopted provisions in its Land Use and Development Ordinance to regulate the location of adult businesses, it exercised its governmental powers. The adoption of these zoning regulations would be considered the "passage" of a law for purposes of Article 1, Section 8. The second type of power is typically referred to as a "proprietary power." Whenever a local government takes some form of proprietary action, under the powers analysis doctrine, the local government has not "passed" a law for the purposes of Article 1, Section 8. One example of a proprietary action would be when a local government takes an action to manage its own property, such as making a business decision to rent space in a building belonging to the local government, to a coffee shop rather than to an adult business. The decision to allow the owner of the property at 408 West Third to control the placement of the signs upon the adjacent public right-of-way was considered to be in the nature of a proprietary action, as the City was essentially making a determination as to how its property would be used. As the decision was considered to be one not involving the "passage" of a law for purposes of Article 1, Section 8, the decision was considered to be consistent with this constitutional provision.

In the case of Karuk Tribe of California v. Tri-County Metropolitan Transportation District, 241 Or. App. 537, 351 P.3d 773 (2011), affirmed on appeal, 355 Or. 239, 323 P.3d 947 (2014), the Tri-Met Board had adopted a policy which established certain categories of advertising which would be approved for display upon Tri-Met's vehicles. The policy also established certain categories of advertisement which were not approved for display. One of the disapproved categories of advertisement included "political campaign speech". The tribe submitted a proposed advertisement which addressed the need to protect salmon as part of an overall energy policy. Tri-Met determined that the proposed advertisement came within the "political campaign speech" exclusion, and refused to display the advertisement. Tri-Met took the position that it was acting in its proprietary capacity, and had not passed any law which would create a violation of Article 1, Section 8.

The Oregon Court of Appeals rejected Tri-Met's argument based upon the "government v. proprietary" analysis of governmental powers. Citing a portion of an Oregon Supreme Court

case entitled State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982), the Court of Appeals noted the following explanation of Article 1, Section 8:

> "(It)…forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants". 293 Or. at 412, 649 P.2d 569 (citation omitted).

The Court of Appeals determined there was no historical exception under Article 1, Section 8 for a local government action based upon the exercise of a proprietary power. The Court of Appeals also noted in their opinion that Tri-Met was asking the Court to engage in what is referred to as a "forum analysis" under Article 1, Section 8. In the case of Christian Legal Society Chapter v. Martinez, 561 U.S. 661, 130 S.Ct.2971 177 L.2d 838 (2010), the United States Supreme Court noted there are three categories to be used in a forum analysis:

1. In traditional public forums, such as public streets and parks, any restriction based upon the content of speech must satisfy "strict scrutiny", which means the restriction must be narrowly tailored to serve a compelling government interest.

2. A governmental entity will be considered to have created a designated public forum when government property which has not traditionally regarded as a public forum is "intentionally opened up for that purpose". Any restrictions on speech in this type of forum must comply with the "strict scrutiny" test cited previously.

3. A governmental entity will be considered to have created a "limited public forum" by opening property which is "limited to use by certain groups or dedicated solely to discussion of certain subjects". In a "limited public forum", a governmental entity may impose restrictions on speech that are "reasonable and viewpoint-neutral".

In May, 2014, the Oregon Supreme Court affirmed the decision of the Oregon Court of Appeals, reaffirming that the conclusion that a local government's claim that it acted in a proprietary manner, will not be a successful challenge to a claim that the local government's action has improperly restricted freedom of speech.

The fourth "WHEREAS" clause of the encroachment agreement acknowledged that the portion of public right-of-way at issue has been traditionally used for the placement of political campaign signs related to candidates and ballot measures. Given that the City informally allowed the placement of such signs upon the right-of-way for a period of years, and then continued this practice on a more formal basis in paragraph 2 of the encroachment agreement, it is likely that the City would be considered to have created a "designated public forum" in this area of public right-of-way, which would trigger the application of the "strict scrutiny" test. The decisions of the Oregon Court of Appeals and Oregon Supreme Court make it clear that any defense of the provisions of the encroachment agreement which restrict the type of signs that can be displayed upon the portion of public right-of-way, cannot be defended upon the basis that

such action constitutes a "proprietary action" which does not violate Article 1, Section 8 of the Oregon Constitution.

Furthermore, by authorizing the adjacent property owner to determine that certain types of signs cannot be posted upon the public right-of-way because those signs are inconsistent with the political or personal views of the owner, the City has also likely created a "limited public forum" which would only allow the use of the portion of public right-of-way by certain persons or groups, or only allow for the discussion of certain subjects. As noted above, any restriction on speech in a limited public forum has to be "view-point neutral". Not allowing the posting of a sign which expresses a viewpoint on a ballot measure which is in opposition to the viewpoint of an adjoining property owner would not be considered to be "view-point neutral".

RECOMMENDATIONS:

As noted previously, in addition to delegating the control over placement of signs in the affected portion of public right-of-way, the encroachment agreement also authorized the continued existence of certain improvements installed by the owner, and authorized the owner to install a hard surface approved by the City. It is my recommendation that the provisions in the encroachment agreement concerning the installation of the improvements not be changed. The provision concerning the installation of a hard surface on the right-of-way may need to be changed depending upon the Council's decision concerning two options related to the placement of signs in the designated right-of-way. Those options are as follows:

1. Determine that the designated portion of public right-of-way not be classified as either a "designated public forum" or a "limited public forum", which would not allow the placement of any type of signs in the public right-of-way. The encroachment agreement would need to be revised to acknowledge this designation of the portion of public right-of-way, and Section 2 would need to be deleted. Triple W. Properties would retain the ability to install a hard surface approved by the City upon the designated portion of right-of-way.

2. Determine that the designated portion of public right-of-way shall be designated as a "limited public forum", which would allow for the placement of signs advertising community events, or signs relating to political campaigns or ballot measures, without any restriction as to the content of those signs. The encroachment agreement would need to be revised to acknowledge this designation of the portion of public right-of-way. The encroachment agreement would need to be revised to delete the language in Section 1 allowing for the installation of a hard surface on the public right-of-way, and deleting Section 2.

The following is suggested language for a motion under either of these options:

> Option #1: Move that the portion of public right-of-way at the intersection of Third Street, Fourth Street, and Third Place, as described in the encroachment agreement dated April 5, 2013, not be designated as a "designated public forum" or a "limited public forum", and direct staff to prepare a revised version of the encroachment agreement to acknowledge this designation, and delete Section 2 of the agreement.

Option #2: Move that the portion of public right-of-way at the intersection of Third Street, Fourth Street, and Third Place, as described in the encroachment agreement dated April 5, 2013, be designated as a "limited public forum", which would allow for the placement of signs advertising community events, or signs relating to political campaigns or ballot measures, without any restriction as to the content of those signs; and direct staff to prepare a revised version of the encroachment agreement acknowledging this designation, and deleting the language in Section 1 allowing for the installation of a hard surface on the public right-of-way, and deleting Section 2.