

The Leavenworth Flag Ordinance Debate

(as of July 15, 2006)

The Leavenworth flag dilemma began two years ago today when Matt R. Erickson, Founder and President of FoundationForLiberty.org, in a July 15, 2004 list of e-mailed questions to the City of Leavenworth in anticipation of an upcoming Pre-Application meeting, wrote "I may install an 80' flag pole and fly a large American flag (including illumination at night)" and asked if there were "any problems with this or codes which prohibit this"? He also further asked "Does this affect the ability otherwise to have a sign?"

Leavenworth Community Development Director Connie Krueger commented at the September 1, 2004 Pre-App hearing that although the current City codes did not pointedly address flags and flagpoles, it otherwise provided her discretion on such matters. Ms. Krueger then verbally denied the request, holding the height allowed of the proposed flagpole to the height allowed of buildings in the underlying zone. She further commented that others in the community may find offense to the erection of an 80' flagpole flying a large American flag.

Though Erickson specifically requested the City's position of him erecting the flag, no written response was included within the official Meeting Notes received by Erickson from the City on October 9th, 2004.

On September 28, 2004, the Leavenworth City Council enacted emergency moratorium Ordinance #1233, prohibiting the construction and erection of flags and flagpoles within Leavenworth for the period of six months, while the City developed permanent flag standards.

The City enacted two addition moratoria prohibiting the erection of flags and flagpoles while they developed their final ordinance over the next seven months. On May 10, 2005, Leavenworth City Council members enacted Ordinance # 1246 (codified as Leavenworth Municipal Code (L.M.C.) Chapter 14.14) permanently regulating flags, flagpoles, towers, and tower structures.

In a lawsuit filed June 10, 2005 in Chelan County Superior Court (No. 05-2-00587-9) against the City of Leavenworth and its L.M.C. 14.14, plaintiff Erickson has accused the Bavarian-themed City of enacting content-based legislation targeting the American flag.

In defense of the City's actions, Leavenworth City Councilman Peter D. DeVries stated in a June 5, 2005 Wenatchee World editorial that "This is not an issue about flying the American flag...the suggestion in letters to the editor that the United States flag would detract from the Bavarian theme of the city is ridiculous!"

In a June 17, 2005 Wenatchee World article, reporter Michelle McNeil quoted Leavenworth City Administrator Rich Brinkman as stating "This is absolutely not about the flag". Brinkman is further quoted in the article stating "It could have been a proposal to put a cellular tower. It was only about the height of the structure."

In a May 25, 2005 Leavenworth Echo article, reporter Greg Woehler quoted Community Development Director Krueger as saying: "This isn't about flags".

In that Erickson's charge counters the stated opinions of a City Councilman, the City Administrator, and the City's Director of Community Development, a closer look is in order to see which position is supported by documentation.

This in-depth look is further necessitated by later statements of Mr. Michael C. Walter, attorney for the City of Leavenworth in the Superior Court case referred to above. Mr. Walter, in the Defendant City of Leavenworth's Motion for Summary Judgment (Page 15, Lines 22 – 23), charges, in response to Erickson's assertion that the City of Leavenworth enacted flag regulations to protect its Old World Bavarian Theme: "There is absolutely no evidence to suggest or support these baseless and speculative allegations".

This paper is being written to prove Erickson's position and support his efforts to proudly fly an American flag.

The first evidence supporting Erickson's specific position establishes that Leavenworth's flag regulations were enacted as a result of his proposal to fly a large American flag.

The first moratorium (Ordinance # 1233) acknowledged that it was enacted because "an owner of property in the City of Leavenworth has expressed to the City an interest in constructing and erecting an eighty (80) foot flagpole with display lighting on commercial real property in the City of Leavenworth".

The City later specifically admitted that it was Erickson's flag inquiry that prompted the City's ordinances and regulations (see Krueger Deposition of May 24, 2006, Pg. 14, Lines 13 – 17. Erickson's attorney asked— "It was...(Matt Erickson) that prompted the City to research whether they wanted to regulate flagpoles and flags, correct?"; Ms. Krueger answered "Yes". Also see Krueger Deposition, Pg. 26, Lines 11 – 15).

The City further admitted that flags and flagpoles were not regulated at the time when Erickson inquired about erecting an 80' flagpole: "the City of Leavenworth zoning ordinance and development code do not clearly set forth the regulations pertaining to the erection and construction of flagpoles in the City" (see Ordinance #1233).

A Finding of Fact issued by the City Council on February 22, 2005 further acknowledged that "The city's current development regulations do not address the issue of size, height or number of flags with adequate or enforceable clarity" (Finding of Fact #1).

Community Services Director Krueger in her deposition of May 24, 2006 (Pg. 11, Lines 9 -11) in response to the question: "How were flagpoles and flags regulated within the City?" stated: "They were not regulated".

The City of Leavenworth readily admits that there were no regulations of flags and flagpoles when Erickson requested to erect an 80' flagpole to fly a large American flag. Leavenworth City Council then enacted three "emergency" ordinances of moratorium prohibiting the construction and erection of flagpoles and flags, and a fourth "emergency" ordinance heavily regulating flags permanently. The City acknowledges these actions stemmed from Erickson's inquiry.

Erickson charges that Leavenworth's "emergency" nature of the four flag ordinances themselves provides a fair amount of evidence of the City of Leavenworth's desire to keep out that large American flag within the Bavarian-themed City.

It was not that the City had never been confronted with tall poles, for instance.

Though attorney Walter made the claim that: "Had the City the foresight to predict, when adopting its original development and Bavarian theme standards for buildings and other structures, that someone would want to erect an 80-foot flag pole—or other structure of that size and scale—City leaders surely would have adopted regulations to address the impacts from those structures" (Motion for Summary Judgment, Page 38, Lines 21 – 25).

Erickson points to the 95'+ high maypole (maipole/maibaum) standing in the downtown central park as evidence that they had not been worried about tall poles before his proposal, for instance. The City *was* confronted seven years earlier with someone wanting to erect a 100-110 pole, yet the City did

nothing then or afterward to restrict tall poles. Mr. Walter's supposedly hypothetical case was actual reality, and flatly proven wrong.

Community Services Director Krueger stated in the May 25, 2005 Leavenworth Echo article that the 95' maypole was different from the proposed 80' flagpole "because there were no height regulations when it was erected".

If Ms. Krueger was speaking of no height regulations of "structures", she would be correct about that, but wrong then for stating the maypole and the flagpole were different, for she admits above that flagpoles "were not regulated" when Erickson inquired about erecting a flagpole

If Ms. Krueger was stating that there were no height regulations on "buildings" when the maypole was erected however, she is mistaken on that account.

On March 5, 1997, Mr. Robert Smith of Projekt Bayern (a group of local community leaders who took it upon themselves to build and erect the maypole) turned in a variance application (\$200 fee waived by the City) to "place a 100-110ft maypole in the downtown City Park".

If there had been no height restrictions of any kind in place at that time, there certainly would have been no need of a variance request. The variance application paperwork itself notes that the Leavenworth Municipal Code placed limitations on "buildings" to 50' in height, showing building heights *were* regulated when the maypole was erected.

In other words, no pertinent legal differences existed in the City's ordinances of tall poles between 1997 when the 95' + maypole was erected and in 2004 when Erickson inquired about erecting an 80' flagpole. As discussed earlier, the City admitted there were no regulations effecting poles when Erickson first inquired on the subject matter.

That Leavenworth treated Erickson's proposal to erect an 80' flagpole (four emergency ordinances) differently from the proposal to erect the 95' maypole (the City "blessed" the erection of the maypole, while also providing the very ground upon which to erect it) provides rather convincing evidence of their specific dislike for Erickson's proposal to fly a large (American) flag.

This difference in reaction though of similar proposals is further strengthened from the maypole variance request itself. Item 4 of the 1997 variance application for erecting the maypole states "This Maypole is essentially a 100-110 ft. flagpole, but is more colorful and will describe Leavenworth's history on 14 placks [sic] attached to its sides".

That the proponents of the maypole state that their maypole is "essentially a...flagpole" shows that the maypole and flagpole are essentially similar in nature (though the maypole was taller), yet the political fallout between the two were completely opposite.

While the City has stated repeatedly in their quest to restrict flagpoles that they must have "structures complementing the aesthetics and scale of the 'Old World Bavarian Theme'" (see Leavenworth Ord. 1233, Ord 1243, Ord. 1245, L.M.C. 14.14.010, Krueger Deposition, Pg. 47, Lines 15 – 25; Pg. 65, Lines 15 – 23; Pg. 81, Lines 20 – 25; Pg. 82, Lines 1 – 9, 24 -25; Pg. 83, Lines 1 – 25; Pg. 90, Lines 8 – 15), they do not anywhere address what is the proper "scale" of the "Old World Bavarian Theme" in relation to poles. By restricting the height allowed of flagpoles in LMC 14.14.080 to that of the height of buildings, they are inferring that the proper Bavarian scale for poles is that of the same height as buildings.

However, in the maypole variance request, the proponents of the maypole state that their "plight is that an authentic Bavarian Maypole is 100-125 ft" in height, and also that "A shorter maypole is not authentic or desirable" (sic).

If an authentic Bavarian Maypole is 100-125' in height, then the only charge against an 80' flagpole would be that it is too *short*, not too tall! The authentic Bavarian scale for poles, as evidenced in

the maypole variance application, is 100' – 125'. Thus, Erickson's desire to erect an 80' flagpole is of a proper Bavarian scale for poles!

That the City of Leavenworth restricted new flagpoles to 35' or 50' in height (depending upon the underlying zoning) now ensures that they will now be of an vastly *improper* scale for authentic Bavarian poles—much too *short*.

Although the proponents of the maypole were first told they needed a height variance for erecting a pole taller than the 50' limitation of buildings, it is important to note that their variance request was withdrawn after the City acknowledged the height restrictions only applied to “buildings”, and not “structures” (Krueger's May 24, 2006 Deposition, Page 51 Lines 22-25 and Page 52, Lines 1 & 2: “Let me clarify. A variance was applied for, but a variance was not obtained for it because they rendered— basically they found a portion of the code which stated that building heights—or that heights within a zoning district were limited to buildings, and the variance application did not go forward at that point in time”).

The maypole variance application was withdrawn as unnecessary in 1997 when the City determined that the maypole structure was not a “building”; that it was not subject to the heights allowed of “buildings”. It was erected in the public park in downtown Leavenworth shortly thereafter.

That “Projekt Bayern has the blessings of Leavenworth Parks Committee and City Council to place a 100-110 ft Maypole in the downtown City Park” (see Maypole Variance Application: Description section), but that the City Council enacted four emergency ordinances prohibiting the erection of an 80' flagpole to fly a large American flag shows that the City Council viewed the two proposals in fundamentally different light.

That one was of a distinctly Bavarian theme and one of a pointedly “non-Bavarian” theme should be patently obvious. This fundamental difference of these two similar objects is summed up by Community Development Director Connie Krueger succinctly and accurately: “Of course there's the difficulty of: It's an American flag; you can't Bavarianize an American flag” (see Krueger May 24, 2006 Deposition, Page 57, Lines 5 & 6).

Upon this dilemma, clarified by Director Krueger's words, lies Erickson's charge of the City enacting content-based regulations against the American flag proposal.

Fortunately for Erickson, the proof of his position is even more blatant than that listed above.

The City Council recited that “structures complementing the aesthetics and scale of the ‘Old World Bavarian Theme’ form a key part of the overall visual attractiveness of the City” (Ordinance Numbers 1233, 1243, & 1245).

These Ordinances clearly ordain that only structures complementing the “Old World Bavarian Theme” would be allowed. Indeed, the “Old World Bavarian Theme” is so important that this phrase is repeated verbatim six times within Ordinance Number 1233 itself.

Even the City's attorney, Michael C. Walter, in the Defendant City of Leavenworth's Motion for Summary Judgment” argued before Judge John E. Bridges in Chelan County Superior Court June 29, 2006 (Page 10, Lines 3 – 5) stated “The regulations were also deemed necessary for protection and preservation of Leavenworth's ‘Old World Bavarian Theme’, a vital component to the City's economic survival as a tourist destination”.

These admissions of motive would certainly seem to indicate that Leavenworth viewed a large American flag as a potent visual threat to its Old World Bavarian Theme.

April 27, 2005 Staff Report

The first direct acknowledgment of that view charged here will be from an April 27, 2005 Staff Report from the Department of Community Development to the Planning Commission. The report

admits that “Particular concerns which emerged” in discussion between City staff and the City Council was the possibility of “potential applicants...using flags...in (a) manner *which would overwhelm the Old World Bavarian Design Theme*” (emphasis added).

Though the Staff Report admits to “concerns” about other issues over flags and flagpoles (public health & safety, lighting, impacts to surrounding property owners, and impacts to the sign code and development code), the only item they admitted to be of “*Particular concern*” was the possibility of using flags to “*overwhelm the Old World Bavarian Design Theme*”.

This admission of *Particular concern* provides convincing evidence that the City’s primary concern with flags and flagpoles was in making sure no flag (nor group of flags) could *overwhelm* the Old World Bavarian Design Theme. Of course, only flags not of the Bavarian Design could “overwhelm” the Bavarian design. Only non-Bavarian flags were of *Particular concern* to the Staff and City Council.

The most logical answer to the non-Bavarian flag most likely to “overwhelm” the “Old World Bavarian Design Theme” would be the American flag. It was, after all, pointedly admitted that the flag ordinances were enacted specifically because Erickson sought to erect an 80’ pole to fly an American flag.

The Staff Report admits yet even more, however.

Initially, City staff proposed making the flag ordinance applicable only within the commercial and industrial zones of the City while exempting the residential zones (proposed 14.14.030).

The April 27, 2005 Staff Report states that “The Planning Commission did not feel that flags in residential areas of the City were typically large monopolies, not (sic) did they feel that they would *conflict with the Bavarian Design as the Old World Bavarian Design Theme does not apply in these non-commercial zones*” (emphasis added).

This passage first admits that the Planning Commission did not think that large flagpoles were likely within the residential zones of the City. More importantly, however, was that even if someone did erect a large American flag, it could not “conflict with the Bavarian Design” because the “Old World Bavarian Design Theme *does not apply in these non-commercial zones*”.

This wording all but admits that the City believed that large monopolies flying an American flag *would conflict* with the Bavarian Design in the commercial and industrial zones in the City where *the Old World Bavarian Design Theme does apply!*

This draft of the ordinance admits that the Planning Commission, with agreement by City staff, were not opposed to tall poles and big flags per se, *only to tall poles and big flags which conflicted with the Old World Bavarian Design Theme!*

Though City staff’s comments include reported concerns over public safety from tall poles, the proposed exemption of the ordinance within Residential zones proves otherwise. Much taller poles would have been allowed within Residential zones than in the industrial and commercial zones by this early version—exactly opposite one would otherwise think in normal (non-Bavarian) settings, and even completely opposite than the final version ultimately allowed when the City attempted to even the playing field.

Under the initial proposal, one could have erected a 120’ flagpole in the Residential zone, 50’ in the Downtown Commercial Zone, or 35’ in the General Commercial zone. As it was ultimately enacted, would-be flag erectors can only erect a 35’ pole in the Residential zone (and 35’ in General Commercial and 50’ in Downtown Commercial zone). This drastic change for the Residential zone shows how different the City’s first intentions were from that they later enacted. By treating the Residential zone as harshly now in the final version as the other zones were all along, one sees how far the final ordinance goes in regulating flags (all to protect the Old World Bavarian Design Theme).

The exemption from regulation of tall poles in Residential zoning districts where the Old World Bavarian Design Theme was not applicable shows that the City's stated concerns over supposed "threats to public health and safety...(&) excessive lighting (&) impacts to surrounding property owners" was but a ruse to cover their real concern—their "particular concern"—that they did not want a large American flag conflicting with, and possibly overwhelming, their Old World Bavarian Design Theme that was only applicable within the commercial and industrial zones of the City.

A suggested Finding of Fact recommended by City staff in the Staff Report was: "The proposed ordinance...is intended to further the...preservation of the Old World Bavarian Design Theme"; a suggested Conclusion stated that "Adoption of the proposed code amendments will further the intent of the Old World Bavarian Design Theme". The ordinances were all about "preservation of the Old World Bavarian Design Theme", protecting that theme from a large American flag which would "*conflict* with the Bavarian Design".

Coinciding with the April 27, 2005 Staff Report, City staff released their proposed draft of Chapter 14.14 of the Leavenworth Municipal Code for the regulation of flags and flagpoles.

First Public Draft of Chapter 14.14, Leavenworth Municipal Code

This first draft of Chapter 14.14 shows the original intentions of the City with regards to regulation of flags and flagpoles. L.M.C. 14.14.010 (Purpose) begins with the first sentence (in full):

"The regulations set out in this Chapter are for the construction and display of flagpoles and flags."

The last sentence (in full) of the last paragraph of the first public draft of L.M.C. 14.14.010 states:

"The City herefore adopts this ordinance to ensure the the (sic) development regulations will address the issue of size, height, or number of flags with adequate or enforceable clarity and will ensure the continued aesthetic attractiveness and conformance with the Old World Bavarian Design Theme which is important to the economic health of the Community".

The very first full sentence and the very last full sentence of the "purpose" of the proposed chapter which supposedly regulates Flags, Flagpoles, Towers, and Tower Structures provides clear emphasis of regulating (only) flags and flagpoles, while "towers" or "tower structures" are nowhere mentioned.

Regulating flags for the "*conformance with the Old World Bavarian Design Theme*" to protect the "economic health of the Community" is about as clear and precise of a statement on the City's intent as can be found.

L.M.C. 14.14.010 shows that the purpose of the ordinance was to properly enforce flag restrictions, such as Krueger's September 1, 2004 denial of Erickson's proposal to erect an 80' pole to fly a large American flag.

The final version of Chapter 14.14 regulates Flags, Flagpoles, Towers, and Tower Structures.

"Tower/tower structure" is defined under L.M.C. 14.14.020 as "A structure taller than its diameter which can stand alone or be attached to a building or other structure, and anything tall and thin approximating the shape of a column or tower".

Given the broad definition of "tower" and "tower structure", then one would certainly think the anything within that definition would be regulated, or at least anything within that definition normally thought of as a tower or pole. Cell towers, for instance. Light or power poles, for another.

However, Director of Community Development Connie Krueger stated in her deposition of May 24, 2006, that cell towers are regulated "in a separate chapter" (deposition, Pg. 66; Lines 11 – 16). Director Krueger also stated that neither are light poles considered a "tower" by the City of Leavenworth

“Because we were not thinking about light poles when we crafted this ordinance” (deposition, Page 89, Lines 4 – 5).

So much for Leavenworth City Administrator Rich Brinkman’s quote in the June 17, 2005 issue of *The Wenatchee World*, that “It could have been a proposal to put a cellular tower” (that triggered the regulations). Leavenworth Director of Community Development Krueger states that the new regulations do not affect cell towers.

As L.M.C. 14.14 provides no explicit exemptions to the definition of “Tower/tower structure”, certainly there is no rational basis that cell towers, light poles, or even trees for that matter (after all, all wooden poles are from trees, and trees would well fit within the definition of “anything tall and thin approximating the shape of a column or tower”. It should be noted that cutting down a tree and removing its branches and planting this newly-made wooden pole firmly in the ground allows it to finally be properly engineered for safety, all while greatly reducing its exposure to high winds or fire damage) would not be included within the definition.

So much for “anything tall and thin approximating the shape of a column or tower” being a tower. Since cell towers and light poles were not brought within the purview of this chapter, what was the purpose of even including “tower” in the first place (perhaps just to make it appear that something besides flags and flagpoles were supposedly regulated by chapter 14.14)?

Festival Flags

Preliminary Code section 14.14.080 provided Exemptions. “Festival Flags” representing “official festivals held within the City or sponsored or sanctioned by the City” were proposed to be completely exempted from regulation under the preliminary public draft of Chapter 14.14 (April 27, 2005 version).

The April 27, 2005 Staff Report (detailed in Issue #4) detailed that these multi-colored festival flags “are extremely important to the festival-theme driven local economy”.

The April 27, 2005 version of the flag code exempted “festival flags” from regulation; American flags were to be regulated, except on so-called “flag-flying holidays”.

The proposed Section 14.14.080 (2) initially listed 27 specific days, plus five (5) other categories of days (50 State “birthdays”, State holidays, etc.) on which flags (flags not including within the definition of “festival flags” or “business flags”) were exempted from regulation. Further, the Staff Report admitted that flying flags were “important for purposes of patriotic expression”.

The City’s list of days worthy of patriotic expression closely resembles the selection of days listed in Title 4 of the United States Code, at Section 6(d).

Federal law, however, before listing the days when the flag should “especially” be flown, directs that “the flag should be displayed on *all* days”. This wording was also repeated at Title 36, the title on Patriotic Customs and Observances (36. U.S.C. 174(d)).

City staff admit that flying the (American) flag is “important for purposes of patriotic expression”, yet that patriotic expression in support of the country founded upon liberty was ironically limited only to days the City government allowed, even against the directive of federal statutes which state that “the flag should be displayed on *all* days”.

Lighting

City staff first proposed restricting the use of nighttime illumination of the American flag with their April 27, 2005 version of code: 14.14.140 allowed “discrete lighting of the flag pole”. The section misleadingly stated that “The Federal Flag Code encourages, but does not require, lighting of the American Flag at night if the flag remains on display after dusk”.

Title 4 U.S.C. 6(a) actually states: “When a patriotic effect is desired, the flag may be displayed 24 hours a day if properly illuminated during the hours of darkness”. This section maintains that the flag may only be displayed in hours of darkness when it (not the pole) is sufficiently (not discretely) illuminated.

The US Code, in essence, defines “patriotic effect” as the flying of the U.S. flag 24 hours a day—being “properly illuminated” during hours of darkness. Federal law’s “Patriotic effect” is equivalent to “patriotic expression”; freedom of expression is well-protected by the First and Ninth Amendments to the U.S. Constitution.

Though City staff at one point admitted that flying a flag amounts to “patriotic expression”, though Title 4 of the U.S. Code discusses “patriotic effect” and Title 36 discusses “Patriotic Observances”, and though there is even a national Flag Day (June 14th) which the President of the United States urges people of the United States to observe and calls on all government officials to display the flag of the United States on all government buildings, Leavenworth City Council members have now nevertheless sought to absolutely control and regulate that display of patriotism so as not to conflict with the Old World Bavarian Design Theme.

Later versions of the Leavenworth code, including the final code as enacted on May 10, 2005, removed the exemptions for flag-flying holidays and made the code enforceable at all times. The final code also was made applicable in all zoning districts of the City, including the residential zone which was earlier destined to be exempted.

Though later editions of L.M.C. Chapter 14.14 removed the exemptions of the festival flags and appeared to regulate them equally with American flags, the City Council re-inserted language in the final adopted version of the code to benefit festival flags. L.M.C. 14.14.110 (3) removed the limitation of the number of small flags (not exceeding 24 square feet) allowed on buildings. Business owners can still fly their wide assortment of (festival and/or patriotic) flags on their buildings without a restriction in their number.

The City’s preferential treatment of festival flags over a large American flag evidently continues to exist, even though at first blush it appeared to be eliminated. Director of Community Development Connie Krueger admits, in the Planning Commission Meeting Minutes of May 4, 2005 (pages 71 -73 @ 72 of City’s Production of Documents in response to Plaintiff Erickson’s request) of a *separate* future plan for “festival flags”, which is to “develop their own regulations”.

Krueger notes that festival flags are only to be “loosely regulated under the proposed ordinance”, but that festival flags “would probably fall under” a “future ordinance” because the proposed new ordinance “would specifically delineate so in the language”. Further, Director Krueger “indicated that the intent in eliminating the exemption language was to provide for more time to work on this and that perhaps they might want to look more into the idea of an exemption”.

These passages provide compelling evidence of Leavenworth’s continuing desire to treat “festival flags” preferentially to the American flag.

Permit

Leavenworth Municipal Code 14.14.050, as enacted on May 10, 2005, states “Persons seeking to construct and/or display a flag, flagpole, tower or similar structure and/or light display pursuant to the provisions of this chapter shall complete and submit an application for a Building Permit, Design Review Board Approval, and an application for review and approval by the Department of Community Development”.

Leavenworth Municipal Code 14.14.040 also now requires “building permits and related inspections” of all flagpoles.

Due to such regulations, no person in any zone within the City of Leavenworth can now fly a new flag of any size without this Building Permit and approval of the Design Review Board and the Department of Community Development (unless they had been flying it prior to enactment of the new code, and were thus “grandfathered” in).

*As is all too common with new regulations, a “grandfather” clause was inserted into the code, exempting existing poles and flags which would otherwise violate the new ordinance from the necessity of following the new requirements. Grandfather clauses and exemptions by their very nature create distinct classes of persons with varying “privileges” allowed.

Grandfather clauses and exemptions undercut the American principle of equal protection under the laws. “Divide and conquer” is the method used to incrementally restrict our rights while limiting the number of vocal opponents.

That the Design Review Board does not even have authority outside the commercial and industrial zoning districts where the Old World Bavarian Design Theme is applicable evidently makes no difference to the City. A homeowner living within the residential zones of the City which are not subject to the Old World Bavarian Design Theme cannot be made to seek the approval of a Board which has no jurisdiction within the residential zones!

Even within the commercial and industrial zones of the City where the Old World Bavarian Design Theme has applicability and where the Design Review Board has jurisdiction, what is the purpose of having the Design Review Board (which enforces the Bavarian Theme) review every permit to fly a flag or erect a flagpole unless flags and flagpoles must now be in conformance with the Old World Bavarian Design Theme?

Though City staff admitted that flying a flag is “important for purposes of patriotic expression”, they enacted an ordinance which now requires every person wanting to fly an American flag first seek and obtain a building permit *before exercising that patriotic expression!* There is not even a size threshold under which flags of a small size are exempted. No person in any zone can put up a new flag of any size without a building permit, approval from the Design Review Board and approval from the Department of Community Development!

The absurdity of requiring a “building” permit to fly even a small American flag should speak volumes as to the length the City of Leavenworth has gone to “protect” their “aesthetic character”, their “Old World Bavarian Design Theme” from being “overwhelmed” by American flags.

One final mention on the propriety and wisdom of a City regulating “aesthetics”; beauty is in the eye of the beholder and such regulations should be promulgated carefully and in limited fashion. In a May 4, 2005 Staff Report, at Issue #7, City staff admit “the new ordinance limits the size of the flag to one which can effectively be displayed in relation to the flagpole or tower on which it resides. This is to ensure that flags are proportionate to support structures *for both aesthetics as well as safety purposes*”.

It is enough of a stretch for the City to claim that it must regulate the height of flagpoles for purposes of safety, but now the City of Leavenworth claims the ability to regulate the size of a flag on a flagpole also for purposes of “aesthetics”.

In support for determining the appropriate size of a flag allowed given the height of a pole in L.M.C. Chapter 14.14.100, Community Development Director Krueger states in her May 24, 2006 Deposition (Page 44, Lines 6 – 9) “I believe this actually came from a website that Mr. Erickson gave to us. And this was a *recommendation*, and we saw this echoed in several different documents on *guidance* on appropriate display of the flag” (emphasis added).

Leavenworth took *recommendations* on *guidance* and made them binding regulations. The Leavenworth Flag Code simply goes too far!



The City of Leavenworth flies an American flag in front of the central park downtown along Highway 2 from a flagpole approximately 30' in height. 117' away, within the same landscaped area for much of the year, the City flies a festival flag flying *higher* than the American flag at about 32' in height.



At City Hall, a second American flag also flies from a pole about 30' in height while 100' away within the same landscaped area flies another festival flag again flying higher than the American flag.

Any flag or banner flying higher than the American flag violates national flag standards and shows a lack of proper respect for the American flag (4 U.S.C. 7(c)) .

That the City flies their festival flags higher than the American flag at two different locations shows a level of disrespect contrary to their supposed intentions of attempting to make flag etiquette standards binding law.

Perhaps City officials should worry less about the intentions of those who do show proper respect for the American flag, and worry about bringing their own flag displays into conformance with proper rules of flag etiquette.



Consider also, the picture shown above shows the Canadian flag (to right of the American flag) improperly below the American flag [flags of countries should be flown at the same height when they are not at war with one another. The American flag is to be flown at the flag's right {viewer's left} in the United States, with other countries' flags at the American flag's left], but all at uniform height—4 U.S.C. 7(c) & (g)).

Visual Clutter

Worst of all, and showing perhaps the greatest degree of disrespect for the U.S. flag yet, one of the five stated purposes for enacting the flag code (which was enacted to stop the proposal to fly a tall American flag), was for the “elimination of *visual clutter*”! These are the words chosen by the City of Leavenworth to regulate flags (and specifically to prevent a large American flag from being flown).

Recall the City officials (the staff, the Planning Commission, and the City Council), fell all over themselves to exempt festival flags from regulation. Included within the final ordinance (L.M.C. 14.14.110(3)) was the specific provision eliminating the numbered restriction of small flags mounted on buildings. A building owner could have two hundred 24 square foot festival flags mounted on the face of a small building, but this would not constitute “visual clutter”, but Matt Erickson was specifically stopped from flying a majestic 20' X 30' American flag atop an 80' pole, for this would constitute “visual clutter” in Leavenworth's view (judging by their words and actions).

The City of Leavenworth's attorney, Michael C. Walter, also incredibly stated in court documents that it is “objectively reasonable” for the City “to conclude that the erection of 80' foot flag poles would be aesthetically harmful” (Defendant City of Leavenworth's Motion for Summary Judgment, Page 31, Lines 12 – 13). The City of Leavenworth knows no bounds of propriety towards the American flag.

Further Express Indications of Intent

The official Meeting Minutes of the January 5, 2005 Planning Commission meeting perhaps provides the clearest indication of Leavenworth's intent in regulating flags and flagpoles. The official Minutes* state that Planning Commission members “indicated that the conceptual language related to flags and outdoor displays *would more accurately reflect their interests in maintaining flags and other outdoor displays which are in keeping with the Bavarian theme* while offering more adequate protection of public safety” (emphasis added).

*Community Services Director Connie Krueger takes the official Minutes of the Planning Commission (Krueger Deposition of May 24, 2006, Page 69, Lines 24 & 25).

It should be noted what Planning Commissioners were working on at the time is what would soon become the first public draft (April 27, 2005 version) of L.M.C. 14.14, with all its pointed bias against the American flag and preference to festival flags (which were then completely exempted from regulation).

This last quote provides the final proof of Erickson's charge that the City of Leavenworth strongly intended to protect their Bavarian theme, that they viewed a large American flag at the entry into the City as a direct threat to that Old World Bavarian Design Theme.

The evidence provided above easily refutes attorney Walter's charge against Erickson that: "There is absolutely no evidence to suggest or support these baseless and speculative allegations".

Safety

Before giving a final assessment on motives of City staff and City Council, it is appropriate to at least briefly review their admitted purposes.

In the June 17, 2005 Wenatchee World article, reporter Michelle McNeil reports that Leavenworth Mayor Mel Wyles states that "the restriction on the height of flagpoles is in part a safety issue because during firefighting season helicopters sometimes fly low through town".

The Defendant City of Leavenworth's Motion for Summary Judgment further espouses the argument of an 80' flagpole being unsafe to "low flying helicopters" (Page 6, Footnote 3). The footnote also notes that "the City Council...recognized that the highest building was 35 feet and the highest tree canopy was only 55 feet".

L.M.C. 14.14.060 carried this supposed concern about "low flying helicopters" into the final ordinance, directing the City "shall seek consultation for height and lighting restrictions through the Federal Aviation Administration".

Given that flagpole and tower heights were ultimately limited to *building heights*, why in the world (other than for dramatic effect) should the City check with the FAA for approval? If it is necessary for poles, then they should also check with the FAA for approval of all buildings, as their heights are specifically tied to one another. I'm sure the FAA would appreciate every jurisdiction in the country checking with them before any new building was approved.

These statements of heights are incorrect and also misleading. The 35' limitation of building height is applicable in the Residential, Recreational and General Commercial zones of the City. In the Downtown Commercial and Light Industrial zoning districts, the height limitation is actually 50'.

However, the reference points for building heights take into consideration the length of roof rafters, the pitch, and also the average grade of the ground. The actual peak of the roof can be much higher than the stated height allowed.

For example, the peak of the roof of the new Bavarian Lodge which opened up in Leavenworth at 810 Highway 2 on July 15, 2005 is actually 53' (See building Plans Pg. A5.1, showing South Elevation 53' 0 3/4").

The River Park Homes condo units currently under construction on Commercial Street in Leavenworth have their peak at 64' 4 3/4" above the garage grade (see Pages A5.1, A5.2, A5.3, A5.4 of their building plans).

Lastly, the new Alpine Visions Condo units (also being marketed as Haus Wunderbar Condos) under construction at 617 Front Street in Leavenworth will have a total exposed height from the base of the building to roof peak of 73' (see Plan Sheet Page A9).

Given such wide variety of actual roof peaks allowed by the Leavenworth Municipal Code, tying the height of flagpoles to the "height restriction for buildings/structures" (Leavenworth Municipal Code,

Chapter 14.14.080) makes even far less sense. If a building peak can be 73', why must the flag pole height be only 50' (or is actually allowed to the same 73' height as the peak?).

Further, if an 80' flagpole (even one with nighttime illumination of the flag) would be dangerous to "low flying helicopters" and must be banned for "safety", then why "grandfather" in existing poles such as the 95' maypole located in the downtown central park? Is that "safe"? What about the many 60', 80' and 100' fir and pine trees also located in town?



Though the City states in its Motion for Summary Judgment that the "highest tree canopy" is only "55 feet", the City readily acknowledges the maypole to be in the neighborhood of 95 to a hundred feet, or even to 110 feet in height (see maypole variance application; and also Director Krueger's May 24, 2006 Deposition, Page 51, Line 17). One can look at the trees next to the maypole which are of equal height, or taller than, the maypole itself (see pictures above). Other trees throughout the City are equally as tall, with many more that are at least 80' in height.

If a helicopter pilot is threatened by an 80' flagpole, perhaps the real danger is not *to* him, but *from* him. This does not even touch upon the argument of property (rights) extending deep into the ground and high into the air (that a low-flying pilot is the transgressor of the airspace [property-rights] of the landowner).

Krueger gave a much safer answer when she did not give any specifics as to the actual safety threat. In a May 25, 2005 Leavenworth Echo article, reporter Greg Woehler writes that "Krueger said the city views the situation as an issue of public safety".

If public safety was truly the issue, then one would expect that the City's response would have been uniform throughout every district zone within the City.

The City initially only sought to make the flag ordinance applicable in the Commercial and Industrial zones in the City and exempt out the Residential zones. As detailed earlier, this was because the Old World Bavarian Design Theme was only applicable in the Commercial and Industrial zones in the City. If safety were truly the issue about flagpoles and towers, such structures would not have initially been exempted from regulation in the Residential zones.

If public safety was truly the issue, then one would expect that the City's response at regulating flags and flagpoles to be uniform throughout the City, perhaps only varied when the material of a given pole differed (metal versus wood, for example), or perhaps considering variations of ground consistency or backfill material (concrete versus gravel, for example).

However, in no situation did the City give uniform answers, but instead opted for answers which fit their political agenda. Even in the code as enacted, a flag pole in the Residential and General Commercial zones may only be 35' in height, but in the Downtown Commercial and Light Industrial zones, a flag pole may be 50' in height. Limiting the height allowed of flagpoles to differing heights of buildings in a given zone smacks of *politics*, not of safety.

Further, if safety was truly the purpose of the ordinance, then why are *flags* even mentioned? After all, only the *flagpole* should be logically seen as a potential threat to safety. If safety was truly the purpose of the ordinance, then one would expect regulation only of flagpoles and towers.

Flags are the *first* items listed within the ordinance (“Flags, Flagpoles, Towers and Tower Structures”) because *they are the whole purpose for the ordinance!* Recall that the only “Particular concern” to City staff and City Council was “using *flags*...in (a) manner which would overwhelm the Old World Bavarian Design Theme”. Recall that the Planning Commission members wanted outdoor displays that “would more accurately reflect their interests in maintaining *flags* and other outdoor displays which are in keeping with the Bavarian theme”.

Recall the initial draft of L.M.C. 14.14.010 ends with the sentence: “The City herefore adopts this ordinance to ensure the the (sic) development regulations will address the issue of size, height, or number of *flags* with adequate and enforceable clarity and will ensure the continued aesthetic attractiveness and conformance with the Old World Bavarian Theme which is important to the economic health of the community”.

The real purpose of the ordinance was “protection” of the “Old World Bavarian Design Theme” from a large American *flag*. Poles do not easily offend; it is the *flag* which offends the City! Safety was just a legal expedient used by the City as a political deterrent.

Recall that the 95' maypole did not offend the City. Erickson contends it was not his 80' flagpole which offended the City, but his desire to fly a 20' X 30' *American flag*.

Ensuring traffic safety

Leavenworth proposes that a large flag, especially one illuminated at night would be a distraction to motorists.

If a driver is going to be distracted by an 80' pole flying a 20' X 30' American flag illuminated at night where the speed limit is 30 mph, then that driver is already in trouble.

1.25 miles further East of the site where FoundationForLiberty.org desires to fly its flag is found (at Prey's Fruit Barn, outside city limits) a 30' X 50' American flag flying from a 100' pole, where the speed limit is 50 mph. FoundationForLiberty.org proposes that flying a flag 40% of the size as the one found at Prey's Fruit Barn, at 80% of its height, where the speed limit is 60% would allow drivers to become better accustomed to large flags before seeing a gigantic flag, thereby increasing safety.

If night lights are a danger to drivers, the City should re-think its famous Christmas lighting ceremonies and ban Christmas lights from buildings.

Added light *helps* nighttime safety, and helps eliminate the cover of darkness where danger lurks (hence, the many lightpoles throughout Highway 2 through the City). A lighted flag will increase light, increasing safety.

Limiting heights of flying the American flag akin to lowering highway signs

In a June 5, 2005 Wenatchee World editorial, Leavenworth City Councilman Peter D. DeVries, in defense of the limitation on the heights of flagpoles, points out that the height of highway signs was reduced within the City from 25' to 15' several years ago and then boldly declares that this ordinance “is no different”.

The last time I checked, no one stood at baseball games, removed their hats, placed their right hand over their hearts, and looked toward a highway sign in reverence while the National Anthem was sung. I have witnessed no City Council meeting where Council members pledged their Allegiance to a highway sign. I have not seen a picture or statue of World War II soldiers raising a highway sign in victory at Iwo Jima or elsewhere. I have viewed no pictures of rescuers at Ground Zero in New York City foisting a highway sign showing our perseverance and resolve when confronted by a national tragedy.

To contend that limiting the height of a highway sign and limiting the height of perhaps the primary symbol of American liberty are equivalent events is a monumental blunder or a sign of profound indifference.

Billboard Alley

Councilman DeVries further states in the editorial: “we do not want Leavenworth to be a ‘billboard alley’ with unlimited heights for signs, flagpoles and other structures”. As to the worry of a proliferation of unlimited-height flagpoles, the sheer cost of such poles makes that hypothetical scenario about as likely as the sky falling.

As to Councilman DeVries’ worry about a proliferation of any advertisement-type of flags, these would fall under the City’s restrictive sign code.

It is apparent from the Council’s last-minute re-insertion of removing the numbered limitation of flags under 24 square feet which hang from buildings, Leavenworth could well be destined to become, however, a “billboard alley” of cheap, small flags; predominantly festival-oriented in nature.

Locational Device

Director of Community Development Connie Krueger has placed great stock in her allegation that Erickson’s purpose for erecting a large American flag was primarily for a “locational device” for FoundationForLiberty.org, a non-profit organization he founded and of which he is President (Krueger May 24, 2006 Deposition, Page 15, Lines 14 – 25; Page 16, Lines 1 – 3; Page 17, Lines 3 – 12; Page 19, Lines 13 – 25; Page 20, Lines 13 – 23; Page 23, Lines 11 – 16; Page 58, Lines 23 – 25; Page 59, Lines 1 – 14; Page 60, Lines 19 – 25; and Page 61, Lines 1- 25). This would, in effect, turn the American flag, not as a symbol of freedom enjoying the strong protection of free speech under the federal and State Constitutions, but the equivalent of a business sign to be easily regulated by City ordinances.

Erickson refutes such a position, and states that if he ever admitted to any type of locational device, it was only as a reference landmark if directing someone to his home or place of business. The non-profit Foundation’s “business” is conducted primarily via written means on the Internet, mail or newspaper editorials. The Foundation will generally discourage walk-in traffic, as the Foundation will only be sparingly staffed and walk-in traffic will simply deter from its primary work—the Foundation’s writing (which can reach a much broader audience).

Erickson’s primary purpose of erecting a large American flag is to encourage others to think about liberty and reflect about what they could do to help maintain that freedom, and where there has been an erosion of freedom, to help restore it. The American flag is a strong visual symbol of the efforts and sacrifices of those brave Americans who came before us and paved the way for our good fortune of being born Americans, or those transplants currently enjoying the freedoms America has yet to offer.

The City’s “locational device” allegation counters the only written statements of Erickson’s intentions, provided by the City Clerk in her official minutes of the City Council meeting of May 10, 2005. The minutes reflect: “Mr. Erickson, who is the individual who approached the City about the 80-foot flagpole, mentioned that it was not his intent for this issue to bring the attention it has, and *stated his patriotic desire to prominently display the American flag*” (emphasis added) (Plaintiff Matt R. Erickson’s

First Set of Interrogatories and Requests For Production of Documents to City of Leavenworth @ Page 31).

The closest Erickson came to providing a written reason for erecting a tall flag was in a April 30, 2005 Letter to the Leavenworth Mayor, City Council, and Planning Commission members, where he stated: “The Foundation For Liberty strongly desires to prominently install, display and maintain a proud United States flag at its administrative office” (April 30, 2005 —see http://foundationforliberty.org/pdf/government_folder/flag/april_30_letter.pdf). In this nine-page letter, he wrote of his “strong opinion” on the flag matter, and made numerous patriotic references.

That Leavenworth pay homage to the Bavarian lifestyle is not in any way inappropriate in the United States, for these United States were predominately founded, developed and populated by Europeans. That a U.S. flag flies proudly within the city that acknowledges both its past and present, both its roots and where those roots actually developed, is appropriate. That the U.S. flag fly proudly within the Bavarian themed village of Leavenworth, Washington is appropriate.

To attempt to treat Leavenworth as nothing to do with America is not only to perpetuate a lie, it also distracts from the uniqueness which is Leavenworth. If Leavenworth could be transplanted somehow to Europe, much of its uniqueness would be lost on similar villages in the surrounding hills. *It is precisely that Leavenworth is in the United States that contributes much to its unique attributes.* **Anything which denies its truly-unique attributes will ultimately detract from it, not contribute to it.** Removing all vestiges of things American therefore makes Leavenworth *less* unique, not more unique.

Let us not forget that our ancestors came from countries including Germany, Austria & Switzerland to the United States because America held a *greater* promise for a future life of freedom and prosperity. As such, even a theme-driven city such as Leavenworth should not throw off perhaps the fundamental symbol of why there can be a Bavarian culture *within the United States of America.*

Leavenworth has placed great weight of its need to restrict the height of flagpoles and the maximum size of flags, but it has not clearly shown a legitimate government purpose. Leavenworth first stated it was for purposes of safety, yet careful analysis of their flag code shows only political apologies, and no reasonable answers why flag sizes were limited. Their supposed safety concerns were not even ever uniformly applied.

The reason for limiting the heights of buildings in the first place by governments should be discussed. This reason can be inferred by looking at Wenatchee’s code providing for height restriction exemptions. Wenatchee Municipal Code 10.60.010 states: The height limitations contained in the zoning district regulation do not apply to the following...flagpoles...or other appurtenances usually required to be placed above roof level and *not used or intended to be used for human occupancy*” (emphasis added).

Limiting the height of buildings to the fire-fighting and rescue capability of the local fire district *to protect human life* is the fundamental reason for limiting building height. If no human is to occupy a structure, why expressly limit it? Since flagpoles are not intended for human occupancy, the vast majority of Washington jurisdictions do not even attempt to regulate them, and many even provide express exceptions exempting flagpoles from regulation, such as shown above by the City of Wenatchee.

The City of Leavenworth’s every action on flags has been, first and foremost, ALL ABOUT THE FLAG. The City of Leavenworth’s every action is fully consistent with their stated worry that a large American flag would “conflict” with the Old World Bavarian Theme. The City of Leavenworth’s every action concerning flags was utterly consistent with their stated desire to “*more accurately reflect their interests in maintaining flags and other outdoor displays which are in keeping with the Bavarian theme*”.

Leavenworth Municipal Code 14.14 regulating flags and flagpoles is content-based regulation, seeking to foreclose the possibility of a large American flag from “overwhelming” the Old World Bavarian Theme.

L.M.C. 14.14 regulating flags and flagpoles is not narrowly tailored to reasonably promote a legitimate or compelling government purpose and it improperly restricts the free speech rights of American citizens.

Matt R. Erickson's charges are fully supported by convincing and strong evidence. L.M.C. 14.14 should be declared constitutionally unacceptable as it is.