

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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NASER JEWELERS		*
		*
v.		* 06-cv-400-SM
		* November 8, 2006
CITY OF CONCORD		* 9: 50 a. m.
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TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE MAGISTRATE JUDGE JAMES R. MUIRHEAD

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BEFORE THE COURT

THE CLERK: Court has for consideration this morning a preliminary injunction hearing in Civil Action 06-cv-400-SM, Naser Jewelers versus City of Concord.

Would counsel please enter their appearance for the record.

MR. ROBERTS: Steve Roberts, McNeill, Taylor and Gallo for the plaintiff Naser Jewelry, Inc.

9 MR. WINSTON: John Winston, Winston & Bragg
10 appearing pro hac vice.

11 MR. BAUER: Charles Bauer, Ransmeier &
12 Spellman in Concord, New Hampshire, for the City of
13 Concord.

14 MS. LEE: Lisa Lee from Ransmeier & Spellman
15 for the City of Concord.

16 THE COURT: Are you ready, Mr. Roberts?

17 MR. ROBERTS: Yes. Good morning. How are
18 you.

19 Again, this is Tony Naser. Mr. Naser is a
20 principal in the plaintiff Naser Jewelers, Inc. They
21 are the owner of Joseph Michaels Diamonds, Inc., which
22 is the store on Loudon Road in Concord that brings us
23 here.

24 With me is John Winston of Winston & Bragg who
25 has been retained to assist us in this matter given the

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1 First Amendment issues in the case. I will defer to Mr.
2 Winston will present and we're here ready to put Mr.
3 Naser on the stand if testimony is sought by the court.

4 THE COURT: It's not what I seek. It's what
5 you seek. Without the evidence you're not going to win,
6 I will tell you that.

7 MR. ROBERTS: Pardon me?

8 THE COURT: Without evidence you're not going
9 to win.

10 MR. ROBERTS: Fully understand that, judge.
11 Let me refer to Mr. Winston and then we can --

12 THE COURT: You both filed very thorough legal

13 memorandums and I've read them, and I saw the reply that
14 was filed this morning, so I have read all of those
15 things.

16 MR. ROBERTS: Okay, thank you.

17 THE COURT: So it's really evidence that I'm
18 interested in today.

19 MR. ROBERTS: Okay. Thank you. Let me defer
20 to Mr. Winston.

21 THE COURT: Okay.

22 MR. ROBERTS: Thank you.

23 MR. WINSTON: Good morning, your Honor. I
24 would like to specifically address that concern.

25 Mr. Bragg wrote a response brief. At the same

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1 time I prepared a rebuttal page by page to all the
2 contentions that are in the objection, and I'm ready to
3 go forward with that if that's where we go. And the
4 reason I say that, your Honor, is after reviewing the
5 objection -- well, let me start with this predicate.

6 We're relying chiefly on the case of ACLU,
7 Ashcroft versus ACLU. And I don't know if the court
8 recalls from reading our memorandum, but that specific
9 case provides that in terms of irreparable harm, okay,
10 that the burden is on the defendant to show that he
11 complied with the relevant speech standard. In this
12 case we're going under Central Hudson.

13 So it's their burden. We don't have any
14 opposite proof that I can find that shows they complied
15 to Central Hudson, but here's what they have alleged.

16 The first prong of Central Hudson is conceded
17 whether this is commercial speech and not misleading, so

18 there's no debate on that, your Honor.

19 The second prong of Central Hudson, from what
20 I tell is there's an allegation by the defendants that
21 the second prong is substantial government interest that
22 are being furthered by this particular restriction. The
23 defense is claiming that aesthetics essentially are the
24 government interest that supports this particular ban.
25 We believe there's a dispute on this. That what the

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1 city's problem really is is that they didn't have time
2 to consider all the alternatives, they were afraid the
3 signs would start appearing in the meantime, so rather
4 than take the time to comply with Central Hudson they
5 simply decided to ban this particular meeting.

6 The third factor of Central Hudson is
7 furthering. If you start with the predicate that we ban
8 these signs or we enacted this restriction on speech
9 solely because of aesthetics, then you have to show that
10 this purpose is furthered. I don't see how that purpose
11 cannot be furthered by banning a medium that the city
12 considers offensive. That still doesn't satisfy Central
13 Hudson. It actually just begs the question of whether
14 aesthetics is a genuine purpose. And I believe it
15 reduces the defense argument down to the irrational
16 basis justification rather than an intermediate scrutiny
17 compliance justification.

18 Finally the fourth prong of Central Hudson,
19 they are claiming that we stated that they needed to
20 take -- to chose the least restrictive means after
21 considering two dozen other means short of banning that,

22 and that it's almost impossible to say that a ban is
23 less restrictive than one of those 24 alternatives or
24 any combination of them. We haven't seen any offer of
25 proof to show otherwise. They said it is not exactly

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1 that standard. It has to be a reasonable alternative.
2 But then again, same question, how is it reasonable to
3 ban something when you could take a little bit more time
4 and consider two dozen other alternatives especially
5 where you have a legislative history showing at
6 different points in time that the city government
7 approves allowing the EMCs.

8 So your Honor, I guess the first question is
9 after reading this response and objection, that I have
10 anyway, is are there any other offers of proof that the
11 defense intends to put forward beyond what's in their
12 objection. I think that's very important.

13 I don't know if the court would indulge my
14 request to ask the defendant, defendant's counsel if
15 that's the case, but I'd like the court to do so.

16 THE COURT: Well, it seems to me that first
17 you have to start -- you know, I have certainly not seen
18 your agreed to exhibit, so I don't know what's in your
19 exhibit book.

20 MR. WINSTON: Yes, your Honor.

21 THE COURT: I know there are a lot of
22 exhibits. I don't know if the legislative history is in
23 here. I don't know whether the ordinance is in here. I
24 don't know whether the minutes are in there. I know
25 nothing about this. It may be that there are a whole

1 lot of facts that may have already been stipulated here
2 that I don't know.

3 Mr. Bauer?

4 MR. BAUER: Yes, your Honor, good morning. I
5 think what my brother is suggesting is that me go first.
6 I don't have any problems with going first. I don't
7 think we do have the burden of proof. I think the
8 burden of proof remains on the moving party for the
9 preliminary injunction in satisfaction of the four
10 criteria of the preliminary injunction.

11 I also think ultimately the issue is the
12 burden of proof on the Central Hudson theory and that's
13 a shifting burden, I acknowledge that.

14 I'm happy to put on Mayor Donovan who is here
15 to speak with regard to the city and what the city did
16 and why --

17 THE COURT: All right.

18 MR. BAUER: -- just to get this thing moving.

19 THE COURT: That will make you happy and he's
20 happy to do it, so let's do that.

21 MR. WINSTON: Well, not necessarily, your
22 Honor, but I'm not going to object having Mayor Donovan
23 being put on, I'm having trouble understanding how one
24 individual out of the entire city government can
25 overcome what we already have learned from the city's

1 legislative history which is what's reported in our
2 memorandum.

3 THE COURT: Well, that's what

4 cross-examination is for, isn't it?

5 MR. WINSTON: Yes, it is, your Honor.

6 THE COURT: Okay.

7 MR. WINSTON: Your Honor, I just want to make
8 one final point.

9 THE COURT: Yes.

10 MR. WINSTON: I believe that if there's no
11 offer of proof beyond what we've seen in the city's
12 objection, the court can resolve this entire case as a
13 matter of law, not just a preliminary injunction, but
14 the court can go forward and declare this ordinance
15 unconstitutional.

16 THE COURT: Well, okay, just so I make myself
17 clear. What I'm obligated to do because the matter was
18 referred to me, is to do a report and recommendation.
19 As a consequence, what I need to do is to assure myself
20 that I have fleshed out the record sufficiently so that
21 Judge McAuliffe doesn't have to resume this hearing and
22 take more evidence. So I am going to err on the side of
23 taking too much evidence rather than too little.

24 MR. WINSTON: Okay.

25 THE COURT: Okay?

10

1 MR. WINSTON: And your Honor, if I could just
2 clarify one thing.

3 THE COURT: Sure.

4 MR. WINSTON: My arguments are based upon the
5 agreed upon exhibits and what they contain.

6 THE COURT: I take it that they were, but I'm
7 at a kind of a disadvantage because I haven't seen those
8 exhibits.

9 MR. WINSTON: Okay, your Honor.
10 THE COURT: They were filed, I don't know,
11 this morning, but since I was just downstairs in a
12 criminal case --
13 MR. WINSTON: Okay, we did supply ours
14 originally in the memorandum.
15 THE COURT: The exhibits were here as part of
16 the original memorandum? Not on CM/ECF.
17 MR. ROBERTS: Not all of the exhibits, your
18 Honor, but many of the exhibits were attached to either
19 the complaint or --
20 THE COURT: I've read the ones that were
21 attached.
22 MR. WINSTON: We haven't seen much alteration
23 from that and obviously you haven't seen that.
24 THE COURT: All right. Mr. Bauer you can
25 proceed.

11

1 MR. BAUER: I call Mike Donovan to the stand,
2 please.
3 THE CLERK: Please raise your right hand.
4 MICHAEL DONOVAN
5 having been duly sworn, testified as follows:
6 THE WITNESS: I do.
7 THE CLERK: Please be seated. Please state
8 your name and spell your last name for the record.
9 THE WITNESS: Michael L. Donovan,
10 D-O-N-O-V-A-N.
11 DIRECT EXAMINATION
12 BY MR. BAUER:

13 Q. Mr. Donovan, what is your capacity with the
14 City of Concord at the present time?

15 A. I am mayor of the City of Concord.

16 Q. And how long have you been mayor?

17 A. I am winding up my fifth year as mayor.

18 Q. How long have you been on city council prior
19 to that?

20 A. I have been on the city council prior to being
21 elected mayor for 12 years. I took office January 1st
22 of 1990.

23 Q. Would you briefly describe the city
24 government.

25 A. Concord has a city manager, strong city

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1 manager form of government with 15 city councilors.
2 That means that the city manager is the chief
3 administrative officer, the chief executive officer of
4 the city, and that the 15 city councilors, which include
5 the mayor, are the body politic so to speak in that we
6 set the policy and the city manager and staff carry out
7 the policy. The only ones we hire and fire, the only
8 one is the city manager.

9 We have 15 city councilors. Ten of them are
10 ward councilors elected from districts, which we call
11 wards every two years. Four city councilors are elected
12 at large, two staggered four-year terms, two each for a
13 four-year term, and then the mayor is elected every
14 two years at large in the community.

15 Q. So 15 city councilors and there was just an
16 election yesterday?

17 A. There was an election to fill a vacancy. The

18 municipal elections are in the odd years.

19 Q. Okay. And the city mayor, does that person
20 have to be a city council member before he or she
21 becomes mayor?

22 A. No, anyone in the community may run for the
23 office of mayor by filing for \$5.

24 Q. Okay. But in your case you were on city
25 council for a number of years and then became elected

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1 mayor for the past five years?

2 A. Yes. I was a councilor for 12 years and then
3 resigned my council seat to run for mayor in 2001.

4 Q. Mr. Donovan, would you also tell us what your
5 educational background consists of in an overview;
6 please.

7 A. I have a Bachelor of Science degree in civil
8 engineering from the University of New Hampshire. I got
9 that in 1962.

10 I attended the Georgia Tech. School of City
11 Planning and received a Master's of City Planning degree
12 in 1969, also a Master's of Civil Engineering degree
13 with a specialty in transportation engineering in 1969.

14 I attended Franklin Pierce Law Center from
15 1983 to 1986 and I obtained a JD from Franklin Pierce
16 Law Center.

17 Q. And do you also maintain an active private
18 practice in law?

19 A. Since 1986 I have been a member of the New
20 Hampshire Bar and am a sole practitioner focusing on
21 municipal law and planning and zoning law.

22 Q. In addition to your educational background
23 could you give us an idea of your employment background
24 as it relates to municipal issues.

25 A. Prior to attending law school in 1983 when we

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1 moved to Concord, I was principally employed as a city
2 planner in various parts of the country, in South
3 Carolina, in Texas, in Pennsylvania.

4 I've held supervisory community planning
5 positions, helping communities with their master plans,
6 writing zoning ordinances, performing various city
7 planning type studies.

8 I also did a bit of engineering work while I
9 was in the military. I spent two and a half years in
10 the military during the Vietnam war. Part of that time
11 was spent as a construction management officer where I
12 supervised millions of hours of work of construction
13 activity and part of that was spent in a site planning,
14 air base planning position, at headquarters level in San
15 Antonio.

16 And then my wife and I came back to New
17 Hampshire in 1974. I became the first city planning
18 director of the city of Berlin, and later was appointed
19 city manager of the city of Berlin, and then moved to
20 Concord to attend law school in 1983.

21 Q. So after living and working in Berlin you came
22 to Concord and have been living in Concord since 1983?

23 A. That's correct.

24 Q. And are you familiar with, and -- are you
25 familiar with the areas of Concord and the particular

1 area that we're dealing with, Loudon Road, in this
2 particular case?

3 A. Yes, yes I am, I'm familiar with all of
4 Concord.

5 Q. Are you also familiar, Mr. Mayor, with the
6 sign ordinance that has been in place with the City of
7 Concord and its history?

8 A. I am familiar with the sign ordinance. The
9 entire zoning ordinance was rewritten and reviewed in
10 detail by the city council in 2001 and that includes the
11 portions of the zoning ordinance that are the sign
12 ordinance.

13 Q. All right. And my understanding is that you
14 are speaking on behalf of the city council that adopted
15 this ordinance that's in dispute which is referred to,
16 judge, as the ECM ordinance, electric center message
17 ordinance, and if it's okay I will just refer to it as
18 ECM.

19 MR. ROBERTS: EMC.

20 MR. BAUER: Pardon me.

21 MR. ROBERTS: EMC.

22 MR. BAUER: EMC.

23 THE COURT: He's going to call it ECM just to
24 throw us off.

25 A. Yes, I am familiar with that ordinance.

1 Q. Okay. Are you also familiar with -- can you
2 give a brief description of what the city ordinances
3 allow and did not allow going back to approximately

4 1967.

5 A. With respect to electronic signs, my
6 understanding is that the city ordinances allowed the,
7 what we call the TDTs I guess we will use an acronym,
8 time, date and temperature signs, to visually
9 electronically display information but that all other
10 types of electronic signs that flashed and so on have
11 been prohibited by the ordinance except by variance.
12 It's always been possible to go get something done, to
13 get a variance for a flashing animated EMC type sign.

14 MR. BAUER: At this time, your Honor, I would
15 make an offer of proof that -- actually, let me do this
16 if I may. I'm going to put up on the screen various
17 exhibits, if I may. And right now I'd like to get
18 Exhibit Number 1 up on the screen. And would you just
19 zoom in on number one, please.

20 THE COURT: Just one second. Okay, I have it.

21 MR. BAUER: Okay.

22 THE COURT: Have you been in this courtroom
23 with Judge McAuliffe? Does he always crawl under the
24 bench to turn the switch? There's a switch that changes
25 my screen from real time to exhibits but in this

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1 courtroom it's -- you have to crawl under the thing to
2 do it.

3 MR. BAUER: Okay. Back on the record so to
4 speak.

5 THE COURT: Yes.

6 Q. BY MR. BAUER: I misspoke. I said Exhibit
7 Number 1. I meant Exhibit 23 which is up on the screen.

8 And Mr. Mayor, are you familiar with what is

9 on the screen, Exhibit 23, and these are all full
10 exhibits, your Honor.

11 A. Yes, I am. Those are the purposes of the sign
12 regulations as a whole, essentially the public purposes
13 that the sign regulations are intended to carry out.

14 Q. And in the legal vernacular as to, Mr. Mayor,
15 what is the substantive or substantial governmental
16 interests from the city's point of view that the sign
17 ordinance, and particularly the electronic sign
18 ordinance, addresses and deems to regulate?

19 MR. WINSTON: Your Honor, I'm going to object
20 for a lack of foundation. I don't see a foundation that
21 shows why this specific individual should know the
22 answer to that question.

23 THE COURT: Well, I think he said that he was
24 part of the adoption generally of the regulation --
25 re-regulation in 2001 as part of the council that did

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1 it. I think he can address -- this has been the same
2 purpose since 2001, hasn't it?

3 A. Yes, it has, your Honor.

4 MR. WINSTON: Your Honor, his testimony is
5 hearsay. Those witnesses aren't before the court.

6 THE COURT: He's one of them who adopted it.

7 MR. WINSTON: But he's testifying about what
8 the rest of them did.

9 THE COURT: Overruled. Go ahead.

10 MR. BAUER: Thank you, your Honor.

11 Q. BY MR. BAUER: So going back to my question.
12 With regard to the substantial governmental interests

13 that is being addressed by the city with regard to the
14 electronic sign ordinance and the sign ordinance in
15 general, would you identify what the substantial
16 governmental interests are, Mr. Mayor?

17 A. Well, I believe that all six of these purposes
18 forms substantial interest but some are more substantial
19 than others in terms of the EMC regulation. I think the
20 most important of a purpose here is subparagraph B of
21 the exhibit which is to maintain and enhance the
22 appearance and aesthetic environment of the city,
23 particularly in downtown Concord and Penacook, and along
24 the highway corridors leading into the city.

25 The principal concern of the city council in

19

1 adopting the ordinance that is at issue here today was
2 that we did not want the appearance of some of our key
3 commercial areas to --

4 MR. WINSTON: Your Honor, I'm going to object
5 again. This is hearsay again. He's testifying what the
6 city council decided, not what he knew.

7 THE COURT: Are we talking about 2001?

8 MR. BAUER: Yes.

9 THE COURT: Okay, what --

10 MR. WINSTON: I only object, your Honor, to
11 the extent he's trying to get into what kind of
12 commentary third parties are making and try to use that
13 to support his argument.

14 THE COURT: All right, so you need foundation.
15 What was the discussion at the time that led to the
16 adoption of this.

17 Q. BY MR. BAUER: Mr. Mayor, back in 2002 when

18 these principles, substantial governmental interests
19 were adopted, do you recall the discussion that occurred
20 regarding these particular principles, do you recall?

21 A. I don't recall any specific discussion on the
22 principles themselves. We had had several meetings on
23 the zoning ordinance, we had several meetings going
24 through the thing page by page. Virtually every page
25 was discussed and these particular public purposes for

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1 sign regulations in general were discussed and adopted
2 as part of a big thick zoning ordinance.

3 Q. What was the interest that the city was
4 addressing with regard to -- I'm going to take A,
5 encourage -- I'm sorry, B, the maintenance and
6 enhancements of the appearance and aesthetics
7 environment of the city?

8 A. Well, is the question with respect to EMCs or
9 the ordinance in general?

10 Q. To the EMCs.

11 A. With respect to EMCs the substantial objective
12 is to avoid having a proliferation of signs that detract
13 from the appearance and aesthetic character of our
14 commercial areas that we're trying to establish in here
15 Concord. We do not want our commercial areas of our
16 city to become Las Vegas or Atlantic City or Time
17 Square. That is, to keep and foster the type of
18 character we want to see in downtown Concord and
19 Penacook and our highway corridors, we need to regulate
20 these types of flashing animated electronic messages.

21 Q. And are you familiar with the type of flashing

22 strolling animated illusion of movement signs that we're
23 talking about with regard to these signs?

24 A. Yes, I am. Yes, I've seen them in other
25 communities and of course we have had some in Concord as

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1 well. Some by variance and some that have come in here
2 in the gap between ordinances.

3 Q. When you say the gap, this is before this
4 ordinance was posted?

5 A. Yes.

6 MR. BAUER: Your Honor, at this time I'd like
7 to play the videotape which is a full exhibit and it is
8 Exhibit 29. I'm going to show you the edited down
9 version. Attorney Roberts has had that. There's two
10 parts on that and it will be fine if you wanted to look
11 at the longer version later, but this one runs about
12 9 minutes. Thank you.

13 MR. WINSTON: Your Honor, I would just note we
14 have no objection to the display. We may have some
15 comments about the weight that it has.

16 THE COURT: Okay.

17 MR. BAUER: There is no commentary, judge.

18 THE COURT: Okay.

19 (Video being played.)

20 MR. BAUER: Thank you, your Honor.

21 Q. BY MR. BAUER: Mr. Donovan, we've just looked
22 at the first part of the exhibit, the video exhibit.
23 Would you describe on the record what you've just seen
24 and address, if you will, what the City of Concord was
25 trying to regulate with regard to the sign ordinance and

1 specifically the purpose as set forth in 28-6-1-B.

2 A. Well, what I saw on the video was what I
3 believe what we are calling the EMC type of signs. The
4 electronic messaging centers, which are electronic signs
5 with constantly changes messages, often photographs. I
6 saw one which was curious, I saw off-premise advertising
7 of real estate sales for Brady Sullivan on a sign at a
8 bank. So there are photographs. They are constantly
9 changing signs. It's animation. They are bright and
10 glaring with flashes. They go on and off. But
11 generally the type of sign that provides an awful lot of
12 visual stimuli to the passerby.

13 Q. I'd like to direct your attention to the next
14 purpose with regard to the substantial governmental
15 interests that the city was addressing with the sign
16 ordinance. And what is the next one that you'd like to
17 comment on.

18 A. Well, I thought the next one that the counsel
19 was concerned about with respect to these types of
20 signage would be the improvements and basic promoting of
21 pedestrian and traffic safety. These signs are meant to
22 gain attention and they're being proposed on our highest
23 traffic corridors. I believe Loudon Road where the
24 subject jewelry store is has about 20,000 cars a day for
25 traffic. I think it's our busiest entrance to the city.

1 And they provide a distraction to the drivers and the
2 pedestrians. And this is particularly critical on a
3 corridor like Loudon Road where we have a history of

4 some serious traffic accidents where we actually
5 installed in the late 1990s five pedestrian-activated
6 traffic signals on about a one and a half mile stretch
7 which are hard to see when you're focusing on all sorts
8 of other things that are happening visually as you're
9 driving.

10 So we were concerned in general about the way
11 these type of signage distracts drivers from pedestrians
12 as a traffic safety purpose.

13 Q. What other substantial governmental interest
14 did the city address when it enacted the EMC in August
15 of 2006?

16 A. Well, subparagraph C on the exhibit, retaining
17 the city's ability to attract and encourage economic
18 development and growth is really linked to subparagraph
19 B, the overall appearance and aesthetic environment of
20 our major corridors. But that's linked. We are trying
21 to establish a certain high quality character to our
22 retail and business sectors in Concord and that doesn't
23 happen if you get what I as a city planner calls sign
24 blight similar to what you have down in Route 1 in
25 Saugus and Revere as you're going into Boston. That's

24

1 not the type of economic development that comes along
2 with sign blight that you want to see in Concord.

3 MR. WINSTON: Object.

4 A. And that's linked to appearance and
5 aesthetics.

6 MR. WINSTON: Your Honor, I'd kind of like to
7 know where this is all going. So far all I'm hearing is
8 a personal opinion of the mayor who apparently does not

9 like electronic message centers. There's no signs that
10 connect the signs to traffic --

11 THE COURT: Well, I'm assuming that we're
12 going to come to council meetings that occurred some
13 time in 2006 that dealt specifically with these
14 electronic message centers, and I thought I saw minutes
15 and I didn't see much discussion, but we will get to
16 that.

17 Q. BY MR. BAUER: With regard to the governmental
18 interest set forth in E, minimizing the potential
19 adverse effects on the nearby public and private
20 property, would you first describe the neighborhoods
21 that adjoin Loudon Road for the court; please.

22 A. Well, the neighborhoods, Loudon Road, what we
23 call the Loudon Road corridor is a mixture of mostly
24 retail commercial and residential development. There
25 are several garden apartment projects that front right

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1 on Loudon Road. There's a fire station. There's a
2 large public park. There's a school right off of Loudon
3 Road which generates an awful lot of pedestrian activity
4 called Dame School. In fact, it was the first school to
5 participate in what then was experimental safe walk to
6 school day in Concord.

7 There are residential neighborhoods
8 essentially one lot back from Loudon Road that back up
9 to Loudon Road.

10 So it's -- it is a mixture of residential and
11 retail development with some -- with some public space.

12 Q. And are there also sidewalks along both sides

13 of Loudon Road and as you mentioned crosswalks?

14 A. There are sidewalks and many crosswalks both
15 sides.

16 Q. And were those issues also being addressed by
17 city council during the deliberative process that
18 occurred between December of 2005 and August of 2006
19 when enacting the EMC ordinance, present ordinance?

20 A. Those things were in all of our minds. We're
21 all familiar with the community and --

22 MR. WINSTON: Your Honor, I object.

23 THE COURT: Well, he certainly can't know
24 what's in everybody's minds. Sustained. Strike it.

25 Q. BY MR. BAUER: Was it in your mind, Mr. Mayor?

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1 A. It certainly was in my mind, yes.

2 Q. And was there discussion among the councilors
3 with regard to these topics and concerns?

4 A. There is discussion among the councilors but
5 mostly these sort of things are reflected in the written
6 record as well that's before us as staff reports.

7 Q. With regard to, the only one that you haven't
8 discussed is paragraph A, encourage the effective use of
9 signs, could you comment on that substantial
10 governmental interest as it relates to the adoption of
11 the EMC in August of 2006.

12 A. Well, the EMCs tend to -- tend to dominate an
13 area if they come in. If one comes in, then somebody
14 else wants one and somebody else wants one. They tend
15 to dominate because of their nature with the constantly
16 changing messages and the visual stimuli, they tend to
17 dominate the signs in the area so that someone who wants

18 the traditional identification signs of their business
19 that just tells what their business is, look, here we
20 are, John's Shoe Store or whatever, those sort of signs
21 get lost in the backdrop, and I think that by having
22 EMCs and letting them proliferate, that discourages the
23 effective use of signage overall because of the way they
24 dominate.

25 MR. BAUER: Your Honor, I'd like to address,

27

1 if I may --

2 THE COURT: I really don't understand that at
3 all. If you put an EMC in you said everybody wants an
4 EMC. And if everybody has an EMC, you're going to
5 prevent EMCs because a couple of people don't want them
6 and want to use the old signs? How does that promote
7 the effective use of the signs?

8 A. Well, perhaps everybody was -- assumes that
9 everybody is 100 percent, you know, that because the
10 case then there is nobody. But what my point, what I'm
11 trying to --

12 THE COURT: Well, are you seriously arguing
13 that a sterile sign is a more effective means of
14 communication than the EMCs that I just saw?

15 A. Well, the EMCs -- my understanding of one of
16 the principal purposes of signage is to identify the
17 location of a store. If you go back to the before the
18 EMC era you had a Red Blazer Restaurant sign and
19 everybody knew that the Red Blazer Restaurant was there
20 and the sign was regulated in terms of how big it could
21 be in and so, but it was a fixed identification sign on

22 the premises.

23 Now what the EMCs are, are not only do you
24 have that fixed sign, but you have the constantly
25 changing messages about prime rib at special night and,

28

1 you know, margaritas on the rocks tonight, so on and so
2 forth, are constantly changing visual stimuli which is
3 going beyond just identifying the location. So those
4 businesses that just want for whatever reason to have
5 the traditional business identification sign on their
6 frontage get lost in the many others that come along
7 that are doing this other thing.

8 THE COURT: That's like saying that when we
9 had independent billboards taking over from painting the
10 side of a barn, that the farmer's interest should be
11 protected because he preferred the sign on the barn as
12 opposed to eggs for sale out front on an independent
13 sign. I mean, it makes no sense to me at all.

14 MR. BAUER: Well, if I may, your Honor, I
15 guess what I'd like to suggest is that these are from
16 various governmental interests that went into
17 consideration --

18 THE COURT: I understand that. But I said are
19 you really seriously maintaining that a sterile sign is
20 a more effective means of communication? I just find
21 that incredible.

22 MR. BAUER: Well --

23 THE COURT: I mean, that may have been his
24 judgment, but --

25 MR. BAUER: And that's one of the --

1 THE COURT: I guess it's a comment on his
2 judgment.

3 MR. BAUER: And that's one of five or six
4 criteria as well of governmental interests.

5 THE COURT: I understand. I didn't think
6 that's what this was all about. I thought this was all
7 about the first two you addressed.

8 MR. BAUER: And I think you're absolutely
9 right, but I wanted some commentary that there was some
10 consideration of the other governmental interest --

11 THE COURT: Which I'm going to see in the
12 minutes of those meetings?

13 MR. BAUER: In some fashion or other, yes,
14 yes.

15 THE COURT: I will wait to have it pointed out
16 to me.

17 MR. BAUER: There's no doubt, judge, that
18 aesthetics to the primary governmental aspect the city
19 is addressing. A secondary interest is the traffic and
20 pedestrian issue. And then the other ones are
21 collateral.

22 THE COURT: Okay.

23 Q. BY MR. BAUER: I would just like to bring up
24 Exhibit Number 23 -- or maybe we can just do this by
25 hard copy, judge. I just want to direct your attention,

1 if I may, to what the fight is about here today. It's
2 Exhibit 23, and it's the third, fourth page, and it's
3 Section 28-6-7. Can I bring that up, please. And it's

4 subparagraph A, which starts off with signs which
5 physically or visually move, et cetera.

6 THE COURT: Ah-hum.

7 Q. And H, signs which appear animated or
8 projected, et cetera.

9 And Mr. Mayor, those two provisions were
10 adopted in August of 2006, were they not?

11 A. Yes, they were.

12 MR. ROBERTS: Objection, your Honor. And I
13 hate to interrupt, but A and H are the two provisions
14 that were found to be unconstitutional by Judge McGuire
15 in April of this year. What was enacted in August of
16 this year is R, Q and R.

17 MR. BAUER: With regard to what Judge McGuire
18 ruled on, judge, had to do with time, temperature and
19 date, and that has been excised with regard to A and --

20 MR. WINSTON: Your Honor.

21 THE COURT: Just a second. Let him finish
22 and, then you can comment. Go ahead.

23 MR. BAUER: Time, date and temperature were
24 part of A, and that was excised by city council in
25 August of 2006.

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1 And H, the word scrolling was added to H in
2 August of 2006.

3 MR. ROBERTS: As well as Q and R.

4 MR. BAUER: As well as Q and R, sure.

5 MR. ROBERTS: That's all I'm trying to
6 clarify, your Honor.

7 MR. WINSTON: And your Honor, I was just
8 concerned that he was characterizing Judge McGuire's

9 ruling as a ruling on content-based regulation. It
10 wasn't at all. It was failure to comply with Central
11 Hudson, failure to meet its burden of proof on prong
12 three and prong four.

13 THE COURT: Well, the ordinance on which she
14 rules is not the ordinance that's before me, right?

15 MR. BAUER: Correct.

16 MR. ROBERTS: A and H have been modified in
17 August as a result, apparently as a result of Judge
18 McGuire's ruling.

19 THE COURT: And that ruling is on appeal to
20 the New Hampshire Supreme Court.

21 MR. ROBERTS: Correct, has been briefed. We
22 don't have an oral argument day yet.

23 MR. WINSTON: But the signs that are covered
24 are all banned.

25 THE COURT: Pardon?

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1 MR. ROBERTS: The signs that are covered
2 before are all banned.

3 MR. BAUER: I'm sorry, I didn't hear that.

4 MR. ROBERTS: The signs that were covered
5 before are all banned under the new ordinance,
6 electronic messaging centers.

7 Q. BY MR. BAUER: Well, Mr. Mayor back to the
8 testimony. When was this, the ordinance that was
9 adopted in August of 2006, when was that posted?

10 A. I don't know the exact date, but I believe it
11 would have been posted when it first came before us for
12 public hearing, which the first public hearing was on

13 March 13th of '06 so it would have been posted at some
14 point about 10 days or so before that.

15 Q. And the records do reflect, the exhibits do
16 reflect that in March of 2006 there was an initial
17 posting of the ordinance that was adopted, your Honor.

18 Mr. Mayor, I'd like to now have you describe
19 the deliberative process that went on by the city
20 council and by the various city staff, planning board,
21 and ad hoc committees that went into the deliberative
22 process between December of '05 and ultimately August of
23 '06 which are reflected in the exhibits, and in order to
24 speed this up I will be happy to refer to the exhibits
25 and move through them.

33

1 MR. WINSTON: Your Honor, I'm going to object
2 that there's no foundation. We don't even know if the
3 mayor was present at these meetings. I think we're at
4 least entitled to know that before he starts telling us
5 about what occurred.

6 MR. BAUER: Well, they are part of the city
7 records. They are also full exhibits.

8 MR. WINSTON: Then we can go with the
9 exhibits.

10 THE COURT: I understand we can read them, but
11 I don't know where he's going. The objection is
12 premature. Overruled.

13 Q. BY MR. BAUER: Referring to Exhibit 1, please,
14 which is the December 28, 2005 report to the planning
15 board. Do you have that, Mr. Donovan?

16 A. Yes.

17 Q. Coming up?

18 A. Coming up, I think.

19 Q. Did you receive -- you know what, let me get
20 you a hard copy if I may.

21 Mr. Donovan, did you and the city council
22 receive a copy of Exhibit 1?

23 A. Yes, but that isn't, at least the first page,
24 that's not what's showing on the screen right now just
25 to make that clear. I think the second page is on the

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1 screen.

2 Q. Yes.

3 A. And it's dated December 28, 2005.

4 Q. Okay. Sticking with Exhibit 1, though, did
5 you and the rest of the city council receive Exhibit 1,
6 the report to the planning board?

7 A. Yes, we did. At some point we received the
8 report to the planning board.

9 Q. And was -- were aesthetics, and now directing
10 your attention to the screen, were aesthetics, the
11 impact on neighboring uses, impact on the character and
12 the other ideas that are set forth in the highlighted
13 version in Exhibit 1, were they part of your
14 consideration and the city council's consideration when
15 adopting EMC ordinance in August of '05?

16 MR. WINSTON: Your Honor, I wonder if we could
17 get that question clarified a little bit. Is this
18 considered after the fact consideration? Consideration
19 while the mayor is attending a meeting?

20 THE COURT: Well, you can cross-examine about
21 when he considered it or when they considered it. The

22 question is was it considered.

23 Q. BY MR. BAUER: Was it considered prior to the
24 city council adopting the EMC in August of 2005?

25 A. These reports were with the council before

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1 then and each councilor gets the entire package and
2 reads, to my knowledge reads everything, as I do, and
3 as, you know, highlighted on the screen this particular
4 report talks about the impact on aesthetics, neighboring
5 uses and so on of EMCs.

6 Q. Was there also consideration, if I can go to
7 the third area, zoom in, there's a reference now on page
8 two of Exhibit 1, second paragraph, was there commentary
9 being provided by city staff with regard to the right to
10 regulate what I'll call EMCs before the city council?

11 A. Yes. We were told in this report and others
12 that basically that the law allows regulation, as is
13 outlined here, getting into the location and frequency
14 of the message, that sort of thing, the intensity of the
15 message or that that was lawful to regulate along those
16 lines but that it was also lawful to simply prohibit
17 these sort of EMCs.

18 Q. Now, at this point in time in December of 2005
19 the prior ordinance, the time, date and temperature
20 ordinance was under legal challenge, was it not?

21 A. Yes, it was.

22 Q. But at that point Judge McGuire had not yet
23 ruled on that issue?

24 A. That's right, she had not ruled until April.

25 Q. Nonetheless the city is examining its time,

1 date and temperature ordinance?

2 A. Yes, the staff was doing that and at this
3 stage we're working with the planning board on that.

4 Q. Referring to Exhibit 2, prior to adopting the
5 EMC ordinance in August of 2006, did the city council
6 and you have this memo in front of you and consider the
7 commentary?

8 A. Yes, yes, we did.

9 Q. And if you zoom in, please, number four, Sue.
10 This is indicating that the city either has to -- has to
11 either prohibit all electric message signs including
12 time, date and temperatures or otherwise eliminate the
13 restrictions on the messages provided by such signs.
14 Was that in front of the city council when it adopted
15 the ordinance?

16 A. Yes, that message, yes, that message as in
17 front of the city council.

18 Q. And when you say the message, was that coming
19 from staff?

20 A. It was coming from staff and -- principally
21 from staff and also I believe from the planning board,
22 but principally from staff.

23 Q. Was the city council also familiar the idea
24 that there needed to be a balance between the
25 governmental interests that it was trying to protect and

1 First Amendment rights of commercial speech?

2 A. Yes. We're aware of that.

3 Q. And those are reflected also in the records

4 that we're seeing here?

5 A. That's right. Again, the staff reports, the
6 planning board reports reflect that concept as well.

7 Q. In January, now, Exhibit 2, what was the
8 purpose for this memo going to the city planning board.
9 If you can just give me, Mr. Donovan, if you could give
10 the court the explanation as to how this deliberative
11 process moved through the various boards with
12 recommendations and commentary for ultimate decision
13 making by the city council.

14 MR. WINSTON: Your Honor, again, we have
15 absolutely no foundation for this. It sounds like pure
16 conclusory statements.

17 THE COURT: For him to describe how the
18 deliberative process -- I hope as mayor he knows how it
19 works.

20 MR. WINSTON: We don't know if he was there.

21 THE COURT: Why do we care?

22 MR. WINSTON: We don't know how it worked in
23 this specific situation.

24 THE COURT: The question was, what is the
25 deliberative process.

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1 MR. WINSTON: Okay.

2 THE COURT: Not with regard to this specific
3 item but generally.

4 A. Well, this issue originally came to us with
5 the February 2nd report, and I don't know what exhibit
6 that is from the planning board. I guess that's
7 Exhibit 4. These reports come to us in a package --

8 THE COURT: Well, that's not what the question
Page 32

9 was. The question was, what is the deliberative
10 process. I presume, since I can't imagine it's any
11 different in Concord than it was in Manchester when I
12 was practicing law, the city planner provides something
13 to the planning board. That's what they're supposed to
14 do. The planning board then considers it. Is that
15 right?

16 A. Yes.

17 THE COURT: And that presumably would have
18 occurred with this memorandum.

19 A. That's right. And then it gets to the
20 council.

21 THE COURT: So that's the answer to the
22 question.

23 MR. BAUER: And if I could just make an offer
24 of proof. There are staff input recommendations made to
25 the planning board. The planning board, as we see in a

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1 number of these documents, makes various commentary,
2 recommendations, and they are recommendations only to
3 city council.

4 THE COURT: Well, this is a recommendation to
5 the planning board. It's not a recommendation to city
6 council.

7 MR. BAUER: Well, this particular document,
8 yes.

9 THE COURT: Right. Interestingly enough I
10 would have thought that lawyers would have made legal
11 recommendations, but apparently the city planner in
12 Concord gives legal opinions.

13 MR. BAUER: Well, we're getting to that.
14 We're getting to that, judge.

15 Q. BY MR. BAUER: Exhibit 4. Exhibit 4 is
16 entitled the report to the mayor and city council. And
17 would you describe that document and the purpose for
18 that document as it relates to the EMCs.

19 A. Well, this document was, as I said earlier,
20 the first time the issue got in front of the city
21 council, and it came to us as an agenda item with a
22 report and a recommendation that the city council retain
23 the current provisions of the sign regulations which at
24 that time would have retained the permission for the
25 TDTs and made no changes.

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1 Q. So in other words, the planning board here was
2 recommending that the current ordinance, the time, date
3 and temperature ordinance that was under attack, under
4 legal challenge, remain in place and that no change
5 would be made?

6 A. Yes.

7 Q. Exhibit 5 is an additional or supplemental
8 report to you and the city council; is it not?

9 A. Yes.

10 Q. And that is coming from whom?

11 A. That's coming from the community director who
12 says supervises the planning staff and others, and he's
13 recommending that we accept the report or schedule a
14 hearing on the proposed amendment.

15 MR. BAUER: With regard to Exhibit 6, your
16 Honor, if I could just make an offer of proof, city
17 council then tabled the matter for approximately a month

18 and a half, from February 1st through the middle of
19 March, March 13th, because of a request for additional
20 planning board input. The planning board, if I may
21 continue with an offer of proof, your Honor, the
22 planning board in Exhibit 7 then had further
23 deliberation and indicating in the minutes of the
24 planning board that the time, date and temperature
25 ordinary, your Honor, in place would maintain the status

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1 quo and respect the overall appearance of the city. And
2 that the ban was on not on content but on method. There
3 was some consideration, your Honor, as the records
4 reflect, that the EMC may have a place in the community,
5 but that is the planning board's thought process, if you
6 will, not the city council record, and I think you will
7 hear that the plaintiffs take that out of context, at
8 least in their pleadings filed so far.

9 Q. BY MR. BAUER: Ultimately, Mr. Donovan, what
10 happens? Is there any ad hoc committee input, and if
11 so, would you describe what happens there?

12 A. Well, in this particular case, after the
13 public hearing on the proposed orders on March 13th, the
14 city council wanted to have some input from the business
15 community, so they asked the staff to go set up and
16 organize an ad hoc committee to review the EMC zoning
17 amendment proposal and city council tabled the ordinance
18 until that was done and we had a report back. And so
19 there was an ad hoc committee of staff persons,
20 representatives of the business community,
21 representatives I believe from the sign community or

22 sign association and others that met and discussed the
23 situation.

24 MR. BAUER: And your Honor, just for the
25 record, those are reflected in Exhibits 12 and 13 in

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1 terms of this ad hoc committee, and the notes and
2 minutes of that ad hoc committee, part of which
3 consisted of the video that you've seen or a sample of
4 that video that you've seen.

5 Q. BY MR. BAUER: Mr. Donovan, after the ad hoc
6 committee was convened and there was a public debate and
7 discussion about this proposed EMC ordinance, what
8 happened then?

9 A. Well, the next, I believe there was another
10 report that came back to us as a result of that.

11 Q. And that's 14A?

12 A. I believe 14A. And the original motion had
13 been -- there with a couple tabled motions and at the
14 time that the council wanted to have a committee look at
15 this ad hoc it had been tabled to 90 days which brought
16 it back up June 19th. And in the interim on May 30th we
17 received a report from the staff reporting the results
18 of the committee's work and other information to us.

19 Q. Now, in the meantime did the city become
20 aware, did you become aware and the city council become
21 aware that Judge McGuire in Merrimack County Superior
22 Court had issued a ruling dated April 13, 2006?

23 A. That's right. She had issued her orders as
24 well.

25 MR. BAUER: And your Honor, that is part of

1 the record, tab 30, your Honor.

2 Q. BY MR. BAUER: And specifically on page six
3 and seven did you and the city council become aware of
4 Judge McGuire's legal ruling that, quote, to protect its
5 interest the city could regulate the number, proximity
6 or placement of electronic display signs, or it could
7 ban all types of electronic signs, including those
8 displaying time, date and temperature. Did you become
9 aware of that?

10 A. Yes, we were aware of that and of course
11 that's consistent with what we had been advised by our
12 staff right along. Her ruling is consistent with what
13 our staff has been telling us.

14 Q. While that is dicta, at the same time the
15 judge declared invalid the time, date and temperature
16 ordinance?

17 A. Yes.

18 Q. And the status of that case is what?

19 A. It's being appealed by the city to the New
20 Hampshire Supreme Court. And my understanding is that
21 the briefs have been submitted and it's awaiting
22 assignment for oral argument.

23 Q. So as of April 13, 2006 with Judge McGuire's
24 ruling in dicta, from what was the status of EMCs
25 ordinances in the City of Concord?

1 A. Well, as of that time the ordinance that we
2 had on the books had been struck down, so, but for the
3 restriction that accompanied the posting of the notice

4 of the prohibition we would have been wide open on
5 unregulated EMCs throughout our communities. So the
6 ordinance basically maintains the status quo while we're
7 waiting to see how this comes out of the Supreme Court.

8 Q. So in other words, if the Supreme Court
9 declares that the time, date and temperature ordinance
10 was valid and constitutional, what happens from the
11 city's point of view?

12 A. Well, as a practical matter it's probably no
13 different. We're back to where we were a year -- back
14 to where we were in December of 2005 if she upholds --

15 THE COURT: Let me just ask the question.
16 Isn't the Supreme Court of New Hampshire, once they find
17 out the City of Concord has adopted amendments in
18 August, going to declare the prior dispute moot? Are
19 they really going to rule on an ordinance that no longer
20 exists?

21 MR. BAUER: Well, it has been briefed, your
22 Honor.

23 THE COURT: I understand. I have things
24 briefed that I've declared moot before.

25 MR. BAUER: There's been no, I mean the city's

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1 position is --

2 THE COURT: I've even tried some that I
3 declared moot before.

4 MR. BAUER: The city's position is that that
5 was a valid ordinance.

6 THE COURT: It was valid, they say. It
7 doesn't exist anymore. I'm just curious. I've been
8 wondering whether any lawyers told them it's a new

9 ordinance.

10 MR. BAUER: I'm not aware that.

11 MR. ROBERTS: I represent Carlson's in that
12 matter.

13 THE COURT: I mean, I assume the Supreme Court
14 is like us, you have to have an actual case in
15 controversy.

16 MR. ROBERTS: Well, there is the allegation in
17 Carlson's and as found by Judge McGuire the irreparable
18 injury to the First Amendment rights. I don't know if
19 that is ever moot, your Honor. The change in the
20 ordinance may have mooted the particular prohibition
21 that prevented Carlson's from initially putting up the
22 signs, but the injury sustained by Carlson's --

23 THE COURT: So you still have damages?

24 MR. ROBERTS: There's still a damages
25 question.

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1 THE COURT: Was there a damage claim in that
2 suit?

3 MR. ROBERTS: That was on a different
4 procedural posture. It was an appeal from the ZBA
5 denial, the standard land use issue. I don't believe
6 that we had a specific request for money damages, so.

7 THE COURT: Be amending the writ pretty I
8 quick.

9 MR. ROBERTS: We could. There's been no
10 indication from the court, however, that they're going
11 to decline to hear oral argument based on mootness.

12 MR. WINSTON: Your Honor, I don't think it

13 really matters because the state court action doesn't
14 include an award of attorney fees, and that amendment
15 issue pertains more to Buchanan that I'm sure the court
16 is familiar with.

17 THE COURT: Okay. Go ahead.

18 MR. BAUER: There also is some discussion,
19 your Honor, with regard to the mootness in a most recent
20 South Carolina case that my brother was involved in, and
21 the court in that case decided that the issue was not
22 moot because there was a change in the ordinance, went
23 forward in the federal district court in South Carolina,
24 as you know.

25 THE COURT: That's on appeal in the Fourth

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1 Circuit, right?

2 MR. BAUER: It is on appeal as we speak.

3 Q. BY MR. BAUER: With regard to Exhibit 14A,
4 that document has three recommendation points; does it
5 not?

6 A. Yes, it does.

7 Q. And did that come before the city council
8 prior to the adoption of the EMC in August?

9 A. Yes. It would have been before us at our June
10 meeting.

11 Q. Referring to Exhibit 21, and if I could have
12 it zoomed, please, on the recommendation. Do you have
13 Exhibit 21, Mr. Donovan?

14 A. Yeah, I do, yes.

15 Q. That's a report to the mayor and council.
16 Would you describe what that report is for and the
17 recommendation?

18 A. This report, again, updated us on matters and
19 is a staff recommendation essentially to adopt the
20 proposed orders banning the EMCs at our August 14th
21 meeting. It had been tabled in June until August. And
22 the staff was recommending it for the reasons stated
23 here in the exhibit, which essentially was to maintain
24 the status quo while the Superior Court ruling was being
25 appealed to the Supreme Court.

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1 Q. Referring to Exhibit 22 now, those are minutes
2 of the city council, and what happened or occurred
3 during that proceeding?

4 A. Well, essentially the city manager summarized
5 for us that the staff had provided extensive report on
6 the entire matter and that the staff's recommendation
7 was to enact the prohibition. And then if you wanted to
8 after the -- after the Supreme Court appeal was resolved
9 we could amend the ordinance further. And then the
10 council at that time voted to pass the ordinance.

11 Q. And when it voted to pass the ordinance, was
12 there -- was the purpose to satisfy the substantial
13 governmental interests that was set forth in the purpose
14 of the signed ordinance?

15 A. Well, the purpose was, as stated here by Mr.
16 Aspell, the principal purpose was to maintain status quo
17 while the Supreme Court decision was pending. We had
18 this in force for 8 months and all these staff reports
19 which we had gone over here in my testimony and, you
20 know, it was certainly done under the umbrella of the
21 understanding that the sign ordinance was consistent

22 with those original purposes that we talked about
23 earlier.

24 Q. You also mentioned during your testimony about
25 a variance procedure. Would you just explain the

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1 variance procedure as it relates to EMC in this case.

2 A. Well, now or as was the case when the time,
3 temperature and date ordinance was in effect, anybody
4 who wanted an EMC, any business could apply for a
5 variance, go before the zoning board of adjustment. As
6 I think we all may know as attorneys, there are five
7 criteria that a variance has to demonstrate and
8 essentially those balance the substantial due process
9 inquiry, and if you can achieve that balancing, you're
10 entitled to the variance. If you can't, you probably
11 don't get it. But basically that variance process,
12 which under New Hampshire law is a substantial due
13 process thing, balancing, is there for all property
14 owners now and as it always was.

15 Q. And with regard to the proprietor that
16 challenged the time, date and temperature ordinance,
17 what was the process by which that proprietor went
18 through?

19 A. That proprietor had applied for a variance and
20 been denied on a three to two vote of the board of
21 adjustment and then the appeal resulted from that
22 denial.

23 Q. And in this particular case are you familiar
24 whether the jewelry store has ever applied for a
25 variance under the EMC statute -- ordinance rather?

1 MR. WINSTON: I'm going to object to the
2 relevance of that question.

3 THE COURT: What is the relevance?

4 MR. BAUER: The relevance is that there are
5 other alternatives to the -- -

6 THE COURT: Does that cure a First Amendment
7 violation?

8 MR. BAUER: No, but on the other hand we're
9 here, judge, on a preliminary injunctive relief matter
10 and that there were certain legal steps that could be
11 taken that would have obviated this whole proceeding.

12 THE COURT: Might have.

13 MR. BAUER: Might have.

14 THE COURT: If had been approved.

15 MR. BAUER: If it had been approved. And
16 we've heard the ZBA was a three-two vote on the first
17 proprietor and there's a very good chance we wouldn't be
18 in the court right now if that process was triggered.

19 MR. WINSTON: Speculation, irrelevant.

20 THE COURT: Well, it's speculation. It's pure
21 speculation. Sustained.

22 MR. BAUER: The procedure is there --

23 THE COURT: Sustained.

24 Q. BY MR. BAUER: As we stand at this point in
25 time, Mr. Donovan, with regard to the adoption of the

1 EMC, from your point of view, from the city's point of
2 view, what are the substantial governmental interests
3 that the present ordinance addresses?

4 A. Well, again, it addresses the subparagraph B
5 purpose of maintaining and enhancing the appearance and
6 aesthetic environment of the city, downtown Concord and
7 Penacook and along highway corridors. As I testified
8 about earlier, the substantial governmental interest is
9 in not having our commercial areas, the character of our
10 commercial areas turn into the Las Vegas type, Time
11 Square type environment that these signs will create as
12 principal governmental purpose.

13 The second governmental purpose is the
14 furtherance of traffic and pedestrian safety.

15 THE COURT: I'm curious about that. The only
16 thing that's been pointed out to me so far from the
17 record indicates that the only evidence you had before
18 you were traffic studies that showed there was no impact
19 whatsoever to the safety of the community in having
20 these signs. So where is the evidence upon which this
21 deliberative body determined that there was a safety
22 issue? Where in the record?

23 A. I believe in the record there are references
24 that the planning staff has made to that being a
25 legitimate substantial government purpose

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1 notwithstanding the fact that there apparently was a
2 study paid for by the sign industry on the New Jersey
3 Turnpike as I'm told, that concluded otherwise, but we
4 do have references in these reports to the planning
5 staff pointing out that substantial government interests
6 include aesthetics and traffic safety.

7 THE COURT: Well, I have no doubt that safety
8 is a legitimate public interest. What I'm asking you is

9 what evidence did you have that these signs affect the
10 public safety.

11 A. I think the evidence was the reports that we
12 had from our planning staff which are the professionals
13 that we look to for those --

14 MR. BAUER: Your Honor, if I may address this.
15 This is a legal principle that members of city council
16 and board of selectmen may take in consideration their
17 own personal knowledge if they're familiar with the
18 environment, and that's --

19 THE COURT: Then you get to counselor's
20 objection, how can he speak for the other 14 people on
21 the council as to what was in their head? What I'm
22 saying is, I would like to know where in the written
23 record is there any substantiation that it's a danger to
24 safety?

25 MR. BAUER: There is no affirmative evidence

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1 that there is a connection between scrolling and
2 flashing signs and traffic accidents. What was before
3 this committee before the city council was a report that
4 they rejected because it had no validity. It was on the
5 New Jersey Turnpike.

6 THE COURT: Well, where does it say that?

7 MR. BAUER: In the report itself.

8 THE COURT: Well, point it out to me. I'm not
9 arguing with you.

10 MR. BAUER: Sorry, your Honor.

11 THE COURT: I'm asking -- I have not read this
12 -- look, you gave me a 3-inch folder this morning. I'm

13 only reading what you're asking me to read as you go
14 along. So I ask the question not because I'm fighting
15 with you, because I want to know. I'd like to be
16 educated.

17 MR. BAUER: Tab 33.

18 MR. ROBERTS: Which is the traffic safety
19 study, your Honor, that we submitted both at the
20 Carlson's matter and in connection with this case, but
21 it's not on the Jersey Turnpike, it's a commercial
22 intersection in Pennsylvania, and I think what the
23 court's looking for is Exhibit 1 where this is the
24 report to the planning board from Mr. Rice who is with
25 us this morning, where he states with a number of

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1 traffic studies concluding that the message has little
2 relationship to safety, only aesthetics remain viable as
3 criteria.

4 THE COURT: That's what I read. That's why I
5 asked after this particular -- I mean this traffic
6 safety study that you submitted was not before this
7 council, was it?

8 MR. ROBERTS: It was before --

9 MR. BAUER: Yes.

10 MR. ROBERTS: -- the ZBA in Carlson's.

11 THE COURT: It was?

12 MR. ROBERTS: Yes, it was.

13 THE COURT: So it is one of the studies that
14 the staff had.

15 MR. ROBERTS: Absolutely, right.

16 THE COURT: From which they concluded that --

17 MR. ROBERTS: There's no --

18 THE COURT: -- there's little relationship to
19 safety.

20 MR. ROBERTS: That's my understanding as well,
21 your Honor.

22 MR. BAUER: Which the city council rejected,
23 your Honor, because looking at Exhibit 33 it is clear
24 that this has nothing to do with the issue in front of
25 the city council. This report does not deal with

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1 flashing signs, scrolling signs or EMCs. It has to do
2 with stationary signs on the New Jersey Turnpike that
3 was completely rejected by the city council.

4 MR. WINSTON: Your Honor.

5 MR. BAUER: If I may. What you're suggesting
6 or what you're looking for is, is there any affirmative
7 evidence to the contrary.

8 THE COURT: Yeah.

9 MR. BAUER: And the answer is no.

10 THE COURT: Okay.

11 MR. BAUER: However, however, the 15 city
12 council members, as a matter of law, may take into their
13 consideration their familiarity with Loudon Road and its
14 aesthetics.

15 THE COURT: Well, they didn't pass this
16 ordinance just with respect to Loudon Road.

17 MR. BAUER: No, they didn't.

18 THE COURT: It's the whole City of Concord,
19 wasn't it?

20 MR. BAUER: Yes.

21 THE COURT: So you're telling me that they

22 adopted this ordinance because of their concerns about
23 Loudon Road?

24 MR. BAUER: One of them, yes. And the
25 aesthetics of the city.

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1 THE COURT: Where in the record does it say
2 that?

3 MR. BAUER: Well, it doesn't, your Honor, and
4 I guess it doesn't say it in the record and I guess --

5 THE COURT: Where does it even say they
6 adopted this ordinance because of safety?

7 MR. BAUER: It doesn't specifically say that
8 either, your Honor, but taking into consideration their
9 purpose of the sign ordinance to --

10 THE COURT: You could have five purposes, but
11 you amend an ordinance only because of one of them.

12 MR. BAUER: To improve, the purpose is to
13 improve traffic safety. It's not to see whether there's
14 any correlation between accidents and scrolling signs,
15 to improve safety.

16 THE COURT: I didn't say that. You improve
17 safety by keeping the status quo --

18 MR. BAUER: To --

19 THE COURT: -- of no signs?

20 MR. BAUER: To improve safety to prevent
21 scrolling flashing signs distracting motorists as they
22 drive down the streets of Concord, yes.

23 MR. ROBERTS: The question is, where's the
24 proof that that ban, the specific ban directly and
25 materially advances that asserted interest, and the

1 answer is there is no proof.

2 THE COURT: Well, there's certainly nothing
3 before the council as Mr. Bauer acknowledges.

4 MR. ROBERTS: Right.

5 MR. BAUER: And I just might add, I need to
6 add that that was a secondary consideration of traffic.
7 The primary --

8 THE COURT: Clearly aesthetics is referred to
9 in virtually every document.

10 MR. BAUER: And I just don't want the tail
11 wagging the dog here. Aesthetics is aesthetics is
12 aesthetics.

13 THE COURT: Well, that comes down to the issue
14 of whether or not the Supreme Court of the United States
15 has ever said you can regulate First Amendment rights
16 purely and only because of aesthetics.

17 MR. BAUER: Right, and on that we have a legal
18 dispute.

19 THE COURT: Right.

20 MR. BAUER: And we've tried to lay that legal
21 dispute out with Metromedia.

22 THE COURT: Yup.

23 MR. BAUER: Most recently if I may just pick
24 up my papers here.

25 THE COURT: Yes.

1 MR. WINSTON: Your Honor, I'd like not to get
2 too deeply in this legal argument. It's addressed in
3 parties' --

4 THE COURT: I've read it. I didn't just make
5 this up.

6 MR. WINSTON: I'm sorry, your Honor.

7 THE COURT: I'm picking it up out of your
8 arguments, you know. You know, the only reason judges
9 ask questions is because that's what really concerns
10 them, so I'm kind of interested in hearing both sides
11 with regard to that.

12 MR. BAUER: If I may.

13 THE COURT: Yes, please.

14 MR. BAUER: With regard to aesthetics --
15 pardon me?

16 THE COURT: I tell you, I'm never using
17 McAuliffe's courtroom again. You could get killed in
18 here.

19 MR. ROBERTS: Booby trapped.

20 MR. BAUER: With regard to aesthetics
21 constituting, standing alone, away from the general
22 welfare of being traffic, aesthetics does constitute a
23 substantial governmental interest. That is set forth in
24 the Metromedia case. Plaintiffs take the adverse
25 position, but if you take a look at that plurality

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1 decision, and you will find that there are seven judges
2 of the Supreme Court that concluded that avoiding visual
3 clutter, visual clutter, aesthetics, was sufficient to
4 satisfy the ban on billboards. That's one case. That's
5 the Metromedia case.

6 MR. WINSTON: Your Honor, if I might point out
7 to the court, the parties in Metromedia stipulated that
8 aesthetics and traffic safety were substantial

9 government interest for the purpose of resolution of
10 that case concerning billboards. The same parties
11 agreed, even if you might have an on premise sign that
12 looked exactly like a billboard, there are different
13 considerations for on premise signs, and San Diego
14 decided to allow an identical structure because it's a
15 different policy. The billboard advertiser has other
16 media to express themselves through and their sign does
17 not attract somebody to commercial activity occurring
18 where the billboard's located. That's the difference.
19 It's a completely different consideration.

20 On the other hand, on premise signs are in a
21 commercial zone. It was zoned for commercial purposes.
22 It's there to propose commercial transactions. It's
23 like comparing apples and oranges.

24 MR. BAUER: The second case that, federal case
25 that identifies aesthetics as being a stand alone

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1 substantial governmental interest comes from the
2 Eleventh Circuit which is the Manatee County case in
3 which the court said that aesthetics is a substantial
4 governmental interest which is entitled to and should be
5 accorded weighty respect.

6 There are other cases such as the taxpayer
7 case from the Supreme Court in 1984 which is also cited
8 in the briefs, your Honor.

9 MR. WINSTON: Your Honor, Taxpayers versus St.
10 Vincent is a public forum case. The government created
11 the forum, the government controls the forum, the
12 government uses a different regulatory scheme. One

13 example is the government -- there is no requirement
14 from incorporating Freedman protections in a public
15 forum regulatory scheme in a permitting process where
16 there is when you're regulating signs in private areas.
17 Different standards. Billboards have a standard.
18 Public forums have a standard. Private forums have a
19 standard. These folks are trying to blur all the
20 standards.

21 The case out of Florida ignored Justice
22 Brennan's concurring opinion that specifically said that
23 this is billboard law. It applies to billboards.
24 Essentially saying, keep applying it to billboards,
25 don't try to extend it beyond that.

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1 What are we trying to do here today? Use
2 billboard law to attack other media. That's also an
3 Eleventh Circuit case, not a Supreme Court case.

4 MR. BAUER: And the next case as I started to
5 say was this taxpayer case which my brother just
6 referred to, 1984 Supreme Court case. In addition, as
7 this court I think knows, the state statutes also
8 recognizes under RSA 674:16, that a municipality may
9 rely solely on promotion of aesthetic values to justify
10 the exercise of zoning ordinance and zoning power. Now,
11 I recognize that that is a state court zoning issue, but
12 that is a statement about they are relying solely on
13 aesthetics.

14 Now, what my brother just mentioned was
15 billboard law, and frankly before I think it was
16 September 20th of 2006 of this year in South Carolina,
17 we didn't have, or at least we could not find and

18 certainly they didn't cite any EMC cases. There is but
19 one EMC case that we've been able to find in the entire
20 country, comes out of the federal district court in
21 South Carolina. I raise that. I understand it's on
22 appeal. But at this point in time we're here on a
23 preliminary injunction, or they are here on a
24 preliminary injunction request that essentially requests
25 that this federal court strike down the entire sign

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1 ordinance for the City of Concord. That is too fast and
2 too much on a preliminary matter. There can be and
3 probably will be when the merits of this case are tried
4 before the court, experts, both on aesthetics as well as
5 traffic in terms of what EMCs do and what they don't do
6 and what this ordinance accomplishes and what it was
7 trying to protect.

8 Lastly, the statement or purpose in the
9 ordinance is also evidence of the substantial
10 governmental interest. That case is a Ninth Circuit
11 case. It's the Morin (ph) case.

12 MR. WINSTON: Your Honor, it's also a
13 billboard case.

14 MR. BAUER: Also what?

15 MR. WINSTON: Billboard case. But your Honor,
16 I kind of object to the way we're proceeding. I could
17 rebut everything he's said about why --

18 THE COURT: You're going to have your chance.

19 MR. WINSTON: Okay. It just seems like it's
20 more appropriate for a closing argument, it's a legal
21 argument.

22 THE COURT: I have raised the question. Mr.
23 Bauer was responding to my raising the question. It's
24 not his fault. It's mine as usual. Go ahead.

25 MR. BAUER: Your Honor, that's all I have on

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1 direct testimony. All the exhibits are in. The mayor
2 is here for cross-examination.

3 THE COURT: Well, I don't want to wear out our
4 court reporter. Do you want to take a break? Okay, how
5 about 10 minutes, 12 minutes.

6 (Recess taken at 11:20 a.m.)

7 THE COURT: You may proceed.

8 MR. WINSTON: Thank you, your Honor. Your
9 Honor, we may not be using the electronic monitoring, so
10 counsel has agreed -- oh, he's already got it up.

11 CROSS-EXAMINATION

12 BY MR. WINSTON:

13 Q. Good morning, Mr. Donovan.

14 A. Good morning.

15 Q. You're a lawyer; is that correct?

16 A. That's correct.

17 Q. What is your commercial speech background?

18 A. Limited.

19 Q. Are you familiar with the book called Street
20 Graphics?

21 A. No.

22 Q. That's not something you studied as a planner?

23 A. No. I studied as a planner in the sixties. I
24 don't recall that book.

25 Q. Okay. That would have pre-dated. It was

1 first published in '74. So you don't keep up with
2 planning trends and recommendations?

3 A. I keep up with planning trends and
4 recommendations, but I'm not familiar with the book that
5 you describe.

6 Q. Okay. City of Concord a member of the
7 American Planning Association?

8 A. I believe we are.

9 Q. Are you a developer?

10 A. No.

11 Q. What is your law practice?

12 A. My law practice focuses on municipal law and
13 planning and zoning law.

14 Q. No speech law?

15 A. Not in this context, no. I have had some
16 First Amendment related advisory work on employee
17 disciplinary matters and things like that. I haven't
18 had a sign case.

19 Q. Do you get paid as mayor?

20 A. Yes.

21 Q. Is that a substantial salary or is it a full-
22 time occupation type salary?

23 A. Yes, we have a city manager form of
24 government. The mayor is not a full-time by any means.
25 The salary is \$2,000 a year.

1 Q. Okay. Thank you. Do you know when Central
2 Hudson was decided?

3 A. Not offhand.

4 Q. Was Central Hudson ever discussed during any
5 of these meetings that you attended?

6 A. It was not discussed at a meeting as such.
7 I'd have to look at the exhibits to see if it's
8 referenced in any of the exhibits.

9 Q. Okay. Was there any concern that you're aware
10 of after the state court ruling on Central Hudson where
11 you're aware that city officials debated how they would
12 be able to comply with Central Hudson if they passed
13 another ordinance?

14 A. I didn't follow that question, sir.

15 Q. Was there any debate that you're aware of
16 amongst city officials before they passed this ban on
17 speech to insure that it complied to Central Hudson?

18 A. Well, we passed -- we as a council passed what
19 you are calling ban on speech. The record shows that
20 the planning staff and the planning board had a lot of
21 discussion of all these issues and I believe it does
22 reflect discussion of various concerns about the staff
23 and planning board in these various discussions. It's
24 not a discussion of that per se with city council.

25 Q. Okay. Where did the purposes that you were

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1 examined about come from?

2 A. The purposes I believe as I testified, the
3 entire zoning ordinance was revised in 2001. That's
4 actually a process that took several years to reach
5 culmination. I don't know if those purposes, as they
6 are worded in the present ordinance, were in the
7 predecessor ordinance or not, but I suspect something
8 very close to them was if they were not in their

9 verbatim.

10 Q. Did you have any role in putting those
11 together?

12 A. Did I personally have any role?

13 Q. Yeah.

14 A. I didn't write the zoning ordinances. The
15 city council and I adopted the zoning ordinances.

16 Q. Did you make recommendations that those be the
17 purposes?

18 A. Did I as mayor make recommendations those be
19 the purposes, no.

20 Q. Do you know who did?

21 A. The zoning ordinance would have been prepared,
22 it was a lengthy process that ran from approximately
23 1993 through 19 -- through 2001 where the planning staff
24 and a committee that the mayor and council had
25 appointed, we had a nice little acronym for it, it

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1 escapes me, ZORCOC or something like that, zoning
2 ordinance review committee of citizens essentially spent
3 several years putting that zoning ordinance together and
4 recommending it to the city council. It started with
5 staff. It was chewed over by a citizens committee and
6 ultimately --

7 Q. How many citizens are we talking about?

8 A. Several. It's been a while. I would say a
9 dozen to 20, but again, I could be corrected. It's
10 been, you know, several years. It's been 5 years since
11 we actually adopted the ordinance.

12 Q. Okay. And you were following that small

13 number of citizens' recommendations?

14 A. I don't think you heard me correctly, sir. I
15 said that the ordinance came to the city council as a
16 mixture of the staff recommended ordinance with the
17 input -- we're talking entire zoning ordinance that is
18 approximately 3 inches thick. That entire ordinance
19 came to the city council having been reviewed with some
20 amendments that the citizens committee had added to it.
21 Basically it started with the staff and the planning
22 board.

23 Q. How many citizens live in Concord?

24 A. We're a population of around 44,000 if you
25 count the state prisoners.

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1 Q. Okay. How about if you don't count them?

2 A. Probably 42.

3 Q. What was the purpose of the video that we saw?

4 A. The purpose of showing the video today?

5 Q. Was that to prove that electronic message
6 centers are ugly?

7 A. No. The video was used at the ad hoc
8 committee meeting to show what typical EMCs look like.

9 Q. But that meeting was inconclusive, wasn't it?

10 A. The meeting -- inconclusive in what sense,
11 sir?

12 Q. There was no recommendation made from that
13 committee that was followed, was there?

14 A. They didn't make a specific recommendation.

15 Q. How much of the committee worked for the city
16 and how much was private?

17 A. May have I look at the exhibit and see who?

18 Q. If you don't recall, if you don't that's fine.

19 A. The exhibit has a list which will tell. Since
20 you ask the question I'd like to look at the list and
21 answer the question unless you'd like me to --

22 Q. Sure.

23 MR. BAUER: Exhibit 13.

24 A. Amongst the people, there are 15 people that
25 attended the ad hoc committee meeting. Four of them are

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1 employees of the city, the last four on the list.

2 Q. Are any of the other ones connected with city
3 government in any way?

4 A. Yes, three councilors and the planning board
5 chair there.

6 Q. How many are not connected with the city
7 government in any way?

8 A. Well, the rest. There are 15. Four city
9 employees, three councilors, and planning board chair.

10 Q. Okay. The video that you showed, was that
11 ever presented to the city council?

12 A. It was not shown to the city council. It was
13 offered and we did not look at it.

14 Q. Why.

15 A. Well, the feeling was that it's a common sense
16 type thing. We all know what these things looked like.
17 We didn't need to see the video. In our every day
18 experience around the state we know what they look like.

19 Q. Your every day experience around the state.
20 Are you suggesting that the surrounding cities allow
21 EMCs?

22 A. We see them around us in other places in New
23 Hampshire and people don't -- we're not stupid, we know
24 what an EMC is, we've seen them. We have some in our
25 own communities as you know.

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1 Q. What makes Concord so different than the rest
2 of the communities that it needs to ban them?

3 A. I'm not sure. You'd have to explain which
4 communities you're talking about that allow them and
5 which ban them.

6 Q. Well, the surrounding communities have more
7 EMCs than Concord does?

8 A. We're talking about the EMCs in other
9 communities. I'm talking about the southern part of the
10 state, Manchester, points south.

11 Q. How far is Manchester?

12 A. 20 miles.

13 Q. Okay. Sorry, your Honor, but you asked
14 several of my questions.

15 THE COURT: Pardon?

16 Q. You've already asked several of my questions.

17 THE COURT: Manchester doesn't have any
18 downtown. Are you familiar with the ordinance in
19 Manchester?

20 A. I'm not familiar with the Manchester
21 ordinance, but I believe one of those, I believe I saw
22 one, a couple Manchester scenes in the video which I
23 just watched.

24 THE COURT: Well, I remember them out on South
25 Willow Street. I just don't remember them right

1 downtown.

2 A. I think there was right downtown by one of the
3 bridges in the video.

4 Q. BY MR. WINSTON: Do you know what commercial
5 speech is?

6 A. Yeah, I'm not -- the area of commercial
7 speech, as you've already established, is not an area
8 that I am particularly specialized in or competent to
9 practice as such as a lawyer.

10 Q. Are you aware that the city council consulted
11 any First Amendment experts during its deliberative
12 process?

13 A. I'm not sure what I would consider First
14 Amendment expert. We have legal council, city solicitor
15 that was involved in these discussions with the staff.

16 Q. Beyond that did you have any other legal
17 council?

18 A. I'm not aware of it but that doesn't mean
19 there wasn't any.

20 Q. Okay, I'd like to direct your attention to
21 Exhibit 1 again, page two. And I'd like you to take a
22 look at paragraph two and the last sentence.

23 You would agree that indicates that there was
24 a division of opinions on EMCs at least at the point
25 this memo was written?

1 A. Well, the sentence means what it says. It
2 says some staff members thought the electronic signs are
3 more attractive and easily read than manual changeable

4 copy signs.

5 Q. Is there any objective standard to tell
6 whether they are aesthetically pleasing or not?

7 A. I believe aesthetic is principally a matter of
8 subjective determination.

9 Q. Okay.

10 A. It's not a matter that I would expect that one
11 would have to establish through experts.

12 Q. Okay, I'd like to direct your attention to
13 Exhibit 2 which is the memorandum of Douglas Woodward,
14 city planner dated January 26, 2006. Is Mr. Woodward a
15 lawyer?

16 A. No.

17 Q. Okay. And so I'd like to direct your
18 attention to the last paragraph on page one of that
19 exhibit.

20 Would you agree that there are comments about
21 pending litigation and an analysis based on free speech?

22 A. Allow me to read it, please.

23 (Pause.)

24 A. And I'm sorry, what was your question again,
25 sir?

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1 Q. Is Mr. Woodward a lawyer?

2 A. No.

3 Q. Does this appear to be commentary on how law
4 regulates signs?

5 A. It appears to be reporting to us, the code
6 administrator who is a different person, believed is a
7 trend in the law and a situation that they felt needed
8 to be addressed.

9 Q. Is the code administrator a lawyer?
10 A. No. But I will say that these people, we have
11 a full-time city solicitor on our staff who spends an
12 awful lot of time communicating with the key
13 administrative officials, and although I don't know, I
14 would be surprised if he wasn't involved in these
15 conversations with the staff.
16 Q. Okay. I'd like to now direct your attention
17 to Exhibit 3, first page. It's entitled Excerpt from
18 the February 1, 2006 minutes of the Concord City
19 Planning Board. I'd like you to take a look for a
20 minute at the last paragraph on that page.
21 (Pause.)
22 Q. Actually the last couple sentences.
23 (Pause.)
24 Q. You would agree as of February 2006 that again
25 staff seemed to think it might be appropriate to allow

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1 EMC so long as they were kept out of the special
2 districts identified above?
3 A. What this paragraph was doing was summarizing
4 Mr. Rice's recommendation to the planning board on ways
5 to regulate EMCs.
6 Q. Okay, so as of February it seems appropriate
7 to allow EMCs, or do you believe --
8 A. No, you're misquoting the letter, sir. It
9 says, he's talking about EMCs in the UT district. He's
10 talking about it being appropriate in only one district.
11 Q. It seems appropriate that the EMC signs be
12 limited to those purposes of the district?

13 A. He's speaking about certain district, he's not
14 speaking about blanket approval of EMCs.

15 Q. Okay, a public hearing as scheduled, is that
16 correct?

17 A. Yes.

18 Q. And what was the purpose of scheduling that
19 public hearing?

20 A. Well, public hearing is a legal requirement
21 for enactment of any ordinance amendment or ordinance
22 for that matter.

23 Q. Is that just a mechanistic step you have to go
24 through?

25 A. It's a legal requirement of our state

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1 statutory scheme to enact a police power type ordinance
2 requires a public hearing. Probably does everywhere.

3 Q. How important is what happens, what kind of
4 testimony is presented at public hearing, is that
5 important at all?

6 A. Of course it is. We take into account all
7 public testimony. We consider all public testimony that
8 we hear.

9 Q. Okay, and the only public testimony that you
10 received at that public hearing was testimony
11 recommending that you allow EMCs?

12 A. The only person that testified was a
13 representative of the sign industry who, yes,
14 recommended it.

15 Q. Would you conclude from that that the
16 community wasn't interested in banning EMCs?

17 A. I'm sorry, that the community was not?

18 Q. Yes.

19 A. No.

20 Q. How would you conclude it was?

21 A. There were 15 of us who are elected to make
22 those decisions. That's why we get paid those bucks as
23 you say.

24 Q. So you are the community?

25 A. We have a representative form of government of

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1 15 city councilors. We are representative of the
2 community.

3 Q. When folks come in and are not interested in
4 your plan, that's essentially irrelevant?

5 A. No. The sign -- the folks who represent the
6 sign issue are part of our communities. We listen to
7 what they have to say.

8 Q. Whose aesthetics are we talking about here,
9 city officials aesthetics or the communities?

10 A. The communities.

11 Q. Why didn't the community show up to talk about
12 it?

13 A. I have no idea. Only 50 percent of the people
14 vote, I don't know.

15 Q. Why would you conclude 15 people out of 40,000
16 represent the community's interest?

17 A. Well, I think we're here talking basic
18 democratic representative government. If we don't
19 represent the community's interest and if we don't make
20 those decisions, who does? We're not a town meeting
21 form of government.

22 Q. So because they voted for you, you have a
23 monopoly over what those interests are?

24 A. I wouldn't use your words, sir.

25 Q. What words would you use?

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1 A. I wouldn't use the word monopoly.

2 Q. What do you have?

3 A. Because they voted for us we have the
4 responsibility of deliberating on matters, listening to
5 what people have to say in public forums, and making
6 decisions that we feel best represent the interests of
7 our community as a whole, all 15 of us as a group, and
8 it's not often unanimous when we do that.

9 Q. Okay. So the public input is just window
10 dressing?

11 A. No.

12 Q. Okay. I'd like to turn your attention to
13 Exhibit 7. Okay, this is a memo from February 22, 2006.
14 The third to the last paragraph.

15 Would you concur that the gist of that
16 paragraph is that the city wanted to maintain the status
17 quo until it's ready to consider an appropriate set of
18 regulations?

19 A. No. I wouldn't agree with the way you said
20 that. This is a planning board. It's an excerpt of
21 planning board minutes. This reflects the planning
22 board's view at this point in time I might add.

23 Q. And their view was that it would require time
24 to develop the ordinance and they wanted to maintain the
25 status quo until they had the time to research, isn't

1 that essentially what they suggest?

2 A. That's right.

3 Q. Okay. And what was the outcome of this
4 meeting?

5 A. Of the planning board meeting on
6 February 22nd? I believe it led to a report which is
7 probably the next exhibit coming to us. I believe it
8 led to Mr. Woodward's report that is Exhibit 8.

9 Q. Okay. I'd like to direct your attention to
10 that report which is exhibit, I believe it's Exhibit 8,
11 yes.

12 If you look at the discussion in the last
13 paragraph, does that not indicate that as of February
14 27, the city still decided to put off conducting further
15 research on appropriate EMC regulations?

16 A. I don't see anything in there about putting it
17 off. I think it basically summarizes what the minutes
18 said that you questioned me about a few minutes ago. I
19 think the gist of it was to maintain the status quo.

20 Q. Is maintaining the status quo not putting it
21 off?

22 A. What this paragraph does, you're asking me
23 just about this paragraph, I think it again conveys a
24 message to city council that we have the option of
25 adjusting the ordinance to allow for EMCs with certain

1 restrictions or to prohibit them community-wide,
2 including temperature, date and time. That's what this
3 paragraph says, which I think is consistent throughout

4 all these documents.

5 Q. Okay, then I'd like to turn your attention to
6 page two of the same exhibit, and specifically paragraph
7 four. The board generally agreed that the EMC signs may
8 have a place in the community but developing an
9 appropriate set of regulations will require time.

10 A. That's right.

11 Q. So were they putting off the research?

12 A. No, they weren't putting it off. I think what
13 they're saying is they want to maintain the status quo
14 until the city was ready.

15 And I think the other thing that was going on
16 at this time is we had the court case pending and the
17 outcome of that court case may well dictate what happens
18 next and whether we undertake the effort to revise the
19 ordinance or whether we simply continue the -- or go
20 back to the old ordinance or to continue.

21 Q. Okay, I'd like to address, I'd like to direct
22 your attention to Exhibit 9 which appear to be the
23 minutes of the city council meeting conducted on
24 March 13, 2006. I'd like to you take a look at page --
25 the bottom of page one starting with Mr. Reid, and then

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1 continue on to page two to the word community.

2 (Witness looking at exhibit.)

3 Q. This is the public input that you received; is
4 that correct?

5 A. Mr. Reid was the only one to testify at the
6 public hearing.

7 Q. Okay. And what did he recommend?

8 A. He recommended that we set up the ad hoc

9 committee is how I read this to get input from the
10 business community.

11 Q. What about getting the proper amount of
12 technical information?

13 A. He also said that he felt we weren't getting
14 the right amount of technical information.

15 Q. Was there any follow-up on that that you're
16 aware of?

17 A. Well, without proper technical, I think he was
18 part of that, I believe he was, Mr. Reid was part of
19 that group or somebody from the sign association was.

20 Q. Who picked the people in that group?

21 A. I don't know. Wasn't me.

22 Q. Weren't you curious about that? You were at
23 the meeting.

24 A. No, I wasn't curious about that. Quite often
25 we have set up citizens ad hoc hearings. As I explained

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1 earlier, Concord is a city management form of government,
2 not a strong mayor form of government, and many of our
3 committees are appointed by the city management staff
4 and some appointed by me.

5 Q. Why was there a bias toward people connected
6 to the city in that group?

7 A. There is no bias, so I can't answer that
8 question.

9 Q. Well, you agree that you -- I thought you
10 agreed earlier that less than half of them were from
11 private industry with no affiliation with the city?

12 A. Well, again, you're trying to characterize a

13 list of people there as biased. I think it's quite
14 clear from the list there are some city councilors, some
15 state staffers, and some members of the business
16 community.

17 Q. Is there much dissent among the city council?

18 A. Depends on the issue.

19 Q. How about on First Amendment?

20 A. You will have to tell me the issue. We all
21 believe in free speech of course.

22 Q. How about EMCs, was there dissent?

23 A. It was a voice vote and there were councilors
24 who voted against it. That usually means there were
25 probably no more than three or four, because if there's

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1 more I ask for a show of hands vote, and I did not do
2 it.

3 Q. Okay.

4 A. And actually I know there were at least three
5 with the subsequent discussions.

6 Q. You don't need to keep --

7 A. You hadn't asked another question, so.

8 MR. BAUER: The witness should be --

9 THE COURT: Let him finish.

10 A. In discussing with some of my fellow
11 councilors how I had to come up here and testify about
12 this, at least three of them indicated to me that they
13 had not supported the ban, so there were at least three,
14 maybe one more who voted against it.

15 Q. Okay, now let's move on to May 30th, and now
16 I'm talking about Exhibit 14A.

17 I think we probably covered this. I don't

18 need to go through this again.

19 THE COURT: While you're looking for
20 something, I want to just ask something. Was there
21 discussion at the council about the different parts of
22 this amendment, for example, just using common sense,
23 you might make an argument that a scrolling or flashing
24 electronic sign could be a traffic safety hazard, but
25 how is a static electronic sign different than just a

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1 light sign that isn't electronic? Why is that of any
2 greater hazard? Why is it different aesthetically?

3 A. They are not at that level of detail, your
4 Honor. I think the minutes reflect the general
5 observation that these types of signs are not
6 aesthetically pleasing, but not on a comparison basis.
7 I don't see that in the minutes anyway.

8 THE COURT: Well, I'm concerned because it
9 seems to me that the law says that if you're going to
10 ban something, you have to use the least restrictive
11 type of ban. And I'm just trying to distinguish whether
12 there was justification discussed for certain types of
13 electronic signs, not the message, but the signs.

14 A. Well, your Honor, I do think that that was
15 discussed in the context of exhibit -- Exhibit 14 spells
16 out the three options that the staff, Mr. Rice was
17 outlining on May 30th, and the option of writing an
18 ordinance that allows EMCs, which is one of the things
19 that was being considered, would deal with that question
20 and many others. But here the other option was to go
21 with the ban which, as we have established, has been

22 consistently told to the city council as equally
23 supported by the law. So again, the fundamental consent
24 of the council was the status quo because we don't know
25 how the New Hampshire Supreme Court is going to rule,

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1 and it may indeed be that the old ordinance is fine.

2 So this prohibition preserves the status quo.
3 But should we go after the next stage is resolved, New
4 Hampshire Supreme Court is over, should we go with
5 writing an ordinance that allows this rather than
6 prohibiting them community wide, those kind of questions
7 --

8 THE COURT: Well, doesn't the Supreme Court of
9 New Hampshire, though, have to deal with content based
10 regulation? I mean, if you're talking about time and
11 temperature and you allow that but you don't allow an
12 electronic sign that says buy here, then it seems to me
13 you're regulating the contents of the message.

14 A. Well, as counsel has pointed out and I've
15 testified I'm not skilled in the commercial speech area
16 of law, but I guess my very fundamental understanding is
17 that the ban itself is not -- is not content based
18 because we're not distinguishing between the types that
19 --

20 THE COURT: Well, I agree. Banning it is not
21 content based, and I don't think they even dispute that.

22 A. And that we are within our legal rights in the
23 community to ban them for aesthetic reasons.

24 THE COURT: No, I only addressed that question
25 to you because you said the Supreme Court was going to

1 decide whether the time, place, temperature thing was
2 okay. And I think the Supreme Court is going to have to
3 deal with the content based regulation on the old
4 ordinance because it was content based.

5 A. Your Honor, I haven't read the briefs in that
6 case so I can't --

7 THE COURT: I'm not asking for a legal
8 opinion.

9 A. -- argue about that.

10 THE COURT: All right, go ahead. I'm sorry.

11 Q. BY MR. WINSTON: So the old ordinance
12 continued in effect after the court's decision?

13 A. No, no. That is why we have a couple of EMCs
14 out there now because the EMCs were struck -- the time,
15 the limitation to only time, temperature and date was
16 struck down by Judge McGuire.

17 Q. But was it removed from your code?

18 A. It was eventually replaced with the language
19 that we --

20 Q. It's still there, though, isn't it?

21 A. I'm sorry?

22 Q. It's still there, though; isn't it?

23 A. No, the amended ordinance. The ordinance is
24 as we adopted it on August 14th.

25 Q. Some portions are, but the original portions

1 are still there?

2 A. You'll have to show me something.

3 THE COURT: No, they're not, counsel. That's

4 what Mr. Bauer pointed out. But there was some language
5 taken out of what, was it A and --

6 MR. ROBERTS: H.

7 THE COURT: And some words put into something
8 else, IQ and R.

9 MR. BAUER: Exhibit 23.

10 Q. BY MR. WINSTON: I'm sorry, your Honor. Okay,
11 I would like to redirect your attention to Exhibit 14A.
12 Again, we're at May 30th. Report by Hamilton Rice on
13 EMCs, page two, paragraph two.

14 Now, this is post-Concord decision, and the
15 majority of participants at that meeting, city council
16 meeting still seem disinterested or opposed; is that
17 correct?

18 A. I believe he's referring to a planning board
19 meeting, not a city council meeting.

20 Q. Well, the first page says report in the
21 commentary -- oh, I'm sorry, it is -- all right. But
22 that is a correct statement?

23 A. Which statement? Again, the writing is what
24 it is. Mr. Woodward is reporting what the planning
25 board did that night, and it says what it says.

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1 Q. I'd like to direct your attention to the
2 paragraph above, the last sentence. It's pretty obvious
3 that Chamber of Commerce wasn't interested in the
4 regulation one way or the other; right?

5 A. That's right, yes, that's right.

6 Q. I'd like to direct your attention to
7 Exhibit 21. Okay, in the last sentence on that page,
8 the last two sentences on the first page of this

9 particular exhibit, July 20, 2006 exhibit. I'm going on
10 to page two.

11 Does it appear to you that the main concern
12 here is trying to get something in place because you
13 don't have time to study how to regulate EMCs, trying to
14 get a ban in place?

15 A. No, I don't think it's a matter of time. You
16 keep using the word we didn't have time to do it. The
17 concept was to not do it while -- and maintain the
18 status quo, while the Supreme Court was pondering the
19 Carlson's case. And I think what Mr. Hawk is saying
20 here is he's telling us what he believes to be fact,
21 that if the Supreme Court does not reverse it, then we
22 would not have any ability to deny any future sign
23 permit applications unless we enacted a prohibition.

24 Q. Mr. Hawk a lawyer?

25 A. No.

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1 Q. Do you have any idea why the majority of the
2 councilors were never interested in viewing your video?

3 A. That's -- I don't think there was a
4 foundation. They weren't interested in viewing them, we
5 just decided not to view it. Some of them had seen it.

6 Q. Well, I don't need you to object to
7 foundation, but I will lay one?

8 A. I misunderstood your question. I think you're
9 right, we decided not to view the video. That's right
10 in the minutes. But three of the councilors had seen it
11 at the ad hoc committee meeting.

12 Q. Okay. I'd like to now direct your attention

13 to Exhibit 31. Now, this appears to be the city's brief
14 in the state Supreme Court case; correct?

15 A. As I said earlier, I have not read it.

16 Q. You're not concerned about the city's legal
17 position?

18 A. I'm concerned about our position. I have not
19 read the brief, plain and simple. We're involved in a
20 lot of litigation and the mayor does not read every
21 brief that is filed and every appeal of the city of
22 40,000.

23 Q. First Amendment is no more important --

24 A. I have not read this brief, sir. That's the
25 fact.

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1 Q. So you don't treat the First Amendment any
2 more important than zoning law?

3 A. I treat the First Amendment very importantly.
4 I have not read the brief.

5 Q. Okay. Do you know when this brief was filed?

6 A. I do not. I suspect there's a date at the
7 very end that would tell that.

8 Q. Why don't you take a look at page 13. When
9 was it filed?

10 A. Page 13 was signed by the solicitor on
11 September 8th.

12 Q. So it had to be generated September 8 -- had
13 to be filed September 8th because it didn't exist before
14 then; correct?

15 A. I'm not sure I follow your question. The
16 brief was signed on September 8th. My presumption is it
17 was filed, could have been filed the next day.

18 Q. Okay. And when did you ban EMCs?

19 A. August 14th.

20 Q. So that was before the brief was filed?

21 A. Would appear so.

22 Q. Okay. I direct your attention to page nine,
23 and I'd like you to look at the last paragraph. There's
24 some discussion by the court about the city's contention
25 that changing the display sign might distract motorists

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1 and increase traffic accidents.

2 A. I'm sorry, where is this, sir?

3 Q. Bottom of page nine, last paragraph.

4 A. This is not a discussion by the court. This
5 is a brief --

6 Q. That's correct.

7 A. Where Mr. Cavanaugh, Attorney Cavanaugh is
8 describing, I suspect in advocacy form, what the court
9 did.

10 Q. And he's the only attorney that you're aware
11 of that was involved in advising the city on the First
12 Amendment?

13 A. I don't know if he had any other advice. He
14 has the authority to seek other advice. Whether he did
15 or not, I don't know.

16 Q. Okay. Do you see the question where was such
17 evidence to be presented?

18 A. Yes, he's citing to a court order. He's
19 quoting a court order on page seven I believe.

20 Q. Right, but he's doing it in response to the
21 court finding that while this may have common sense

22 appeal, no evidence was presented to support such a
23 concern.

24 A. I believe he's quoting the court order.

25 Q. He is quoting the court order, but then he's

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1 asking a question, isn't he?

2 A. Well, I don't know whether that was --

3 Q. What's the question?

4 A. Well, I'm going to read the whole sentence.

5 The whole paragraph if you don't mind.

6 Q. Sure.

7 A. And I didn't write the brief, so I may not be
8 able to answer that question at all.

9 Q. But --

10 THE COURT: I think the point, the only
11 questions he's asking you, mayor, is this. Judge
12 McGuire said no evidence had been admitted to support
13 such a concern. The city attorney then said, where
14 would such evidence have been presented? Like city
15 council, planning board, zoning board. I don't know why
16 he's asking the question.

17 A. I don't either.

18 Q. BY MR. WINSTON: Well, does it indicate,
19 you're an attorney, does it indicate he had no idea when
20 the evidence was supposed to be presented?

21 MR. BAUER: Objection.

22 A. I wouldn't speculate on what --

23 THE COURT: It is speculation on what he said.

24 MR. BAUER: It's a rhetorical question.

25 THE COURT: It's a rhetorical question?

1 MR. BAUER: It's argumentative. It's a
2 rhetorical question.

3 THE COURT: To which I would guess there would
4 be at least five members of the Supreme Court who will
5 have answers to that rhetorical question.

6 MR. ROBERTS: I may receive an answer before
7 they answer.

8 THE COURT: Oh.

9 Q. BY MR. WINSTON: Isn't it a fact that the
10 principal purpose of the ban was to maintain the status
11 quo and not for the traffic safety and not to further
12 aesthetics?

13 A. No, because the status quo does further all
14 those objectives. The status quo does not allow EMCs.
15 And as I testified earlier on direct examination, that
16 further substantiates public purposes.

17 Q. Now, that's rather interesting. Didn't you
18 also ban changeable copy signs?

19 A. I believe that was in there as well.

20 Q. How does that maintain the status quo?

21 A. Well, that's not what this case is about.
22 You're not challenging that, are you?

23 Q. How does that maintain the status quo?

24 MR. BAUER: Objection, your Honor, it's not
25 relevant to the proceedings we have here.

1 A. When I speak of maintaining the status quo, I
2 mean the status quo with respect to EMCs, which is what
3 this case is all about as I understand.

4 Q. So what happens to the changeable copy signs?

5 A. I'd have to look at the ordinance.

6 MR. BAUER: It's not relevant.

7 THE COURT: How is it relevant? They could
8 have made --

9 MR. WINSTON: Your Honor, it's relevant. Gas
10 station signs are changeable. What they are suggesting
11 is every gas station, the only way it can be constructed
12 is a variance --

13 THE COURT: So if they get the price up high
14 enough, it's frozen there because the guy can't change
15 the sign and I have to pay \$3.20 a gallon if I buy in
16 Concord.

17 MR. WINSTON: It also means the guy that can't
18 change the sign loses all his customers to the guy that
19 can.

20 THE COURT: Kind of a risk ordinance.

21 MR. BAUER: Your Honor, that's not the
22 challenge. That's not before the court.

23 MR. WINSTON: This is part of the bans, your
24 Honor.

25 THE COURT: It's not part of this case. This

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1 case is a jewelry store that wants to have a sign. The
2 next case we get we will get from the gas dealers.
3 Manchester will be selling a lot of gas. People will be
4 driving to Massachusetts to get their gas, while they
5 drive up here to get their cigarettes and booze.

6 Q. BY MR. WINSTON: Where is the proof or
7 evidence that the total city wide ban advances the city?

8 A. Proof is all the documents that was before the

9 councilors which we all read and was referred to and the
10 testimony back at the public hearing in March, our city
11 councilor, who was our representative on the planning
12 board, who is the one -- that's why she is our
13 representative on the planning board, is we can
14 understand the planning board's thinking essentially,
15 says that this is what the public policy concern is
16 here. That's back in the March minutes.

17 Q. So you don't know what that conclusory
18 allegation is based on?

19 A. It's based on the evidence that we referred to
20 earlier as I went through these documents with attorney
21 Bauer, that aesthetics and patterns are the reason why
22 we did not allow EMCs other than time, temperature and
23 date prior to all this time, as reflected in the
24 planning board's documents that we talked about earlier.

25 Q. You'd agree that Mr. Rice presented both the

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1 planning committee and the city council with 24
2 different alternatives short of banning EMCs?

3 A. 24 different -- he presented an alternative.
4 It may have had 24 components to it but --

5 Q. Well, isn't each component a different way of
6 regulating the EMC?

7 A. Well, but he presented I believe one amendment
8 that would have wrapped --

9 Q. And aren't there further permutations of those
10 24 that can occur in combinations?

11 A. There sure are.

12 Q. And is there any records that you brought to

13 court today of or that you're aware of that shows the
14 delivery of process occurring?

15 A. Yeah, the entire record of this portion asks
16 about his May 30th memorandum which outlines three
17 options including adopting that type of ordinance,
18 including prohibition, including one other one which I
19 would have to turn to --

20 Q. Could you explain to me how deciding how to
21 regulate them by banning them is less restrictive than
22 choosing one or a combinations of the other 24
23 alternatives?

24 A. Well, it may not be less restrictive, but
25 again, if the ban, as we were being told, the ban is

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1 something that is legally permissible. If you allow
2 them in some manner, then that's different than
3 prohibiting them.

4 Q. Did someone tell you that you wouldn't have to
5 comply with Central Hudson if you banned them rather
6 than allowed them?

7 A. I don't recall the word Central Hudson being
8 used. As I said earlier, what we were told here in
9 several of these documents was that we had two courses
10 of action that were lawful. One would be the community
11 wide ban, which is what we chose. The other would be
12 providing for them in some manner that regulated various
13 components which -- of location, size, intensity and so
14 on.

15 Q. Your last answer raises a good question. Do
16 you agree it wasn't the least restrictive ban, how did
17 the city come to the decision?

18 A. I think that's what you argue, not me as
19 mayor, it's a legal question. You all can argue well
20 from all sides.

21 Q. But would you agree that the city council was
22 aware that they had to go through the deliberative
23 process and chose the least restrictive one, they made
24 the wrong call?

25 A. The city council was aware that it could

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1 choose either option, and we did --

2 Q. But there's --

3 A. -- choose one.

4 Q. But there was discussion about what was least
5 restrictive?

6 A. Well, of course there was discussion. We were
7 aware of what that amendment was and that it would have
8 allowed EMCs subject to certain limitations.

9 Q. And you admit that nonetheless it was not the
10 least restrictive?

11 A. I'm getting in a legal sense clearly it allows
12 them obviously, and the ban does not allow them.

13 MR. WINSTON: Your Honor, I don't have any
14 further questions at this point.

15 THE COURT: Okay, redirect?

16 MR. BAUER: Yes, sir.

17 THE COURT: Well, let me ask this question.

18 How many witnesses more do the two of you have?

19 MR. ROBERTS: Just one, Mr. Naser.

20 THE COURT: You have one?

21 MR. ROBERTS: I'm going to briefly call Mr.

22 Naser to establish the issues.

23 THE COURT: And you have no other witnesses.

24 MR. BAUER: No. We have people here, offers
25 of proof, ready to put one witness on for each side.

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1 THE COURT: What time are those criminal
2 cases?

3 THE CLERK: 2 and a 2:30. 2 is a motion
4 hearing.

5 THE COURT: Oh yeah, yeah.

6 MR. ROBERTS: Mr. Naser will be very brief.

7 MR. BAUER: I'm going to be short here.

8 THE COURT: Pardon?

9 MR. BAUER: I'm going to be short here.

10 THE COURT: I'm going to let you go ahead and
11 we will take a recess and we will come back at 1:30 and
12 maybe we can finish it up.

13 MR. BAUER: Thank you.

14 REDIRECT EXAMINATION

15 BY MR. BAUER:

16 Q. Mr. Donovan, you testified in examination here
17 by Attorney Winston about status quo. Status quo has
18 been in the past based on aesthetics, has it not been?

19 A. Yes, the status quo does not allow EMCs other
20 than -- well, does not allow EMCs, and that's based on
21 the aesthetic concerns.

22 THE COURT: Just so I understand. I think I
23 understand what you're asking. The prior ordinance
24 prohibited EMCs except those that showed time,
25 temperature and something else.

1 MR. BAUER: Date.

2 THE COURT: And you're saying that prior
3 ordinance was based on aesthetics.

4 A. Yes.

5 THE COURT: That that simply was being carried
6 over into the new ordinance.

7 A. Yes, that's right.

8 THE COURT: I have got it, go ahead.

9 A. That's exactly the point, your Honor.

10 Q. And that is the premise, then, is it not, that
11 if the city council from 2001 and probably before,
12 representing the citizens of the City of Concord in this
13 representative form of government, adopted a ban of EMCs
14 except for time, date and temperature, then when you say
15 status quo, that is the same thing as saying what?

16 A. Well, it's the same thing as saying the
17 ordinance was back to what it was in 2001.

18 Q. And that is based on what?

19 A. And that is based on the city councilors'
20 determination when it enacted that ordinance that
21 patterns and aesthetics were the driving public policy,
22 the substantial public policy behind not allowing EMCs.

23 Q. Now, with that premise in mind, you also spoke
24 about, something about least restrictive means, and I
25 understand you didn't mean it in the legal sense, that's

1 for the court and the lawyers here, but if the premise
2 of the city council has been that EMCs are not
3 permissible, should not be permissible because of

4 aesthetics, then isn't it a reasonable fit that banning
5 all EMCs satisfies that governmental -- substantive
6 governmental interests?

7 A. I believe it is.

8 Q. Now, with regard --

9 THE COURT: Could I just ask -- I want to go
10 back to one question. There are a lot of signs out
11 there that -- where the sign is just happening and it's
12 lit from inside. How from an aesthetic point of view
13 does that differ from an electronic sign that the
14 message of which can't change by ordinance?

15 A. From an electronic sign that doesn't change
16 the message?

17 THE COURT: Right.

18 A. Well, there still is the flashing.

19 THE COURT: Well, supposed it doesn't flash?

20 A. If it's just an electronic sign?

21 THE COURT: Just an electronic sign. Instead
22 of somebody having to crawl up there and paint, you
23 know, the price of gas goes down just before the
24 election fortuitously.

25 A. It may or may not, but that's not what these

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1 EMCs are. As my understanding, EMCs you've got to have
2 a motion.

3 THE COURT: The great value to a merchant of
4 the EMC is that they do all sorts of magic things, but
5 I'm just asking, suppose the magic things are banned but
6 not the electronic message as opposed to the neon light
7 message. I'm trying to really understand what it is you
8 banned.

9 MR. BAUER: If you take a look at A and H, and
10 I will just read it for --

11 THE COURT: Where?

12 MR. ROBERTS: 23.

13 MR. BAUER: 23, page four. This is what was
14 adopted. A, signs which physically or visually move,
15 rotate or create illusion of movement or have parts or
16 services that physically or visually move, rotate or
17 create an illusion of movement for which emit the
18 audible sound or noise.

19 H, if I may, signs which appear animated or
20 projected or which are intermittently or intensely
21 illuminated or of a traveling, tracing, scrolling or
22 sequential light type, or signs which contain or are
23 illuminated by animated or flashing light.

24 THE COURT: I understand that. Now you come
25 to R. I mean, you could have an electronic message

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1 center that complies with A and H, but R says you can't
2 have one at all.

3 MR. BAUER: Well, that's -- my position is,
4 I'm not the code enforcement officer or anybody else,
5 but that is a definition, A and H is the definition of
6 the EMC.

7 THE COURT: You can have an electronic message
8 center with a static sign. Of course you can. It's not
9 scrolling, it's not flashing, it's not doing anything.
10 It's just sitting there just like you painted it.

11 A. I was going to say, seems to me, that that
12 would be allowed, and --

13 THE COURT: It would be until you come to R.

14 A. No, I think the electronic message signs wrap
15 in the A and I think the definition is that they have
16 the movement.

17 THE COURT: I don't think that's correct
18 statutory construction.

19 MR. BAUER: That has been my working
20 interpretation.

21 THE COURT: Well, I mean, isn't R the
22 difference between -- that's what differentiates this
23 South Carolina case. The South Carolina case talks
24 about scrolling and all sorts of things, flashing
25 lights, intensity, lights changing in intensity. All

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1 those things are A and H. But the South Carolina one
2 doesn't seem to have R, so --

3 MR. WINSTON: Your Honor, I feel compelled to
4 explain a little bit about the South Carolina case since
5 my partner is the trial lawyer in it.

6 THE COURT: All right.

7 MR. WINSTON: The South Carolina case was
8 almost identical to Carlson's. The particular city was
9 allowing only time and temperature signs.

10 THE COURT: I understand.

11 MR. WINSTON: And no other content. Okay. It
12 was not a ban on EMCs. They've characterized it as one
13 in their pleading but if they read the case more
14 carefully, they may realize that it's not. What
15 happened is that my partner briefed the case, took
16 depositions, had the experts, everything was lined up.
17 Both sides went to oral argument. My partner got there

18 and put his argument on, the city attorney got there and
19 said your Honor, we've decided to amend the ordinance
20 and allow these, okay. So that brought up the mootness
21 issue which brought up Buchanan arguments. My partner
22 attacked the Buchanan defense by noting that the city
23 had collected some public input, very little, but some,
24 and that what they collected was opposed to EMCs, and so
25 it was inconsistent for the city to be claiming that now

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1 they were going to allow them based on public input and
2 it was a sham change and it was a way to defeat
3 Buchanan, and that case pled nominal damages which also
4 plays Buchanan. So the court decided we're going to let
5 you win on Buchanan, but the court writes an opinion
6 that looks as if the city has passed a ban and the
7 court's going to support it.

8 THE COURT: Well, okay. That doesn't answer
9 my question. That ordinance in South Carolina didn't
10 have R in it. R is an outright ban of electronic
11 message centers.

12 MR. BAUER: It is, but you have to know what
13 an electronic message is, and you look to the A and H,
14 judge.

15 THE COURT: No, that's not true at all.

16 MR. ROBERTS: And then R continues, your
17 Honor, excuse me, electronic message center type signs,
18 and this is why it was relevant before, and manually
19 changeable copy type signs. They ban any type of sign
20 that you can change the copy either manually or
21 electronically in addition to A and H.

22 THE COURT: What's the justification for that?
23 Why can't I know that the price of gasoline has changed
24 at gas stations?

25 MR. ROBERTS: Or go to the same movie for the

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1 rest of your life.

2 MR. BAUER: You can, you can. All of those --

3 THE COURT: You can't manually change them.
4 Says you can't.

5 MR. BAUER: Well, first of all --

6 THE COURT: You mean they are going to show
7 the same movies up here in the Cinemaplex --

8 MR. BAUER: Well, they would be grandfathered,
9 your Honor.

10 THE COURT: Oh, you can't have a new gas
11 station or a new movie theater, wow, that will be a
12 constitutional challenge.

13 MR. BAUER: Could I ask the code enforcement
14 officer, at least his interpretation of your question?

15 THE COURT: Oh, I will be happy to hear that.
16 What we're going to do right now is we're going to take
17 a break and we will come back at 1:30.

18 MR. BAUER: Okay.

19 (Lunch recess at 12:40.)

20 Q. BY MR. BAUER: Mr. Donovan, I'm going to take
21 you back to Exhibit Number 1, please. The very first
22 paragraph of the very first exhibit. The very first
23 paragraph, doesn't this refer to electronic message
24 center type signs and manually changeable copy signs?

25 A. Yes, it does.

1 Q. And the prior ordinance that dealt with time,
2 date and temperature, there was a prohibition for
3 changeable electronic signs, was there not?

4 A. Yes.

5 Q. Except for time, date and temperature?

6 A. Yes.

7 Q. What is your understanding of the phrase
8 electronic message center type signs, what does that
9 refer to?

10 MR. ROBERTS: Your Honor, I guess I have to
11 object to.

12 Q. Excuse me, in Exhibit 23, which is the
13 ordinance, section R.

14 MR. ROBERTS: Is he being asked to give a
15 legal opinion?

16 THE COURT: No, he's being asked to give his
17 understanding when he voted on it.

18 MR. ROBERTS: If that's the understanding,
19 that's fine.

20 A. My understanding when we voted on this was
21 that basically what we were talking about was the signs
22 that do have the movement and the message that moves,
23 that's animated, that type of message. That if it's a
24 static message, that that was not what we were talking
25 about.

1 Q. And so definitional, when the phrase
2 electronic message center type signs is used in
3 Exhibit 1, and I will turn your attention to Exhibit 3,

4 please, the first paragraph, Exhibit 3, that talks about
5 the first and second lines, signs with electronically
6 changeable messages. That's -- messages?

7 A. Right. My understanding was that that's what
8 was being prohibited, was signs that allowed the owner
9 of the business to change the message on the sign.

10 Q. And so getting back to Judge Mui rhead's
11 question, if there was a static illuminated sign, would
12 that be permissible under R, section R of the ordinance?

13 THE COURT: Hold it a second. It may be that
14 your client is going to get his approval. Was there
15 anything in the application of the plaintiff in this
16 case that said how he was going to be using the
17 electronic message sign? I'm going to try to understand
18 the justification for turning him down.

19 MR. BAUER: My understanding is that-- his
20 affidavit is that he wanted it to flash, scroll every
21 4 seconds.

22 THE COURT: Well, he might have wanted it to
23 do that. I'm asking about --

24 MR. ROBERTS: The permit is silent, your
25 Honor.

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1 THE COURT: Pardon?

2 MR. ROBERTS: The application is silent to
3 that. It was denied on the basis of the fact that this
4 was an electronic sign. So there's nothing in there
5 that says every 4 seconds it's going to do this, every 4
6 seconds it's going to do this.

7 THE COURT: Is the person who denied it here?

8 MR. BAUER: Yes.
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9 MR. ROBERTS: I believe that's Mr. Rice.

10 THE COURT: Well, good, we will find out what
11 his basis was, then. Maybe he didn't understand what
12 the mayor was voting on.

13 Q. BY MR. BAUER: So, with regard to the
14 definition of an electronic message sign, that was for
15 changeable scrolling type flashing signs?

16 A. Yes.

17 Q. With regard to, on cross-examination, some
18 questions about legal counsel and legal opinions, could
19 you just describe what the role of the city solicitor
20 Paul Cavanaugh is with regard to staff and input into
21 the various memos that were generated; please.

22 A. We do have a city manager form of government
23 and city solicitor who is a full-time employee of the
24 city. Mr. Cavanaugh, who happens to be here today, is
25 an experienced attorney who has been practicing law for

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1 decades, I know that, I don't know exactly how long.
2 He's been city solicitor for several years. Probably
3 about 30 years. His job, among other things, is to work
4 with the staff. And we presume as city council when an
5 ordinance or a report, an ordinance comes to us or a
6 report comes to us with a recommendation, that the city
7 manager has assured that the staff report, if necessary,
8 has been reviewed by the city solicitor and courses of
9 actions that we're being asked to follow are legal and
10 lawful and have gone through that review.

11 Q. Taking a look at Exhibit 27, Mr. Donovan,
12 number two. This is the application. And the message

13 says, quote, changeable copy, does it not?

14 A. This is the first I've seen this exhibit. So
15 I need to --

16 THE COURT: I'm sorry, what exhibit number?

17 MR. BAUER: Exhibit 27.

18 A. On the second page or first page?

19 Q. First page. Application to erect sign by?

20 A. Changeable copy.

21 Q. And the message requested in that EMC was for,
22 quote, changeable copy, do you see that?

23 A. That's right.

24 Q. Now, is that the type of --

25 THE COURT: I'm sorry, what page are you on?

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1 Exhibit 27.

2 MR. ROBERTS: Line two, your Honor.

3 MR. BAUER: Page one, number two.

4 THE COURT: I see, okay.

5 A. My reading of that, as I say, council would be
6 asked to approve an electronic sign that changes the
7 message, changes the copy, or that the city was being
8 asked to approve it.

9 Q. And lastly there was some comment with regard
10 to the ad hoc committee and a number of people not
11 coming out and speaking for or against. What is your
12 perspective as a city councilor and mayor as to the lack
13 of public comment at the posting of all these various
14 public meetings with regard to EMCs, changeable EMCs?

15 A. In my lifetime it's either a city councilor or
16 mayor or in the advisory work I do for municipal clients
17 as an attorney or my past life as a city planner I've

18 probably been to more than 2000 public hearings. The
19 public usually comes out to a public hearing when a
20 change in the status quo is being proposed that they are
21 dis -- the people are generally dissatisfied. And in
22 this case and other cases, when you don't have public
23 comment at a public hearing --

24 MR. WINSTON: Your Honor, I'm objecting.
25 There's no foundation to show that he knows why these

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1 people are showing up from the public.

2 THE COURT: Except from what he heard. Is
3 that what you're testifying from?

4 A. I thought the question was getting at the
5 question on cross-examination that called attention to
6 the fact that nobody came out to the public hearing and
7 how do we as public officials interpret that. And what
8 my response was about to be was we interpret that as
9 being support for what was being proposed because
10 generally people don't come out to public hearings
11 unless they are dissatisfied.

12 MR. WINSTON: And there's no foundation for
13 that.

14 THE COURT: Well, it's his experience.

15 MR. WINSTON: But I don't see what it can be
16 based on if he doesn't have any contact with the people
17 to know why --

18 THE COURT: Well, I suppose if you had to
19 suffer through -- how often do you have to do this in
20 Concord, once a week or once a month?

21 A. Once a month and probably an average of a

22 dozen hearings a month.

23 THE COURT: So, 12 times 12 times how many
24 years?

25 A. Well, in my case almost 25 years.

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1 THE COURT: And so in those 25 years he
2 basically is saying every time he was at a hearing, if
3 anybody is up to speak, they were speaking against it.

4 MR. WINSTON: I think it's a conclusory
5 self-serving statement without any independent
6 corroboration.

7 THE COURT: Overruled.

8 Q. BY MR. BAUER: And what did you infer from the
9 lack of public comment with regard to the status quo and
10 the basis?

11 A. Again, we were being essentially asked to pass
12 an order that maintains things as they were. Is that
13 our community does not have, does not want the effect on
14 aesthetics that electronically changing message signs
15 bring and that the lack of public testimony indicated in
16 my judgment as the mayor that the public is supporting
17 that status quo.

18 MR. BAUER: Thank you. Nothing further.

19 THE COURT: Well, I'm just curious to know.
20 What did you understand the basis is for denying the
21 plaintiff's permit?

22 A. I think what I was saying, your Honor, and
23 this is the first time I've seen the application --

24 THE COURT: Oh, so you didn't have an
25 understanding.

1 A. No --

2 THE COURT: We will get the code enforcement
3 officer. I didn't understand that anything in this
4 ordinance, at least Mr. Bauer is suggesting to me that
5 electronic signs are okay, they just can't do all the
6 magic things that are set forth in A and H, but I don't
7 know why changeable copy is prohibited by either A and H
8 or Q or R.

9 MR. ROBERTS: The plaintiff would agree.

10 THE COURT: What was the basis for denying it?

11 MR. BAUER: The basis for denying the
12 application?

13 THE COURT: Yeah.

14 MR. BAUER: Is because the application was
15 requesting a movable electronic message center.

16 THE COURT: No, it just said changeable copy,
17 that's all it said.

18 MR. BAUER: Well, no, on the application, I'm
19 going to tab.

20 THE COURT: 27.

21 MR. BAUER: Tab 27.

22 THE COURT: Yup.

23 MR. BAUER: Take a look at the last page.
24 There should be a diagram, schematic diagram that
25 references EMC.

1 THE COURT: Yeah.

2 MR. BAUER: New optic EMC addition to existing
3 change.

4 THE COURT: Yeah.
5 MR. ROBERTS: Existing sign.
6 MR. BAUER: Existing sign.
7 THE COURT: And?
8 MR. BAUER: And --
9 THE COURT: So what does that exhibit say,
10 on-site jewelry repairs, how does it offend the
11 ordinance?
12 MR. BAUER: Because the application and
13 discussions were for an electronic flashing, scrolling,
14 and --
15 THE COURT: Where does it say electronic
16 flashing, scrolling? Doesn't say that.
17 MR. BAUER: Well, it does say the
18 changeable --
19 THE COURT: Sure.
20 MR. ROBERTS: -- changeable copy.
21 THE COURT: But I thought you could say it.
22 As long as it was static, you could change it every once
23 in awhile. You could put a new message up.
24 MR. BAUER: No.
25 THE COURT: Oh, so once you have one side, you

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1 have it forever. That means no new theaters, right?
2 You're going to play the same movie for the next
3 50 years.
4 MR. BAUER: Not if it's -- it wouldn't apply
5 if it was not an electronic message type scrolling.
6 THE COURT: So then electric -- what in this
7 application says it's scrolling?
8 MR. BAUER: Well, I don't see anything in this

9 application that says it's scrolling. My understanding,
10 and I can make an offer of proof to you in a second here
11 if I can talk with the code enforcement officer.

12 THE COURT: Please, go right ahead.

13 (Pause.)

14 MR. BAUER: Your Honor, the offer of proof is,
15 Ham Rice is the code enforcement officer, understanding
16 based on discussions with the applicant is that it would
17 be a constantly changing, changeable copy sign.

18 THE COURT: Which then violates what?

19 MR. BAUER: A and H.

20 THE COURT: Which part of H?

21 MR. BAUER: Which part of H?

22 THE COURT: Is it traveling, is it tracing, is
23 it scrolling, is it sequential, is it flashing, is it
24 animated? What is it? Can't be all of them.

25 MR. BAUER: Well, I would have to put I guess

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1 Mr. Naser on as well as Mr. Rice for them to disclose
2 the extent of their discussion in terms of specifics.
3 My understanding is generically it was going to be flat,
4 scrolling, moving.

5 THE COURT: Well, here's what I'm trying to
6 understand, Mr. Bauer. It's your position apparently
7 that an electronic message whatever you call them, are
8 not prohibited by the Concord ordinance.

9 MR. BAUER: If they are static.

10 THE COURT: They just can't be used in
11 particular ways.

12 MR. BAUER: That's true.

13 THE COURT: So I don't understand why this
14 gentleman didn't get his permit with instructions that
15 he couldn't use it in a way that violated the orders.

16 MR. BAUER: Because the belief I believe of
17 both parties here was that as soon as that permit would
18 be given, that it would then be activated and violate A
19 and H.

20 THE COURT: Well, but then you have -- you
21 have a way to enforce codes. I mean you tell the person
22 to cease and desist or you start getting fined whatever
23 it is in Concord, \$10 a day or a hundred dollars a day
24 for misuse of your permit.

25 MR. BAUER: Well, it also costs \$50,000 or

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1 some such number to erect one of these and, I mean, I
2 think it would frankly not be in good faith for the city
3 to say okay, sure, you can erect your 30 to \$50,000
4 sign, but you can't turn it on.

5 THE COURT: Of course you can turn it on.

6 MR. BAUER: I'm sorry, you can't scroll it,
7 you can't flash it.

8 THE COURT: But the ordinance says -- you
9 know, really, it's not a semantic game that I'm playing.
10 I'm trying to understand. Are you claiming that this
11 ordinance absolutely prohibits electronic message
12 boards, or are you saying they're allowed, but they just
13 can't be used to violate either A or H?

14 MR. BAUER: The latter. They cannot be used
15 to violate A or H.

16 THE COURT: Well, then it's up to Mr. Naser
17 whether he wants to spend \$50,000 for a non-scrolling

18 non-animated sign.

19 MR. ROBERTS: And think we have an estoppel
20 issue, your Honor. The objection to our motion for
21 preliminary injunction that we got yesterday at 3:00
22 says on August 14, 2006 the city enacted a zoning
23 ordinance banning all EMCs period.

24 MR. WINSTON: And it also ties to causation.

25 THE COURT: So you're saying that's a judicial

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1 admission?

2 MR. ROBERTS: I think it is, your Honor,
3 absolutely.

4 MR. WINSTON: It's in their pleading.

5 THE COURT: So Mr. Naser doesn't want the
6 permit?

7 MR. ROBERTS: No, he does want his permit.
8 They can't ignore R, your Honor. This is a legal
9 question. A and H say what they say. The permit asks
10 for changeable copy. The denial says per zoning
11 regulations in effect at this time, this is Exhibit 28,
12 this application cannot be issued a permit for the
13 changeable copy sign. That's the basis of the denial.
14 And I would add that's a denial that was received on
15 October 13th after many, many, many requests for a
16 denial in writing that went unanswered.

17 MR. BAUER: And it also goes on to say that
18 Ham had spoken to Mr. Tony Naser and he's aware of the
19 regulation indicating that there's discussions going on
20 with regard to the scrolling, flashing -- I mean, are
21 you saying that -- are you saying that there's not going

22 to be any scrolling, flashing?

23 MR. ROBERTS: I'm saying that there wasn't a
24 discussion between Mr. Naser and Mr. Rice in terms of
25 the nature of the way the sign is going to be moved.

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1 And I'm also saying changeable copy does not necessarily
2 mean anything in A and H, because these --

3 THE COURT: Well, that's my point.

4 MR. ROBERTS: These signs go dark at night.
5 So in the dark at night, when the sign is black, just
6 like some little guy going up on the ladder and
7 repainting the sign, you can reprogram it, so at 7:00
8 the next morning you've got a different message, and you
9 can do the same thing. That's a changeable copy sign.
10 It happens to be electronic. That's what they've banned
11 in addition to manual changeable copy signs, the reader
12 boards.

13 THE COURT: I don't understand that.

14 MR. ROBERTS: I mean, I don't understand why
15 they did it either, your Honor. The ordinance speaks
16 for itself.

17 THE COURT: Apparently the painters union
18 works for the --

19 MR. ROBERTS: I'm not quite sure of the
20 rationale.

21 THE COURT: You can't go up and manually do
22 it. Does that mean you can't paint either?

23 MR. ROBERTS: Manually change?

24 THE COURT: It's just one of those you can't
25 use the thing with the hooks or slide it across.

1 MR. ROBERTS: As a term of art, a manually
2 changeable copy sign is specifically a reader board sign
3 with the plastic letters that get changed. I would
4 offer that to the court.

5 MR. BAUER: But what this was --

6 MR. ROBERTS: Like the gas stations.

7 MR. BAUER: -- in the context of EMCs being
8 changeable flashing, scrolling signs. That was the
9 intent, I think, and I know I'm arguing this now, but
10 that was the intent of the city council when it adopted
11 this provision of A, H and R.

12 THE COURT: Well, I'm raising this, Mr. Bauer,
13 because if that's the city's position, then I don't
14 think they have a basis for denying his permit. They
15 just have to tell him he can't use it in violation of
16 the ordinance. And then if he wants to put \$50,000 into
17 an electronic sign that comes up with a different
18 message every morning --

19 MR. BAUER: Then I will be right back here.

20 THE COURT: Why?

21 MR. BAUER: Because presumably --

22 THE COURT: You wouldn't be back here.

23 MR. BAUER: Presumably --

24 THE COURT: The Superior Court. There are
25 \$350 to start a suit here. You go to Superior Court, a

1 lot less expensive.

2 MR. BAUER: Well, presumably the very next day
3 when the flashing, scrolling occurs, we then move to

4 enjoin or enforce, rather, and we're taken back to here,
5 we're in the same place as we are today. Same arguments
6 are being made.

7 So I think the city acted in good faith based
8 on what it knew that, it was going to be flashing and
9 scrolling, to say, Mr. Naser, no, you're in violation of
10 A and H and R.

11 MR. WINSTON: Your Honor, good faith is not an
12 issue when you're dealing with clearly cases based on --

13 THE COURT: I understand. What Mr. Bauer is
14 really saying, though, is he's saying okay, then the
15 dispute will come back here and say prohibiting that
16 type of use of an electronic sign is abridging
17 somebody's First Amendment rights to flash or scroll.

18 MR. ROBERTS: You still have the Central
19 Hudson issue, your Honor. You still have -- the city
20 has to justify why it shouldn't flash, scroll, et
21 cetera, et cetera, et cetera, and if it's aesthetics and
22 traffic safety, then where's the evidence to coin a
23 phrase. The city has to present that evidence. The
24 city has to be aware of that evidence. And that
25 evidence has to show that those particular restrictions

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1 as outlined in the ordinance directly and materially
2 advance that asserting governmental interest and that
3 restriction is the least restrictive available to assert
4 and advance those interests.

5 So if the interests are safety and aesthetics
6 and you want to get rid of flashing and scrolling,
7 they've got to bring somebody before they enact this,
8 because this is a First Amendment issue, they've got to

9 bring somebody in, do a study, do whatever they have to
10 do to determine those pose a problem. They pose a
11 problem for this reason. And then the city council
12 makes a considered understanding, a considered review of
13 those particular evidentiary bases, and they say we have
14 a basis to impose these restrictions on these types of
15 signs and here's why, and by doing it we're only going
16 to restrict it as little as possible to achieve this
17 goal. That's what they did not do here. No matter how
18 hard Mr. Donovan looks in that book, he's not going to
19 find anything in the minutes that will justify this ban
20 --

21 THE COURT: But we've been through that.

22 MR. ROBERTS: I know.

23 THE COURT: We went through that this morning.

24 MR. ROBERTS: And --

25 MR. BAUER: And that's the same argument that

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1 we're still right where we are.

2 THE COURT: I understand.

3 MR. BAUER: And it comes down to the legal
4 issue of is aesthetics a permissible substantive
5 governmental interest, and the amount of evidence or
6 common knowledge that a city needs in front of it
7 cumulatively or individually to support its decision.
8 And we're arguing both sides of that issue. I say there
9 is enough in there. They say there isn't. And then it
10 comes down to the legal issue whether aesthetics is
11 sufficient.

12 I would just -- let me just read, this is in

13 the brief, quote, it is not speculative to recognize
14 that billboards by their very nature, wherever located
15 and however constructed, can be perceived as an
16 aesthetic harm. Metromedia. U.S. Supreme Court. Page
17 11.

18 MR. ROBERTS: Billboards.

19 MR. BAUER: Yes, billboards, that's because we
20 don't have EMC cases except for South Carolina.

21 MR. WINSTON: Your Honor, they can be either
22 type. You can have a billboard that's an EMC or an off
23 premises sign that's an EMC. Two different areas of
24 law.

25 THE COURT: I went down to see Lady Bird

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1 recently and she was asking me how many billboards there
2 are around here. She's still not in favor of them.

3 MR. WINSTON: Your Honor, I'd also like to
4 emphasize aesthetics is only prong two. And the problem
5 with proceeding further with aesthetics is, if you
6 decide this isn't aesthetically pleasing and you
7 prohibit it, obviously you're advancing your taste by
8 prohibiting it. It's not there anymore. There is no
9 less restrictive means if you disagree with it and
10 you're right back to rational basis. There is no
11 purpose in even having an intermediate standard for
12 reviewing speech under their theory.

13 THE COURT: Okay.

14 MR. BAUER: I'm finished with this witness,
15 your Honor, except if I may make one comment with regard
16 to this whole issue about the dialogue that we just had
17 with regard to why not grant it and also tell him he

18 can't plug it in and turn on his flashing scrolling.
19 Mr. Naser could have appealed this. Could have appealed
20 this administrative decision.

21 THE COURT: Well, the administrator could have
22 issued a permit, too.

23 MR. BAUER: And then tried to shut him down
24 the next day and we're back here. So I think it's ripe
25 at least for the preliminary injunctive phase of this.

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1 I think it's lined up appropriately. And I guess I
2 would just --

3 THE COURT: Well, he might not be afraid to
4 make that \$50,000 investment. He can sell it to
5 somebody in Manchester if it's upheld.

6 MR. BAUER: Thank you.

7 THE COURT: Okay. Thank you, mayor.

8 MR. BAUER: May this witness be excused?

9 THE COURT: Yes, indeed, thank you.

10 MR. ROBERTS: Plaintiff would call Tony Naser,
11 your Honor.

12 THE CLERK: Please raise your right hand.

13 TONY NASER

14 having been duly sworn, testified as follows:

15 THE WITNESS: Yes.

16 THE CLERK: Please state your name and spell
17 your last name for the record.

18 THE WITNESS: My name is Tony Naser.

19 N-A-S-E-R.

20 DIRECT EXAMINATION

21 BY MR. ROBERTS:

22 Q. Mr. Naser, what do you do for a living?
23 A. I'm the owner/treasurer of Naser Jewelers.
24 Q. And is Joseph Michaels Diamonds the entity
25 that's located at 137 Loudon Road, is that one of the

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1 trade names Naser Jewelers, Inc.?

2 A. Yes.

3 Q. And are you the owner of that company?

4 A. Yes.

5 Q. Why don't you briefly give the court a little
6 bit of your background, how long you've been in the
7 jewelry business?

8 A. I've been in the jewelry business about
9 20 years in retail jewelry.

10 Q. All right. And how many stores do you have?

11 A. Five.

12 Q. Can you describe the locations of those stores
13 for the court; please.

14 A. Absolutely. We have three stores that are
15 located in regional malls. And we have two stores that
16 are located on streets, you know, free-standing we call
17 them.

18 Q. Okay, and the free-standing store is the one
19 in Concord and where's the other store?

20 A. In Dover.

21 Q. And specifically to the Concord store,
22 describe the merchandise. How would you characterize
23 the merchandise that's sold at Joseph Michaels Diamonds,
24 if that isn't self-explanatory.

25 A. It's diamonds and fine jewelry.

1 Q. We have heard testimony a little bit earlier
2 today about how the city wants to maintain a high
3 quality marketplace by virtue of what their regulations
4 are. How would you characterize Joseph Michael's
5 Diamonds?

6 A. Of high value.

7 Q. And how high are those values? What are we
8 talking in terms of --

9 A. It's really unlimited. We can go as high as a
10 hundred thousand dollars.

11 Q. Thank you. Let's talk a little bit about the
12 types of signs for the free-standing stores, that would
13 be Concord and Dover. What type of sign do you have at
14 the Dover store at the present time?

15 A. We have an electronic message center.

16 Q. And how long have you had that sign?

17 A. About 4 years.

18 Q. And has there been a change in the use of that
19 sign in the last 4 years?

20 A. Yes.

21 Q. And how did that sign change?

22 A. Well, originally the ordinance or variance was
23 we could only change the copy once every 10 minutes.
24 And as of the beginning of this year we started changing
25 the copy once every 4 to 5 seconds.

1 Q. Okay. And are you personally familiar with
2 what occurred to the sales at your Dover store as a
3 result of the change in the sign?

4 A. Yes, we had an immediate increase of sales.
5 As of July we had an increase of about 18 percent in
6 sales.

7 Q. Okay. And is that increase continuing July,
8 August, September, October, now into November?

9 A. Yes.

10 Q. Okay. Do you have any basis to attribute any
11 other factor other than the change in the use of the
12 sign to your increase in sales, anything else change?

13 A. No.

14 Q. Ever get any complaints about the sign in
15 Dover?

16 A. No, absolutely not.

17 Q. Are you aware of any safety issues with the
18 sign in Dover?

19 A. No.

20 Q. Let's talk a little bit about the Concord
21 store. 137 Loudon Road?

22 A. Yes.

23 Q. We have submitted, your Honor, as Exhibit 38,
24 a series of pictures that reflect the Joseph Michaels
25 Diamonds store in Concord, and there are -- there's 14

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1 in that exhibit that include some photos of Carlson's
2 Chrysler for the court's benefit as well as the Capital
3 Center for the Arts, South Main Street, but there are, I
4 believe there are six pictures of Joseph Michaels. Have
5 you seen those, Mr. Naser?

6 A. Yes, I have.

7 Q. Are they a fair and accurate representation of
8 the condition of the existing sign as it exists within

9 the last couple of days?

10 A. Yes, they are.

11 Q. How would you describe that area of Concord?

12 A. It's a very busy commercial area.

13 Q. And we're here today to get a preliminary
14 injunction from the court that allows you to put up the
15 EMC. Tell the court about the timing issues. Why is
16 November 15th through the end of the calendar year
17 important to your business?

18 A. Okay. Well, I mean, first off I would like to
19 begin with for us to effectively compete with the box
20 jewelry retailers, and one of them is located on Loudon
21 Road, we really have to find an effective way to compete
22 against them, and given their big advertising budgets we
23 really can't compete against them with radio or TV
24 advertising, et cetera, et cetera, so, and going into
25 the fourth quarter the start of our biggest shopping

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1 season is the weekend right after Thanksgiving.

2 Q. I'm sorry, based upon your experience in the
3 business, about how much of your business is done in
4 that Christmas season, from November 15th to the end of
5 the year?

6 A. It's 30 to 40 percent.

7 Q. And at this particular store can you equate
8 that into dollars to what you would lose if you didn't,
9 you know, have the ability to effectively market in
10 connection with the jewelry?

11 A. Just based on this electronic message center?

12 Q. Yes, yes.

13 A. I mean, it could be anywhere from 15,000 to
14 \$30,000, just in that, you know, few weeks, few weeks
15 span.

16 Q. Okay. Now, there's been a discussion in terms
17 of the changeable copy sign. Did you have any -- at the
18 time that the application was submitted, and your Honor,
19 the application is Exhibit 27, at the time that that was
20 submitted, did you have any discussion with Mr. Rice,
21 the code enforcement officer, as to the nature of any
22 changes to the sign that we're contemplating?

23 A. No, I did not.

24 Q. Have you had any discussion with Mr. Rice
25 about any issues in connection with this particular

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1 sign?

2 A. No. I just asked him to give me either an
3 approval or a denial on the permit.

4 Q. Okay. Was that telephone, face-to-face?

5 A. Face-to-face.

6 Q. And what was the response?

7 A. He denied it.

8 Q. And is that in Exhibit 28 which is the e-mail
9 denying which says Ham spoken to Mr. Tony Naser of Naser
10 Jewelers and he's aware of the regulation. Is there
11 discussion concerning the changed Concord zoning
12 ordinance on signs, that you recall?

13 A. On size?

14 Q. Signs?

15 A. On signs. He didn't mention that there was a
16 ban on them.

17 Q. And did he say that the ban was for scrolling,

18 flashing, sequential tracing animated or did he say EMCs
19 are banned?

20 A. I believe it was EMCs are banned.

21 MR. ROBERTS: I have no further questions for
22 Mr. Naser. Oh, I'm sorry, your Honor, one more.

23 Q. BY MR. ROBERTS: The city has submitted as
24 exhibit, I think there's 27 -- 26, excuse me,
25 Exhibit 26, several photographs. And you looked at

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1 these as well, Mr. Naser; is that correct?

2 A. Yes, I have.

3 Q. And I believe the representation from the city
4 is that these were taken on November 6th, a couple of
5 days ago. Included in there are two photos of a very
6 lovely sign that has a little arrow on the top. Can you
7 identify that?

8 A. Yes, that's the sign that I purchased from
9 Sam's Club last year.

10 Q. And have you used that sign?

11 A. I did for a short period.

12 Q. And what happened?

13 A. Well, we were asked to take it down.

14 Q. Why so?

15 A. I think, I believe originally was because we
16 didn't file for a permit. And then one of the people
17 here in town said that we can't use it any longer
18 because we originally didn't apply for a permit and we
19 had it up for possibly the 45 days or 40 days that they
20 are allowed to be put up all year.

21 Q. Did they ever say anything about the

22 aesthetics, like there was an aesthetic problem with
23 that particular sign?

24 A. They did not.

25 Q. That didn't seem to be a problem to the city?

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1 A. No.

2 Q. Did you experience any problems with this sign
3 in connection with any of the recent weather that we
4 had?

5 A. Yes, it got blown over.

6 Q. Not a very effective use of the sign?

7 A. No, absolutely not.

8 MR. ROBERTS: Nothing further.

9 CROSS-EXAMINATION

10 BY MS. LEE:

11 Q. Good morning, Mr. Naser, my name is Lisa Lee.
12 I represent the City of Concord.

13 You testified earlier about the EMC that you
14 have at your Dover store?

15 A. Yes.

16 Q. And you testified that was erected in
17 approximately 2002; correct?

18 A. I think in the beginning of 2003.

19 Q. 2003. And did Barlo Signs design that for you
20 and erect it for you?

21 A. No.

22 Q. Who did?

23 A. A company out of Massachusetts.

24 MR. ROBERTS: Relevance, your Honor.

25 Q. How much did the -- I was just trying to see

1 whether it was the same company in this case.

2 THE COURT: It's asked answered.

3 Q. How much did that sign cost?

4 A. The whole sign package for that store was
5 approximately \$42,000.

6 Q. And in this case you contracted with Barlo to
7 lease or erect the EMC; is that correct?

8 A. Yes.

9 Q. And what was the lease amount for it?

10 A. Approximately \$900 a month.

11 Q. So it wasn't a flat rate to construct it? It
12 wasn't a flat rate of \$42,000?

13 A. There was a flat charge, but no, we're leasing
14 it.

15 Q. What was the flat charge?

16 A. I don't recall.

17 Q. With respect to your Dover store, you
18 testified earlier that the message changes approximately
19 every 4 to 5 seconds; is that correct?

20 A. Yes.

21 Q. Do you intend to use the EMC on Loudon Road in
22 the similar manner as you do in the Dover store?

23 A. I would use it however I was allowed to use
24 it.

25 Q. In the Dover store, when the messages change,

1 do the letters move?

2 A. If we want them to.

3 Q. Do they rotate?

4 A. No.
5 Q. Do they scroll?
6 A. What do you mean by scroll?
7 Q. For instance, if the word Naser --
8 THE COURT: Move right across like that.
9 A. We can have them scroll if we wanted them to,
10 yes.
11 Q. And do you have them do that in the Dover
12 store?
13 A. I really don't know what the salespeople have
14 it programmed to do right now. But I don't believe in
15 Dover it was ever an issue of how we displayed the
16 message.
17 Q. It's certainly not a static sign, though, is
18 it?
19 A. It's not a static sign, no, because they
20 never, one, they never said to make it static.
21 Q. It's your position, isn't it, that to
22 effectively communicate with your market that EMCs are
23 necessary; is that correct?
24 A. I believe so.
25 Q. And when you're talking about EMCs, you're

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1 talking about the way that you use the site in Dover;
2 correct?
3 A. No.
4 Q. Isn't it your testimony that using the sign to
5 change the message only every 10 minutes was not an
6 effective way with communicating with your market?
7 A. That was in Dover.
8 Q. Correct, I'm talking about marketing

9 principles.

10 A. The more we change the sign the more effective

11 it would be I believe.

12 Q. It's more effective?

13 A. Absolutely.

14 Q. It's certainly not the only effective way of

15 communicating with your customer base?

16 A. We are talking about the message center?

17 Q. Correct.

18 A. I mean there's other ways of advertising.

19 Q. Correct.

20 A. Right.

21 Q. So your store on Loudon Road, it opened at the

22 end of --

23 A. December 17th of 2005 to be exact.

24 Q. And we've seen evidence on direct that there

25 was a static fixed sign on Loudon Road advertising the

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1 name of the business; correct?

2 A. (Nods head affirmatively.)

3 Q. Correct?

4 A. Advertising the name of business? There's one

5 up right now, yes.

6 Q. Correct. And that's been in effect since the

7 business, that's been in place since the business was

8 opened; correct?

9 A. Right after.

10 Q. Right about that time?

11 A. Yeah.

12 Q. And has your business been profitable on

13 Loudon Road?

14 A. No.

15 Q. Is it operating at a loss?

16 A. Absolutely.

17 Q. Just to be clear, are you saying that if you
18 can't put up an EMC, that you're going to have to close
19 your doors?

20 A. That's not what I'm saying. What I am saying
21 is I'm operating at a loss and an EMC would definitely
22 help.

23 Q. You testified that you experienced an
24 18 percent profit in the Dover store.

25 A. 18 percent increase in sales.

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1 Q. Increase in sales, since the messages on the
2 EMC were able to change every 4 to 5 seconds as opposed
3 to every 10 minutes; correct?

4 A. Yes.

5 Q. And you said that you didn't know of any other
6 variables other than the EMC that in any way changed
7 during the time period when you were measuring increased
8 revenues; correct?

9 A. The only thing that we changed was the
10 frequency of the message.

11 Q. Did you look into traffic patterns on the road
12 where the Dover store is?

13 A. No, I did not.

14 Q. Population increases?

15 A. No.

16 Q. Was there different types of consumer needs in
17 terms of?

18 A. Jewelry?

19 Q. Jewelry?

20 A. No, not that I no.

21 Q. So you can't really say, can you, that there
22 was nothing else that changed other than the EMC?

23 A. Right. There was nothing else that changed.

24 Q. You said that you didn't have any complaints
25 about the EMC; correct?

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1 A. We had complaints from the city or from the
2 town.

3 Q. I'm sorry, I'm talking about you testified on
4 direct that your customers or people didn't come in and
5 complain about the EMC?

6 A. Right, we didn't.

7 Q. But you had complaints from the city of Dover?

8 A. Yes.

9 Q. And why was that?

10 A. Because it was like a traffic violation or
11 something similar, it was a violation, because of the
12 variance was to change the sign every 10 minutes and we
13 were changing it more often.

14 Q. So you were operating in violation of the
15 variance?

16 A. Yes.

17 Q. And you were fined by the city of Dover for
18 that?

19 A. Yes, we were.

20 Q. You testified that customers or other people
21 didn't complain; correct?

22 A. Customers di dn' t compl ain.
23 Q. Did any customers affirmatively tell you that
24 the reason that they came into your store was because,
25 only because of the EMC?

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1 A. Yes, all the time.
2 Q. And did you conduct a survey?
3 A. No, but customers mentioned it.
4 Q. To you personally?
5 A. If I'm up there, I have heard it, yes.
6 MS. LEE: If I could just have one minute.
7 (Pause.)
8 Q. BY MS. LEE: You would agree with me, would n' t
9 you, that the EMC that you intend to use on Loudon Road,
10 intended to use, was designed or has the intent to
11 attract motorists?
12 A. I think any sign really is a sign to attract
13 customers or consumers.
14 Q. But an EMC particularly?
15 A. Yes, I would hope so.
16 Q. I mean, you testified on direct that it would
17 give you an advantage?
18 A. Right.
19 Q. And the advantage would be that it would be
20 more effective at attracting driver attention than a
21 static sign; correct?
22 A. Right. Well, a sign with no message, yes. I
23 mean, the sign we have now just says the name of the
24 store.
25 Q. Correct.

1 A. It doesn't advertise that we have a sale. It
2 doesn't advertise any services that we do.

3 Q. And the sign that you intended to use is one
4 that will change the message?

5 A. If we can change it, yes.

6 Q. And it's that changing that attracts the
7 attention of the driver; correct?

8 A. I suppose to.

9 Q. I mean in your Dover store you testified that
10 the letters sometimes move or they can scroll; correct?

11 A. Yes. In Dover we are allowed to flash, we are
12 allowed to move, we are allowed to scroll them, and we
13 are allowed to --

14 Q. And there wouldn't be any other reason --

15 A. It's just, I'm sorry, we just can't change the
16 copy except for once every 10 minutes. There's no
17 restriction on how we display the message.

18 Q. There wouldn't be any reason, though, to,
19 wouldn't you agree, to scroll or change or animate other
20 than to attract the attention of passersby; isn't that
21 correct?

22 A. I'm sure the animation would attract the
23 attention, yes, but the message, even a static message
24 will.

25 Q. And there's actually another step. You want

1 to first of all attract their attention, correct, and
2 second of all you want to get them to come into your
3 store; correct?

4 A. Yes.

5 Q. So, you know, hypothetically I'm driving down
6 Loudon Road or near your Dover store and I have to look
7 at the sign; correct? My attention has to be placed
8 with the sign. And then your intent is that the driver
9 comes into your store; is that correct?

10 A. Yes.

11 Q. And an EMC wouldn't be effective if it didn't
12 accomplish those goals; correct?

13 A. I wouldn't think any sign would be effective
14 if it didn't accomplish those goals.

15 Q. Particularly one that's not designed to
16 attract attention more than a static sign; correct?

17 A. Yes.

18 Q. We talked about this a bit and I just want to
19 clarify. For the Loudon Road store there's a flat fee
20 and then a monthly fee. And you testified that you
21 didn't know what the initial flat fee was?

22 A. I don't understand your question.

23 Q. We were talking about the cost of
24 constructing --

25 THE COURT: I think the question really was,

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1 you can either buy it or you could lease it.

2 A. Right.

3 THE COURT: And he couldn't remember what the
4 purchase price was, but the least was \$900 a month.

5 Q. Fair enough.

6 THE COURT: Is that right?

7 A. Yes.

8 Q. So it wasn't going to be a purchase, it was

9 simply a lease?
10 A. It was a lease.
11 Q. At a cost of \$900 per month?
12 A. Yes.
13 MS. LEE: I don't think I have any further
14 questions. Thank you.
15 MR. BAUER: May I have one, judge?
16 THE COURT: Can you have one?
17 MR. BAUER: Yes.
18 THE COURT: You can tell her.
19 THE COURT: One witness.
20 MR. ROBERTS: One lawyer.
21 THE COURT: One lawyer. New Hampshire rules.
22 Q. BY MS. LEE: If you were able to erect the
23 sign, lease the sign on Loudon Road, it's your purpose,
24 isn't it, to use moving letters and scrolling letters?
25 A. Again, if I was allowed to. And if you're

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1 referring back to the Dover site, we're allowed to move
2 them.
3 Q. Correct. And it's your opinion, as you
4 testified, that that's the most effective way to
5 communicate with the public; right?
6 MR. ROBERTS: Asked and answered, your Honor.
7 THE COURT: Well, it's also obvious.
8 Obviously the fancier you can get with it, the more
9 attention. They use video games, why wouldn't you use
10 every imaginable gadget.
11 MS. LEE: I'm through. Thank you.
12 MR. ROBERTS: No redirect.

13 THE COURT: Okay. Thank you, you can step
14 down.

15 MR. ROBERTS: Does the court have a 2:00
16 hearing?

17 THE COURT: You know, but you know what,
18 neither of those defendants are going anywhere. They're
19 going to wait.

20 MR. ROBERTS: A captive audience.

21 THE COURT: They are sitting in the marshal's
22 office just anxiously waiting for me to come into the
23 courtroom so that they can spend more time.

24 MR. BAUER: And apparently neither are we.

25 THE COURT: Well, I'm really interested in, if

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1 nothing else, hearing from your enforcement officer with
2 respect to just what the hell he thinks that ordinance
3 means. I mean, I don't -- I'm surprised that you think
4 R means what you tell me it means. And I can't
5 understand the basis for the denial of the permit. So
6 let's hear from him.

7 MR. BAUER: Okay. I do have to say that I
8 haven't prepared Mr. Rice for his testimony.

9 THE COURT: You only have to ask him one
10 question. What the hell does R mean? And what's the D1
11 that's referred to in R?

12 THE CLERK: Please raise your right hand.

13 C. HAMILTON RICE

14 having been duly sworn, testified as follows:

15 THE WITNESS: I shall.

16 THE CLERK: Please be seated. Please state
17 your name and spell your last name for the record.

18 THE WITNESS: My name is C. Hamilton Rice,
19 R-I-C-E.

20 DIRECT EXAMINATION

21 BY MR. BAUER:

22 Q. Mr. Rice, how long have you been associated
23 with the City of Concord and in what capacity?

24 A. I've been with the City of Concord for some 30
25 plus years. I've been with the code administration

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1 office since 1982.

2 Q. Are you familiar with Article 28, Section 6-7
3 at Exhibit 23 in that book in front of you?

4 A. I'm sorry.

5 THE COURT: Exhibit 23, pages four and five.

6 Q. Exhibit 23.

7 A. I believe I am.

8 Q. And would you explain your understanding as
9 the code enforcement officer whether the, in section R,
10 the electronic message center type signs, refers back to
11 paragraphs A and H of the ordinance.

12 A. I believe they're interwoven, but I believe
13 also that the electronic message center sign as I know
14 it and as I've commonly seen it used also has certain
15 messages in a way that may or may not be covered by
16 that, but certainly most of what they do are moving
17 messages, and I don't think I've ever seen one that does
18 not move the message off to move another message on.

19 Q. And when you say move, are you talking about
20 scrolling or giving the illusion of movement?

21 A. I would say it appears to move or give the

22 illusion of movement.

23 Q. So I think you were in the courtroom when the
24 court asked a hypothetical question about a static
25 illuminated sign, whether that be neon or whether it be

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1 otherwise as. As the enforcement officer, if there was
2 no scrolling, tracing, movement, or illusion of
3 movement, would that static sign be permissible?

4 A. I've got to caveat my answer on this because
5 many of the signs are required to go through an
6 architectural design review process and that's very
7 specific description and very specific to the message
8 being related to the site and fitting site, so from the
9 standpoint that architectural design review it may be
10 required that the message be a specific message related
11 to the business, or it may be the business sign, and if
12 that's going to be changed constantly, then it would
13 have to be looked at a little bit differently than it
14 would if it's a fixed message.

15 Q. Let's assume everything from the architectural
16 review committee was acceptable. Now I'm just trying to
17 narrow this -- I think the court is trying to narrow it
18 down --

19 THE COURT: Let me just ask the question
20 straight out. Does R prohibit electronic message
21 machines period?

22 A. As I understand the use and definition of
23 those, my answer would be yes.

24 THE COURT: Well, use and definition. Those
25 are computerized signs that can do anything the computer

1 tells it to do.

2 A. That's correct.

3 THE COURT: There's nothing in this
4 gentleman's application that said anything other than
5 the message was going to be changed.

6 A. That's also correct.

7 THE COURT: There's nothing that I read in
8 that order that says a message can't change.

9 A. I read the ordinance, your Honor, to say if
10 the message is changing, that's moving the message, it's
11 moving things on and off, it's going to create the
12 appearance of movement of the sign.

13 THE COURT: It could be the appearance of
14 turning it off and turning it on. I mean, if you turn a
15 sign off at night and you turn it back on the next
16 morning, is that moving a message?

17 A. If you're changing the message on a basis and
18 people can see it change, I would say the message is
19 creating the appearance of movement.

20 THE COURT: Boy.

21 MR. BAUER: But to turn it on and off --

22 THE COURT: That makes the ordinance as
23 unconstitutionally vague, unconstitutionally vague.

24 MR. BAUER: Well --

25 Q. BY MR. BAUER: Going back to A and H, from

1 your perspective, and you had some input into this
2 ordinance, is A and H what the city was addressing when
3 it passed this ordinance?

4 MR. ROBERTS: Asked and answered. And I don't
5 know if he's going to try to get him to change his
6 answer, but he did say EMC includes other things besides
7 A and H.

8 THE COURT: Well, okay, I'm going to allow it.
9 I mean, I can read A and H for myself. It's R I'm
10 concerned about. But go ahead. What's your
11 understanding of what --

12 A. If the message is changing, it appears, in my
13 mind it's creating a pattern or illusion of movement.
14 The message is moving off, another message is moving on.
15 That's movement in my mind.

16 Q. And therefore going, and going to R, then, the
17 words electronic message center type signs, does that
18 indicate to you and the city that these are flashing,
19 moving, changeable signs?

20 A. I believe in my mind the electronic message
21 center sign has the ability and is used to do all of
22 those things. It has the ability and in many cases it
23 does things well beyond what our ordinance allows.

24 Q. And lastly, with regard to your understanding
25 for the denial. Tell the court, if you will, the

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1 communications, what your understanding was that Mr.
2 Naser was going to use of the sign that he submitted his
3 permit for in terms of --

4 A. It was my understanding from our discussion
5 that the intent was to use this sign in a manner which
6 changed the message on a regular basis.

7 Q. In what way?

8 A. It would take that message off, put another

9 message on. That's my recollection of the discussion.
10 I do remember discussing it with him. I do remember
11 saying EMC signs are not allowed. Council was
12 attempting to prohibit messages that changed, that
13 flashed, that danced, and that included the electronic
14 message center as a sign that's used for those purposes,
15 and it's a sign that was prohibited by the ordinance.

16 Q. Now, did you have any discussions with any
17 representatives of Mr. Naser, for example, Barlo Sign
18 Company representatives, in terms of what the proposed
19 sign with changeable copy was going to do?

20 A. I don't recall personally having any
21 communication with them.

22 Q. Are you aware of any information?

23 MR. ROBERTS: Well, hearsay, your Honor.

24 THE COURT: He can answer that yes or no.

25 MR. ROBERTS: If he's aware of it.

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1 A. I had asked --

2 THE COURT: No, no, no. You can answer it yes
3 or no.

4 Q. Are you aware?

5 A. Yes.

6 Q. And did --

7 THE COURT: Then you say, how are you aware.
8 Then I can make a ruling.

9 Q. In the information that was communicated, was
10 that information that you became aware of in terms of
11 what that proposed sign was going to do in terms of
12 flashing, scrolling, moving?

13 MR. ROBERTS: How is that not artful way to
14 ask for a response to a hearsay.
15 THE COURT: In addition to which it's leading.
16 MR. ROBERTS: Besides.
17 THE COURT: Sustained.
18 Q. Well, let me ask you the direct question then.
19 What was your understanding of what Mr. Naser's sign was
20 supposed to do?
21 MR. ROBERTS: Without hearsay.
22 THE COURT: Sustained. You've got to find out
23 how he was aware, then I can make an informed judgment.
24 I will ask the question. How were you aware?
25 A. By my discussions with Mr. Naser.

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1 THE COURT: I thought you were asked that
2 question before.
3 MR. ROBERTS: So did I.
4 MR. BAUER: The question I asked was did you
5 have any discussions with other representatives like
6 Barlo Company, sign company.
7 THE COURT: Yeah, but first you asked him
8 about discussions with Mr. Naser.
9 MR. BAUER: Yes, I did.
10 THE COURT: What's he doing, impeaching
11 himself?
12 MR. BAUER: No, but the second --
13 Q. BY MR. BAUER: Just so we're clear, what was
14 your understanding of what the sign was going to do?
15 THE COURT: From Mr. Naser.
16 Q. From Mr. Naser?
17 A. I understood from my discussions that this

18 would be a changeable, constantly changing sign.

19 Q. And what was the basis for your denial?

20 A. My basis for denial was that the zoning
21 ordinance, the sign ordinance does not allow messages
22 that constantly change and move.

23 MR. BAUER: Thank you.

24 THE COURT: Before you get started I'm going
25 to try this once again. Please look at R. R includes

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1 the fact that manually changeable copy signs are
2 prohibited. What's the rationale for that?

3 A. At the time that that was drafted, your Honor,
4 we were looking at this, we were looking at EMC signs,
5 drafting, we were trying to draft an ordinance to
6 address them. We were also looking at the fact there
7 were certain things in the manual changeable copy signs
8 that could be improved. That was the ordinance --

9 THE COURT: Well, this is a total prohibition
10 of it.

11 A. These two pieces interplayed in the original
12 drafting of the ordinance.

13 THE COURT: Well, that's what I thought. Is
14 it because of the architectural control of the contents
15 of the message?

16 A. You mean what the message is?

17 THE COURT: Yes.

18 A. No. The original draft of the ordinance back
19 in last December was not related to the contents, it was
20 related to the operation, the way the signs are
21 utilized.

22 THE COURT: So if it's not a constantly
23 changing message, it's okay?
24 A. No. If the message changes --
25 THE COURT: At all.

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1 A. At all, and that's why these got brought
2 together, so that we could address them and make
3 revisions to the ordinance. At that time that ordinance
4 was placed on hold.

5 THE COURT: Why wouldn't you allow a gas
6 station to tell people that their price of gas has
7 changed with the manually changeable sign?

8 A. If they already have that sign, they could
9 certainly continue --

10 THE COURT: No, a new gas station.

11 A. At the moment the ordinance would appear to
12 conflict with that.

13 THE COURT: So you got to go up and paint.

14 A. When this was drafted, the intent was that the
15 city council, the intent of staff was, I can't say what
16 the intent of the city council was, the intent of the
17 staff was that we be allowed to bring something forward
18 in the future. I believe the mayor has testified that
19 the intent on the council's part would be to do that
20 after the ruling by the Supreme Court.

21 THE COURT: So no new gas stations, no new
22 theaters in Concord until the Supreme Court rules
23 because they can't change their signs. Either that or
24 you get stuck paying the same price and watching the
25 same movie.

1 MR. BAUER: Can I answer that question?

2 THE COURT: No.

3 MR. BAUER: Okay.

4 A. Until the city council directs us to draft a
5 new ordinance, that's correct.

6 THE COURT: Wow, interesting.

7 A. Or until someone petitions the city council.

8 THE COURT: Or if some judge tells you you
9 can't do it.

10 MR. BAUER: With regard to the issue of the
11 manual changeable sign --

12 THE COURT: That's what led me to believe, Mr.
13 Bauer, that in fact R absolutely prohibits electronic
14 message signs, period, and there's no other way to
15 interpret that. You're trying to tell me all that does
16 is capture A and H. That's not so, because I could
17 envision electronic signs that change every 30 minutes
18 that nobody in their right mind could say, oh, that's
19 moving. You take the message off for a minute and you
20 put a new message on, that's not moving, that's
21 replacing.

22 MR. BAUER: Well, what I was going to say was
23 the changeable -- manual changeable issue is not before
24 the court. What is --

25 THE COURT: No, but it informs my judgment

1 about what R really means and what it's prohibiting.
2 That's why I asked.

3 MR. BAUER: Okay, well --

4 THE COURT: I mean, the purpose here is they
5 are not going to let anybody have any changing signs at
6 all. You can't change your sign unless you're already
7 grandfathered in. No new theaters, no new gas stations,
8 no new merchants with signs that one day say -- you
9 can't have a new sign that says sale.

10 MR. BAUER: And if that were before the court,
11 perhaps that would be a severable issue in terms of the
12 manual changeable copy. But that's not what is before
13 the court. What's before the court from my point of
14 view on behalf of the city is, EMC, and yes, that by
15 definition and common experience incorporates movable
16 changeable type signs.

17 THE COURT: It seems to me that the problem
18 the city has is that on the basis of the permit
19 application that has been filed, there is nothing there,
20 if I take your interpretation of the orders which would
21 justify this code officer in denying the application,
22 all he can say to the plaintiff is don't scroll, don't
23 visually move, rotate or create an illusion of movement,
24 don't rotate, don't animate, don't project, don't
25 intermittently or intensely illuminate, no trace, scroll

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1 or sequentially light your sign, but you can put your
2 sign up there, and as long as it doesn't have the
3 appearance of movement you can change the message as
4 many times as you want to, if indeed I take your
5 interpretation of the order.

6 MR. BAUER: Correct.

7 THE COURT: Okay. Go ahead, ask your
8 question.

9

CROSS-EXAMINATION

10 BY MR. ROBERTS:

11 Q. Mr. Rice, Steve Roberts as you know. Mr.
12 Rice, you were candid at the outset of your testimony
13 and I'm just going to bring you back there because
14 you've read our subsection R many, many times, and you
15 know that an electronic message center type sign,
16 language from paragraph R, can do more than those types
17 of activities denoted by A and H, don't you?

18 A. I guess I know that it can do all of those
19 things.

20 Q. And more?

21 A. Probably.

22 Q. Okay. So R, which bans electronic message
23 center type signs as well as the manual changeable, does
24 more than just prevent those signs that can do what are
25 denoted in A and denoted in H, it's in addition to A and

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1 H; is it not?

2 A. I'm trying to put a picture other than
3 changing a message on in a manner in which it's changed.

4 Q. Well, it's an electronic changeable sign. I
5 mean, he was denied -- Mr. Naser was denied because it
6 was changeable copy; correct?

7 A. Because it was changeable copy. My
8 understanding of how intended to use it.

9 Q. Well, and if Mr. Naser will deny that he ever
10 had a discussion with you that indicated he was going to
11 be constantly changing that sign, would he be lying or
12 is your recollection a little faulty?

13 A. My understanding is a little bit different. I
14 can't give you a verbatim conversation. But my
15 understanding is that we had a better understanding of
16 each other.

17 Q. An electronic message center type sign is one
18 that changes the message electronically as opposed to a
19 manual changeable copy sign; right?

20 A. Yes.

21 Q. Okay. And it can change it in many ways
22 including those ways that are prohibited by A and H, but
23 it can also change it in other ways. Wouldn't you agree
24 with me on that?

25 A. (Pause.) I'm struggling to find a way the

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1 message could change that won't meet one of these
2 criteria.

3 THE COURT: Well, let me try this one for you.
4 Electronically, the sign says sale. It's programmed so
5 that the sign turns off. When the sign comes back on,
6 it says big sale.

7 Q. The next day.

8 A. Our ordinance says, prohibits intermittently
9 illuminated signs.

10 THE COURT: That's not what intermittent
11 means. Intermittent is like your windshield wiper. A
12 day apart is intermittent?

13 A. A day a part? I didn't have that impression.

14 THE COURT: I'm not asking your impression.
15 I'm asking about the ordinance. You're the enforcement
16 officer. If the message changes overnight, is that
17 intermittent?

18 A. Well, perhaps not.

19 THE COURT: How about if it changes every
20 hour?

21 A. Somewhere -- I'm not sure where the break is.
22 Somewhere there's going to be a break where I have to
23 say this sign is not static. This sign is changing.
24 It's creating the illusion of movement.

25 THE COURT: That's why I asked you about the

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1 manual one because if there's some rational basis for
2 not permitting manually changing signs, just absolutely
3 not permitting them, aren't you also saying, we're also
4 not going to allow an electronic sign where the message
5 can change? I don't see how else you can -- I don't
6 know what else R means, I really don't.

7 A. It's intent is to have static messages on the
8 sign, a fixed message, your Honor.

9 Q. Forever?

10 A. Or until you come back and ask to change the
11 message.

12 THE COURT: So everytime a new movie comes
13 into town or a new theater, I guess there is a new
14 theater coming into that building downtown, wow, for an
15 every single time there is a new movie they're going to
16 have to come in before the board. Oh my God, we've got
17 a really hot movie, can't show it. Well, you can show
18 it, but you can't advertise it.

19 Q. BY MR. ROBERTS: That's not the intent of R;
20 is it, Mr. Rice?

21 A. I'm sorry?

22 Q. What Judge Mui rhead j ust said. That you've
23 got to ask for a permit change or renew the permit or
24 get some different city approval everytime you want to
25 change either an electronic sign or a manual sign,

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1 that's not the intent?

2 A. I think the expectation is that the city
3 council will ask us to draft a new ordinance to address
4 some of these --

5 Q. Exactly. And that's why the ban is a holding
6 action, isn't it? Merely because of the Carlson's case,
7 a holding action designed to prevent what the city was
8 concerned about this proliferation, using the city's
9 words, because of the what the Carlson's case held, with
10 the intent we're going to ban them all, maintain the
11 status quo, Mayor Donovan's word, and then when we
12 around to it, when we get to it, we'll then refine this
13 ordinance. So you ban the free speech because you
14 didn't have enough time to do the investigation?

15 A. No, I think we did the investigation.

16 Q. What was the investigation?

17 A. I think we did a lot of study on ordinances of
18 this type throughout the country.

19 Q. Do you have any traffic studies on the safety
20 issue? Were there, other than the one that I submitted?

21 A. To best of my knowledge the city has not
22 expended funds to conduct a traffic study.

23 Q. How about any studies of aesthetics?

24 A. I have information on aesthetics.

25 THE COURT: Well, is the center, the Capital

1 Center for the Arts, is that particularly ugly because
2 it has an electronic machine down there? Apparently, I
3 mean, if it's an art center it must not be aesthetically
4 displeasing to the people who donated to the
5 rehabilitation of that center.

6 Q. BY MR. ROBERTS: I'm just trying to determine
7 exactly what all the study investigation the city did to
8 directly and materially advance the plain governmental
9 interests of aesthetics and traffic safety, and you have
10 to do the least restrictive prohibition in order to
11 advance those interests, so what was the study? What
12 was the investigation? What was the research done to
13 determine that the total ban was the least restrictive
14 to assert and advance traffic safety and aesthetics?

15 MR. BAUER: Objection, argumentative.

16 THE COURT: Overruled. Cross-examination.
17 That's what cross-examination is supposed to be.

18 A. Could you repeat that question, please.

19 Q. Probably not, but I will try it. What was the
20 investigation, the study, and I don't want to make a
21 compound question, what research did the city do to
22 establish that the total ban as evidenced by the change
23 in the ordinance, directly and materially advances the
24 asserted substantial governmental interests of traffic
25 safety and aesthetics in the least restrictive way?

1 A. I believe the studies that were done related
2 to field studies. We did view other locations. We read
3 a lot of planning material by the American Planning

4 Association and others, and brought these forward to the
5 city council at that time.

6 Q. It's not in the minutes, are they? None of
7 those studies are in the minutes, are they?

8 A. No, they're not.

9 Q. No, not in the minutes. In fact, what's in
10 the minutes and what's in the record, this is 14B, your
11 Honor, is your May 30th report, Mr. Rice, to which you
12 attach several things, including the May 12th ad hoc
13 minutes, your May 9th report, and let's look at that for
14 a change. That's 14B, the May 9, 2006 report. It's
15 from you. Doesn't say to whom it is. I guess I will
16 ask you to tell me to whom this is directed. Do you
17 have that? It's 14B.

18 A. Okay, 14B never went to the city council.

19 Q. 14B never went to the city council?

20 A. 14A went to the city council.

21 Q. Well, we can get into the 14A, 14B, but the
22 attachment to 14B went to the city council, didn't it,
23 your report?

24 A. If it weren't attached to 14A, it didn't go to
25 the council. I believe most of them probably were.

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1 Q. Most of them probably were?

2 THE COURT: Well, your report to the mayor of
3 May 30, attachment number two, is a copy of the May 9th
4 report. What do you mean it didn't go to the mayor?

5 Q. Right, okay. So let's look at that. Thank
6 you, your Honor.

7 May 9th --

8 MR. BAUER: Could I object, your Honor. Just
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9 for clarification, there's a 14A and 14B, and Attorney
10 Roberts and I have discussed this for a few days, and I
11 will make an offer of proof here on behalf of Mr. Rice,
12 that his testimony is that 14A with three bullet points
13 or three recommendations went to the mayor and city
14 council. 14B did not go to the mayor and city council.

15 THE COURT: Oh, so the whole 14B did not, not
16 just the May 9th thing, is that what you're saying.

17 MR. ROBERTS: No, I don't think that's what
18 Mr. Bauer is saying.

19 14A has one, two, three, bullet points on the
20 first page.

21 THE COURT: Yes.

22 MR. ROBERTS: 14B and one, two.

23 THE COURT: Yup.

24 MR. ROBERTS: The second page is identical
25 with all the attachments. So I don't think Mr. Bauer is

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1 representing to the court that the attachments in 14A
2 didn't go to city council.

3 MR. BAUER: That's correct. Just page one.

4 MR. ROBERTS: Right. And while there is an
5 issue, your Honor, as to why page one is different, I'm
6 not sure it's relevant, because I think the May 9th, Mr.
7 Rice, which brings us back to that, that was attached to
8 your 14A that went to the city council, was it not?

9 A. That's correct.

10 Q. Okay. And May 9th on page two has a section
11 entitled regulatory options, does it not?

12 A. It does.

13 Q. It does. Okay. And a community can regulate
14 EMCs on the basis of one or more of the following types
15 of criteria. And you give 24 different ways that this
16 council could address EMCs, don't you?

17 A. That's also correct.

18 Q. Okay. And which one did they adopt? The
19 total ban. That's not the least restrictive of the 24
20 alternatives that you gave them, is it?

21 MR. BAUER: I want to object, your Honor.
22 Number one, it's a legal issue, the question, and number
23 two, that's the wrong standard. It's not the least
24 restrictive alternative according to the Supreme Court
25 decision.

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1 MR. ROBERTS: Your Honor, I disagree. Central
2 Hudson in the fourth prong says that if you pick a
3 regulation that you believe directly and materially
4 advances that substantial governmental interest, that
5 regulation also, prong four, has to be the least
6 expansive regulation.

7 THE COURT: Or put another way, as narrowly
8 drawn as possible to preserve the constitutional speech;
9 right?

10 MR. ROBERTS: Correct?

11 THE COURT: So put another way, is that as
12 narrowly drawn as it could be?

13 Q. And the question is you gave the city 24
14 options and they didn't pick that, did they, Mr. Rice,
15 they picked the total ban?

16 A. Council elected that.

17 Q. And you were looking to tell me where all this
Page 142

18 research was to show why that total ban was found to be
19 the most narrowly drawn ordinance. Did you find that?

20 A. I was looking for that now.

21 Q. I thought you were --

22 A. No, I was looking for the May 9th.

23 Q. Well, you did the research and found that
24 there were 24 different options to regulate EMCs;
25 correct?

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1 A. Including the ban.

2 Q. Including the ban, correct.

3 A. That's right.

4 Q. Would you agree with me that the total ban is
5 not the most narrowly drawn restriction to uphold the
6 First Amendment right?

7 MR. BAUER: Objection.

8 A. That's a decision beyond my --

9 MR. ROBERTS: I have no further questions.

10 THE COURT: Anything further, gentlemen?

11 MR. BAUER: No, sir.

12 THE COURT: Okay, case submitted?

13 MR. ROBERTS: Submitted -- well, your Honor,
14 could we argue?

15 MR. WINSTON: No, your Honor, I object to the
16 argument. They filed a response at the last minute. I
17 was up all night with my partner trying to --

18 THE COURT: Up all night? Oh my God. I was
19 up all night for a different reason.

20 MR. WINSTON: Your Honor, I just didn't want
21 anyone --

22 THE COURT: You manipulated the election
23 returns. You probably don't even know that Rumsfeld
24 resigned.

25 MR. WINSTON: Heard that at lunch, your Honor.

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1 MR. ROBERTS: Can we be permitted a few days
2 to submit something?

3 THE COURT: I mean, I will do one of two
4 things. I don't care. You can submit things, which is
5 easy, but I do have to go take grand jury returns and I
6 have two criminal cases.

7 MR. WINSTON: Your Honor, I prefer to cut it
8 off right now. I normally make a closing argument. If
9 I can't do that, I normally try to make a responsive
10 brief. This is a preliminary injunction hearing. I
11 don't want to waste any more time. What I predicted
12 what happened at the beginning of the hearing, has
13 happened during the course of the hearing. There's no
14 points in belaboring the point.

15 MR. ROBERTS: And, judge, I just wanted to get
16 something on the record.

17 THE COURT: I didn't know you predicted
18 something. Do you have a Ouija board or --

19 MR. WINSTON: No, your Honor, but there was --
20 I still believe that they have haven't met their burden.

21 MR. ROBERTS: There is an agreement, your
22 Honor, that both sides will adhere to that any
23 objections to the report and recommendations will be
24 submitted within 5 days as opposed to the 10. I just
25 want to make sure that's clear. Is there any dispute?

1 MR. BAUER: That's already on the record. I
2 think all we're talking about really is whether we want
3 to summarize what's gone on here and maybe take 2 or
4 3 days to do so.

5 MR. ROBERTS: And that extends the period,
6 judge, I guess I --

7 MR. WINSTON: I object.

8 THE COURT: Well, you know what, you and I
9 aren't working Friday, are we?

10 MR. ROBERTS: Or weren't.

11 THE COURT: We're not. It's a federal
12 holiday.

13 MR. ROBERTS: Oh, that's right.

14 THE COURT: So how about since you lawyers are
15 getting paid by the hour, whatever you want to file, you
16 can file up till Friday at 5:00. How's that. When I
17 come in Monday, Julie and I will look at it.

18 MR. WINSTON: It's going to be a just one
19 filing one time.

20 THE COURT: Yeah, we don't need another --

21 MR. ROBERTS: No sur replies or anything like
22 that.

23 THE COURT: And it may even be helpful if you
24 address a few of the questions that I might have raised.
25 You know. Thank you.

1 MR. ROBERTS: Thank you, your Honor.

2 (Adjourned at 2:55 p.m.)

3 C E R T I F I C A T E

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I, Sandra L. Bailey, do hereby certify that
the foregoing transcript is a true and accurate
transcription of the within proceedings, to the best of
my knowledge, skill, ability and belief.

SANDRA L. BAILEY, CSR, CM, CRR