BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ONSITE ADVERTISING SERVICES, LLC,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

ICON GROUPE, LLC,
Intervenor-Respondent.

LUBA No. 2010-113

FINAL OPINION
AND ORDER

Appeal from Washington County.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Davis Wright Tremaine LLP.

Dan R. Olsen, County Counsel, Hillsboro, filed a response brief and argued on behalf of respondent.

Roger A. Alfred, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Perkins Coie LLP.

HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.

AFFIRMED 06/22/2011

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer's decision that affirms a planning director's decision that denies petitioner's request for permit approvals for a number of signs.

REPLY BRIEF

Pursuant to OAR 661-010-0039, a reply brief must "be confined solely to new matters raised in the respondent's brief." Petitioner moves for permission to file a reply brief to address new matters raised in the county's response brief. We allow the reply brief, in part.

The reply brief addresses five allegedly new matters—issues A through E. Issues A and D are not new matters. Issue A is whether the fixed goal post rule at ORS 215.427(3)(a) applies in this case. That issue is squarely raised by petitioner in its second assignment of error. The county's citation to a Multnomah County Circuit Court decision in support of its position that the statute does not apply does not raise a new matter. Issue D is whether property owner signatures are required for the disputed applications. In its brief, the county cited ORS 215.416(1) in support of its position that they are. The county's citation to a statute in response to an argument presented in the petition for review does not raise a new matter. Because Issues A and D are not new matters, the reply brief is not allowed with regard to those issues and we have not considered those parts of the reply brief in resolving the merits of this appeal.

Issues B, C and E are new matters. Issue B is whether petitioner failed to assert in its petition for review that it relied on the county exemption from sign regulations discussed later in this opinion. The parties are like ships passing in the night regarding this issue. Although this issue has no bearing on our ultimate resolution of this appeal, we elect to treat it as a new matter. Issue C is whether the petitioner is asserting inconsistent legal positions, and issue E is whether it is unnecessary for LUBA to consider one of the constitutional bases

1 for the hearings officer's decision. We believe both of those issues qualify as new matters.
2 Because issues B, C and E are new matters, we have considered those portions of the reply
3 brief.

4 **FACTS**

5 Between March and May 2010, petitioner filed permit applications for 16
6 freestanding double-sided billboard signs. Signs are regulated by Washington County
7 Community Development Code (CDC) Section 414. CDC 414-5.9 exempts certain signs
8 from regulation under CDC Section 414. Petitioner took the position before the hearings
9 officer that because some of the exemptions granted by CDC 414-5.9 are based on the
10 content of the sign, CDC 414-5.9 violates Article I, section 8 of the Oregon Constitution.
11 Petitioner asserted below that because the CDC 414-5.9 exemption is unconstitutional, CDC
12 Section 414 is unconstitutional in its entirety and cannot be applied to petitioner's
13 applications. Petitioner took the position below that although the proposed freestanding
14 signs exceed the size limits imposed by CDC Section 414 and, in some cases, violate other
15 CDC Section 414 sign standards, those applications must be approved because CDC 414
16 may not be applied to its applications.

17 On June 8, 2010, the planning director issued 16 decisions that deny all of the
18 applications. Each of those 16 decisions includes the following language:

19 "Article [I], section 8 of the Oregon Constitution precludes application of the
20 content based exemptions cited in the application."

21 In each of the 16 decisions, the planning director applies substantive standards from CDC
22 Section 414 and elsewhere in the CDC, finds that the proposed signs do not comply with
23 those CDC standards, and denies the applications based on the failure of the applications to
24 comply with those CDC standards. On June 16, 2010, petitioners appealed all 16 of those
25 decisions to the county hearings officer.

26 In a June 30, 2010 county planning staff report, planning staff proposed Ordinance
27 735 to the planning commission. Record 54-56. At its July 10, 2010 meeting, the planning

commission voted to forward Ordinance 735 to the board of county commissioners. Record 59. On July 20, 2010, the board of county commissioners adopted Ordinance 735. Petition for Review Appendix 32-44. According to the staff report that was provided to the planning commission and board of county commissioners, Ordinance 735 removes all content-based distinctions in CDC Section 414-5, including CDC 414-5.9. Section 3 of Ordinance 735 provides that to the extent permitted by law the changes adopted by Ordinance 735 "shall apply to all applications for approval of a sign received on or after January 1, 2010." Petition for Review Appendix 33.

On October 28, 2010, approximately three months after Ordinance 735 was adopted, the county hearings officer held a public hearing on petitioner's appeals. On November 29, 2010, the hearings officer issued her final written decision denying petitioner's applications. In that decision the hearings officer expresses several alternative bases for denying the applications. Petitioner challenges each of those alternative bases for denial in this appeal.

PRELIMINARY ISSUES

A. Assignments of Error

OAR 661-010-0030(4) sets out the required content for a petition for review. OAR 661-010-0030(4)(d) provides that a petition for review shall:

> "Set forth each assignment of error under a separate heading. Where several assignments of error present essentially the same legal questions, the argument in support of those assignments of error shall be combined[.]"

Petitioner's petition for review does not set out assignments of error. It simply sets out arguments under the headings entitled "First Assignment of Error" "Second Assignment of Error," and so on. As we explained in *Lee v. City of Oregon City*, 34 Or LUBA 691, 694 (1998):

> Although [LUBA's] rules concerning the requirements for assignments of error are not as detailed as those contained at ORAP 5.45, the assignments of error included in a petition for review at LUBA must be stated with sufficient precision for this Board to identify which portions of the disputed land use decision are being challenged and why. *See Heiller v. Josephine County*, 23

> Or LUBA 551 (1992); *Schoonover v. Klamath County*, 16 Or LUBA 846, 848 n4 (1988); *Standard Insurance Co. v. Washington County*, 16 Or LUBA 30, 32-33 (1987). Once error has been assigned, the argument in support of the assignment of error must supply the legal reasoning for sustaining the assignment. *Dougherty v. Tillamook County*, 12 Or LUBA 20, 33 (1984); *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

The OAR 661-010-0030(4)(d) requirement that petitioners set out each assignment of error separately, although frequently ignored or perfunctorily observed, is important. Land use appeals are frequently quite complicated. Setting out concise assignments of error helps all parties and LUBA understand the issues that must be resolved. The importance of clear assignments of error increases as the issues become more complex and overlap. In this case, the petition for review is well organized and well written, and petitioner's failure to include assignments of error neither misled respondents regarding petitioner's legal theories for remand nor prevented LUBA from understanding those issues and the parties' positions regarding those issues. Because petitioners' violation of OAR 661-010-0030(4)(d) in this case caused no prejudice to other parties' substantial rights, it is a technical violation of our rules that does not warrant any remedial action. OAR 661-010-0005.

B. Intervenor-Respondent's Brief

Intervenor-respondent (intervenor) moved to intervene on the side of respondent only. Yet in its response brief, intervenor presents argument in support of petitioner's second and fifth assignments of error, in which petitioner challenges respondent's decision. If intervenor wanted to assist both petitioner and respondent in its appeal, it should have moved to intervene on the side of both petitioner and respondent. If intervenor wanted to challenge aspects of the county's decision it also could have filed its own appeal. But intervenor neither filed its own appeal nor moved to intervene on the side of petitioner, it only moved to intervene on the side of respondent. On our own motion, we strike the portion of intervenor's brief that supports petitioner's second and fifth assignments of error, and limit

our consideration of that brief to intervenor's arguments in opposition to petitioner's first assignment of error.

FIRST ASSIGNMENT OF ERROR

A. The County's Sign Code

Although the CDC could be clearer, the parties apparently all agree that CDC Section 414 was adopted to comprehensively regulate signs, and for the most part signs are neither referenced nor specifically regulated by the balance of the CDC. CDC 414-1 through 414-4.5 set out maximum size and height standards for signs in all zoning districts, as well as other regulatory standards. CDC 414-5 exempts certain signs from the sign regulations set out at CDC 414-1 through 414-4.5 and also exempts those signs from the CDC requirement that proposed development must secure a development permit.[1] CDC 414-5.9 exempts the following signs from regulation under the CDC:

> "Danger signs, trespassing signs, warning signs, traffic signs, memorial plaques, signs of historical interest, holiday signs, public and service information signs such as restrooms, mailbox identification, newspaper container identification."

Petitioner and the county apparently agree that some or all of the CDC 414-5.9 exemptions are based on the content of the sign and to that extent CDC 414-5 runs afoul of Article I, section 8 of the Oregon Constitution.[2] In addressing petitioner's first, third, and fourth assignments of error, we have assumed that such is the case.

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[1] CDC 414-5 provides, in relevant part:

> "The following signs are exempted from development permit requirement[s] and from the standards set forth above; however, a permit may be required as determined by the Building Official."

[2] Article I, section 8 of the Oregon Constitution provides:

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

B. Failure to Request an Exemption and Severability

Under its first assignment of error, petitioner challenges two of the hearings officer's legal theories for denying the requested permits. We address each of those theories in turn.

1. Failure to Request an Exemption

Although it is not entirely clear, the hearings officer's decision can be read to say the planning director correctly denied the disputed applications, in part, because petitioner never requested an exemption under CDC 414-5.9. For that reason alone, the hearings officer finds the permits were properly denied because the proposed signs do not comply with one or more of the sign standards at CDC 414-1 through 414-4.5. Intervenor in particular argues that this finding makes it unnecessary to consider whether CDC 414-5.9 is unconstitutional or to consider the hearings officer's other legal theories for denying the applications.[3]

Petitioner does not appear to have ever expressly asked that its signs be granted exemptions under CDC 414-5.9 and approved pursuant to those exemptions. However, we do not see how that failure, in and of itself, could provide a basis for denying all the permit applications. In an April 22, 2010 letter, petitioner makes it reasonably clear that its position is that CDC 414-5.9 violates Article I, section 8, and that petitioner believes that violation has the legal consequence of rendering all of CDC Section 414 unconstitutional. Petitioner's failure to request an exemption provides no independent basis for denial of the applications.

2. The Hearings Officer's Decision that CDC Section 414 Can be Saved by Severing CDC 414-5.9

When part of a state statute is declared unconstitutional, the legislature has made it clear that the legislature's preference, if possible, is to sever the unconstitutional part of the statute and leave the balance of the statute that is not unconstitutional in effect:

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[3] Intervenor apparently sought exemptions for a number of signs, and when the county did not act within the 120 day period specified by ORS 215.427, intervenor filed a petition for writ of mandamus under ORS 215.429. That mandamus action is pending at the Washington County Circuit Court. Intervenor is concerned that its "interests regarding its applications could be affected by the outcome of this proceeding." Intervenor-Respondent's Brief 2.

1 "It shall be considered that it is the legislative intent, in the enactment of any
2 statute, that if any part of the statute is held unconstitutional, the remaining
3 parts shall remain in force unless:

4 "(1) The statute provides otherwise;

5 "(2) The remaining parts are so essentially and inseparably connected with
6 and dependent upon the unconstitutional part that it is apparent that the
7 remaining parts would not have been enacted without the
8 unconstitutional part; or

9 "(3) The remaining parts, standing alone, are incomplete and incapable of
10 being executed in accordance with the legislative intent." ORS
11 174.040.

12 The Supreme Court has held that "[t]he same analysis should be employed to determine
13 whether part of an ordinance, if held to be unconstitutional, should be severed from the
14 remaining parts." *City of Portland v. Dollarhide*, 300 Or 490, 504, 714 P2d 220 (1986). The
15 county adopted a severability clause when it adopted the CDC, and that severability clause
16 appears to express an even stronger preference to sever portions of the CDC found to be
17 unconstitutional and continue to apply the constitutional portions of the CDC. CDC 105-1. [4]

18 Under the first assignment of error, the disagreement between petitioner and the
19 county is not *whether* to sever but *what* to sever. Petitioner would solve the problem
20 presented by the improper content-based distinctions in CDC 414-5.9 for exempting certain
21 signs from regulation by severing all of CDC Section 414 from the CDC. The result of such
22 a severance would be all types of signs would be unregulated, and any applications for sign
23 approval under the CDC prior to the Ordinance 735 amendments to CDC 414-5 would not be
24 regulated by the severed CDC 414, or any other part of the CDC, and would have to be
25 allowed outright. As petitioner correctly points out, the impact of such a severance would be

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[4] CDC 105-1 provides:

"If any portion of this Code is for any reason held invalid or unconstitutional by a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this Code."

somewhat limited. Because Ordinance 735 took effect on July 20, 2010, thereby removing the constitutional infirmity from CDC Section 414, only pending sign permit applications that predate that July 20, 2010 ordinance would have to be approved.[5]

The hearings officer on the other hand determined that the appropriate remedy in this case is to sever the CDC 414-5.9 exemptions, with the result that the CDC 414-1 through 414-4.5 sign regulations would remain in effect, and the signs identified in CDC 414-5.9 would not be exempt from those requirements. Under that interpretation, petitioner's signs would remain subject to the CDC 414-1 through 414-4.5 sign regulations.

The parties spend a significant portion of their briefs disputing the meaning and significance of *Outdoor Media Dimensions v. Dept. of Transportation*, 340 Or 275, 132 P3d 5 (2006). We therefore turn first to *Outdoor Media*. As we explain below, there are fairly significant differences between the facts and the regulatory scheme in place in that case and the facts and the regulatory scheme in this case, which render *Outdoor Media* of limited assistance in resolving the severance question presented in this case.

The dispute in *Outdoor Media* included an Article I, section 8 challenge to the Oregon Motorist Information Act (OMIA). In *Outdoor Media*, like the present appeal, some signs qualified for an exemption and some signs did not (on-premises signs were partially exempt from the OMIA; off-premises signs did not qualify for the partial exemption). The Supreme Court concluded that the on-premises/off-premises distinction was a distinction based on the content of the signs and therefore violated Article I, section 8. But in *Outdoor Media* the exemption was not a complete exemption. The unconstitutional exemption in

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[5] Petitioner's first assignment of error assumes the 16 permit applications are applications for statutory "permits," as that term is defined by ORS 215.402(4), and that those statutory permit applications must be reviewed based on the land use standards that were in effect when the applications were deemed complete. The hearings officer found that the 16 permits are not statutory permits, and that the Ordinance 735 amendments may be applied to the applications even though those amendments post-date the complete applications. Petitioner assigns error to that finding in its second assignment of error. It is unclear exactly how many sign applications were pending when Ordinance 735 was adopted on June 20, 2010, but both petitioner and intervenor contend that their applications may not be reviewed under CDC 414, as amended by Ordinance 735.

Outdoor Media was only an exemption from the OMIA requirement that a prospective sign developer must secure a permit and pay a fee. The time, place and manner regulatory standards in the OMIA applied to all signs, without regard to whether the sign developer had to pay a fee or secure a permit. So the severance issue in Outdoor Media was whether to sever the permit and fee exemption (so that all signs were subject to the fee and permit requirement) or sever the permit and fee requirements (so that no signs were subject to the permit and fee requirements). The Supreme Court resolved that issue as follows:

> "[T]he OMIA includes many restrictions on highway signs that we do not find unconstitutional, including restrictions on sign size, spacing, location, and lighting. Those restrictions, in general, apply equally to on-premises and off-premises signs, and we think that the legislature would have wanted them to remain in effect, notwithstanding the unconstitutionality of the on-premises/off-premises distinction. Accordingly, we hold that the OMIA is not unconstitutional in its entirety.
>
> "Our conclusion that the OMIA's different treatment of on-premises and off-premises signs is unconstitutional presents a more difficult problem. We can end that infirmity either by striking from the OMIA the exemption from the permit requirement for on-premises signs, ORS 377.735(1)(c), or by striking the permit requirement itself, ORS 377.725(1), as it applies to outdoor advertising signs (off-premises signs). In choosing between those alternatives, we are mindful of the legislature's policy statement in ORS 377.705 that the purposes of the OMIA include 'promot[ing] public safety,' 'preserv[ing] the natural beauty and aesthetic features' of state highways, and 'prohibit[ing] the indiscriminate use of * * * outdoor advertising.' However, we also are aware from the record that the number of existing on-premises signs, which do not require OMIA permits or fees, far exceeds the number of outdoor advertising signs, which do require permits and fees. We thus find ourselves faced with the same two unpalatable choices that the legislature would face: permitting sign owners to display "off-premises" (outdoor advertising) signs without obtaining the permits required by the OMIA, or imposing new permit and fee requirements on thousands of individuals and businesses that now have on-premises signs. We think that, faced with that choice, the legislature would not have been willing to extend the OMIA's permit and fee requirements to the large category of new and existing on-premises signs. Accordingly, we conclude that the appropriate remedy in light of our holding is to strike from the OMIA the permit and fee requirements for outdoor advertising signs, ORS 377.725(1). 340 Or at 301-02 (footnote omitted).

1 Petitioner contends the hearings officer in this case erred because she did not perform
2 the kind of "impact" inquiry that the Supreme Court performed in *Outdoor Media*. Petitioner
3 contends very few signs will have to be approved if CDC 414 is invalid in its entirety
4 because the amendments adopted by Ordinance 735 in July 20, 2010 will apply to all permit
5 applications submitted after July 20, 2010. Petitioner contends that the small number of
6 applications that will avoid sign regulation stands in stark contrast to the potentially very
7 large number of signs that were approved via exemptions under the pre-July 20, 2010
8 (unconstitutional) version of CDC 414-5.9.[6] Petitioner contends it was error for the hearings
9 officer to fail to consider the more significant impacts that will result from severing the CDC
10 414-5.9 exemption as opposed to the much more limited impacts that would result from
11 severing CDC 414 altogether.

12 The short answer to petitioner's argument is that the "impact" analysis that the
13 Supreme Court applied in *Outdoor Media* is but one way a court can go about answering the
14 critical question that must be answered in deciding whether and how to sever a
15 constitutionally infirm ordinance. The critical question is whether and how the enacting
16 body would have severed the unconstitutional law, had it been aware of the constitutional
17 infirmity. *See Clear Channel Outdoor, Inc. v. City of Portland,* 243 Or App 133, 147, ___
18 P3d ___(2011), ("whether an unconstitutional legislative provision should be severed is a
19 matter of the legislative intent of the enacting body"). It is the court's understanding of
20 legislative intent that determines whether and how an unconstitutional ordinance should be
21 severed. That intent may or may not have anything to do with the impact that severance
22 might have or how many signs will be affected by competing severance options.

23 In its recent decision in *Clear Channel Outdoor*, the Court of Appeals considered a
24 similar challenge to the City of Portland's sign regulations, which at one time included an

[6] The county asserts that it has not enforced CDC 414-5.9 in a way that is unconstitutional. We have no way of confirming that is in fact the case.

exemption for painted wall decorations (murals) that was found to be a content-based exemption that violated Article I, section 8. In considering whether the city council would have preferred to eliminate the exemption for "painted wall decorations" that had been found to violate Article I, section 8, or broaden that exemption to include all signs, the court concluded the city council would have preferred to eliminate the exemption. 243 Or App at 149-50. While the Court of Appeals considered the fact that relatively few murals had taken advantage of the exemption, whereas many thousands of signs were subject to the city' sign regulations, the court considered a number of other factors to determine legislative intent, including the city's response to litigation that challenged the city's sign regulations:

> "Since 1986, in response to litigation determining that provisions of the city's sign regulations had constitutional defects, the city has made a variety of changes to its sign code in attempts to bring those regulations into conformity with the law. There is no evidence in the record that, at any point, the city has acted to deregulate signs *in toto* in order to comply with constitutional standards." *Id.*

Hewitt v. SAIF, 294 Or 33, 653 P2d 970 (1982), is another case where the court considered post-enactment actions by the enacting body to try to determine how that enacting body would go about severing unconstitutional regulations. In *Hewitt*, a gender-based condition for receiving benefits was found to violate Article I, section 20 of the Oregon Constitution. The Supreme Court found that "[n]o legislative history of [the statute] exists to clarify its original purpose and we are reluctant to surmise." 294 Or at 47. But the court looked to expressions of legislative purpose in subsequent unsuccessful legislative efforts to remove the gender-based distinction to "resolve what the legislature would have done if faced with the invalid statute." 294 Or at 51.

> "* * * In resolving how the legislature would have remedied the invalidation of the statute we need not hypothesize. We have seen that when faced with the issue of the statute's discriminatory impact on women workers the committee was in general agreement that they did not want the statute 'thrown out.' When presented with the suggestion that they delete the statute entirely committee members thought it more important to ensure benefits to the family unit. Thus, given the choice between eliminating the statute entirely or

> passing it out of committee in potentially unconstitutional form, they chose to preserve existing entitlements to male workers' families. * * * 294 Or at 52.

Based on these post-enactment statements, the Supreme Court ultimately severed the language that precluded receipt of the benefit based on gender.

By the time the hearings officer rendered her decision in this appeal on November 27, 2010, Ordinance 735 had been in effect for over four months. It was entirely appropriate for the hearings officer to consider Ordinance 735 in determining whether the board of commissioners would have preferred when it adopted CDC Section 414 to leave all signs unregulated by CDC Section 414 or instead have severed CDC 414-5.9, if it had been aware of the constitutional problem created by the content based distinctions in CDC 414-5.9. As already noted, Ordinance 735 eliminated the CDC 414-5.9 exemption. A portion of the hearings officer's findings concerning Ordinance 735 is set out below.

> "Appellant argues that the adoption of Ord. No. 735 does not reflect any policy decision by the County; pointing to language in the staff reports to the County Board of Commissioners and the Planning Commission, and the Planning Commission minutes. The identified language indicates that the changes proposed were being made without consideration of the policy or planning rationales that went into the initial adoption of the sign ordinance, and that Ord. No. 735 was considered a potentially temporary measure pending a thorough consideration involving all stakeholders of the design, policy and planning issues that should be implemented through the sign ordinance. However, those documents also make it clear that the planning staff were recommending, and the Planning Commission and Board of Commissioners were agreeing, that the content based regulations should be removed at this time, while leaving the remainder of the sign regulations intact, even though this would mean expanding the number of signs to which the permitting and other standards applied. That is a clear statement of legislative intent that was consistent with the action that had been taken on the 16 applications. The fact that the Board of Commissioners made it clear that the entire sign ordinance should be placed on the next year's work program does not change the fact that they made a clear policy decision about how they wanted to deal with the fact that some of the current provisions in sign ordinance were unconstitutional." Record 11 (footnote omitted).

We agree with the hearings officer that the board of commissioner's desire to continue to work on its sign regulations in the future does not mean that Ordinance 735

1 provides no insight into how the board of county commissioners would have gone about
2 severing CDC Section 414 to correct its unconstitutionality at the time of enactment. Given
3 the choice of (1) severing CDC Section 414 in its entirety, and leaving signs unregulated, or
4 (2) severing CDC 414-5.9, and leaving those formerly unregulated signs subject to regulation
5 unless and until a constitutional way to exempt some or all of those signs could be adopted,
6 Ordinance 735 strongly suggests that the board of county commissioners would have
7 preferred to sever CDC 414-5.9.

8 Finally, petitioner contends the board of county commissioners may have been
9 influenced by county staff representations that the number of formerly exempt signs that
10 would now require permits and fail to satisfy the standards set out in CDC 414-1 through
11 414-4.5 is small. Record 52. We are not sure we understand staff's reasoning in making
12 those representations, but the staff representation that eliminating the CDC 414-5.9
13 exemptions would not have a significant impact was made and that representation was not
14 contradicted. Similar uncontested representations were made to the hearings officer. To the
15 extent the board of commissioners relied on that representation in adopting Ordinance 735,
16 we see no error in the board of county commissioners relying on unchallenged
17 representations by legal and planning staff. Similarly, the hearings officer committed no
18 error in relying on those representations.

19 The hearings officer correctly considered Ordinance 735 in determining what the
20 board of commissioners would have done had it recognized at the time it was enacting CDC
21 Section 414 that the exemptions authorized by CDC 414-5.9 violate Article I, section 8 of the
22 Oregon Constitution. From Ordinance 735, it was reasonable for the hearings officer to
23 conclude that the board of county commissioners would have elected to sever CDC 414-5.9
24 rather than sever CDC Section 414 in its entirety and leave signs unregulated until a
25 constitutional replacement for CDC Section 414 could be adopted.

26 The first assignment of error is denied.

1 **REMAINING ASSIGNMENTS OF ERROR**

2 Our denial of the first assignment of error has the legal effect of upholding one of the
3 several independent bases for the hearings officer's decision to deny petitioner's permit
4 applications. Because only one sustainable basis for denying a land use permit application is
5 necessary, the county's decision must be affirmed, and we need not address petitioner's
6 remaining assignments of error. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA
7 256, 266 (2004); *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 635
8 (1995); *Adams v. Jackson County*, 20 Or LUBA 398, 403 (1991). Deciding assignments of
9 error two and five would require us to determine whether petitioner's 16 permit applications
10 are applications for statutory "permits," as that term is defined at ORS 215.402(4).
11 Deciding—after-the-fact—whether a decision that may have been viewed as ministerial and
12 rendered without the notice and hearing required for statutory permits is in fact a statutory
13 permit has long been problematic. *Tirumali v. City of Portland*, 41 Or LUBA 231, 240-42,
14 *aff'd* 180 Or App 613, 45 P3d 519 (2002); *Farrell v. Jackson County*, 39 Or LUBA 149, 152-
15 53 (2000); *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651, 664 n 15 (1990).
16 Resolving petitioner's second and fifth assignments of error would require that we resolve
17 exceedingly close and difficult questions of law and could require that LUBA consider legal
18 issues that the parties have not briefed. We therefore elect not to address those assignments
19 of error, since no matter how those assignments of error might be resolved our disposition of
20 this appeal would not be affected. But assignments of error three and four are relatively
21 straightforward and can be decided within the statutory deadline for issuing our final opinion.
22 We therefore address those assignments of error.[7]

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[7] In ORS 197.835(11)(a) the legislature has directed that LUBA decide all issues "when reversing or remanding a land use decision" if it can do so within the statutory deadline for issuing its final opinion. There is no such statutory directive when LUBA is affirming a land use decision.

1 The hearings officer took the position that even if petitioner is correct, and the legal
2 consequence of finding that CDC 414-5.9 violates Article I, section 8 is that the entirety of
3 CDC Section 414 must be severed from the CDC, petitioner's 16 permit applications would
4 nevertheless have to be denied. Among the findings adopted by the hearings officer in
5 support of that position are the following:

6 "1. The Staff Report points out that the Transit Oriented Retail
7 Commercial District (TO:RC) allows only ground mounted monument
8 signs. It does not allow the proposed freestanding * * * signs. CDC
9 Section 431-11.3(C)(1). For that reason, Permits # P0166349,
10 P0166351 and P0166610 should have been denied without any
11 application of the provisions of CDC Section 414.

12 "2. The other 13 proposed signs do not comply with the objective set back
13 standards in the relevant land use districts. However, for commercial
14 and industrial districts, CDC Section 414-2.3C does allow freestanding
15 signs to project into the front yard setback up to the street right of way,
16 provided the sign has a minimum ground clearance of eight feet six
17 inches. This provision overrides the setbacks in the underlying land
18 use districts. * * *

19 "If [petitioner] is correct that all of CDC Section 414 is invalid
20 because it contains some unconstitutional provisions, then the
21 exception for front yard setbacks in CDC Section 414-2.3C would not
22 apply, and all of the signs would be in violation of the setback
23 standards for the land use districts." Record 13-14.

24 We do not understand petitioner to dispute that the three signs proposed for the
25 TO:RC District are freestanding signs that are not permitted in that district. Neither do we
26 understand petitioner to dispute that the remaining 13 signs do not comply with front yard
27 setback requirements in the zoning districts in which they would be located. Rather,
28 petitioner argues that those CDC requirements do not apply to its applications, and that the
29 hearings officer erred by applying those CDC requirements to deny the permit applications.

30 **A. Consideration of Additional Grounds**

31 The planning director did not deny the applications on the bases specified in the
32 hearings officer's findings quoted above. Petitioner contends:

"* * * An appeal of a Type I decision is not a de novo review. CDC 209-5.2. The hearings office's review was limited to considering Petitioner's challenges to the grounds for denying the applications. The Planning Director did not deny any of the applications on the grounds that they failed to comply with the setback requirements of the underlying zone. * * * Therefore, the hearings officer erred in denying this application on an additional ground that was not relied on as part of the Planning Director's decision on appeal." Petition for Review 19.

CDC 209-5.2 provides that appeals of Type II decisions are *de novo*; CDC 209-5.2 says nothing about appeals of Type I decisions. According to the county the CDC is silent about whether appeals of Type I decisions are *de novo*, but it is county practice to conduct those appeals *de novo*. The county also contends that the appeal in this matter was a *de novo* appeal, and petitioner did not object.

Because petitioner cites no authority for its claim that the hearings officer was required to limit her review in the manner petitioner argues, we reject the argument.

B. The CDC Setbacks and Prohibition on Freestanding Signs

Petitioner also contends that signs are comprehensively regulated by CDC Section 414 and that the county has never applied the cited CDC limitations to signs. With regard to three signs located in the TO:RC District, CDC Section 431-11.3(C)(1) expressly prohibits "Free-standing signs." Petitioner identifies nothing in CDC Section 414 that would override such an express prohibition, and we see nothing that would. We agree with the county that freestanding signs are expressly prohibited in the TO:RC zone. Therefore, the hearings officer did not err in denying the three signs proposed for properties located in that zoning district.

Turning to the 13 signs that the hearings officer found to violate the applicable front yard setbacks in the underlying district, the question is only a little closer. CDC 414-2 applies in Commercial Districts. CDC 414-2.3(C) provides that freestanding signs "may be located anywhere on the premises," except as further provided by CDC 414-2.3(C). CDC 414-2.3(C)(2) sets out the following limitations on freestanding signs:

> "A freestanding sign shall not be located in a required side or rear yard. A freestanding sign may project up to the street right-of-way provided there is a minimum ground clearance of eight (8) feet six (6) inches."

The county concedes that if CDC 414-2.3(C)(2) applies here, petitioner's 13 proposed signs could be sited as proposed within the front yard setbacks imposed by the underlying district, although those signs would still violate other requirements of CDC Section 414. CDC 414-2.3(C)(2) prohibits locating freestanding signs in the side or rear yard setbacks imposed in the underlying zone, but it expressly authorizes signs to project into the front yard setback "up to the street right-of-way." The express override of the underlying front yard setback would not be necessary if the front yard setback did not otherwise apply. The county also concedes that it was county practice not to apply general CDC development standards like front yard setbacks to exempt signs.[8] But the county contends that if the pre-Ordinance 735 version of CDC Section 414 is unconstitutional and must be considered void and unenforceable in its entirety, as petitioner argues, then the proposed signs do not enjoy the exemption from the underlying zoning district standards that CDC Section 414 provides. In that event, the county argues, signs are regulated like any other development and must comply with the CDC development standards that apply to development generally. The county's argument is set out below:

> "* * * CDC 106-57 defines 'development' as, 'Any man-made change to improved or unimproved real estate, including but not limited to construction, installation or change of * * * [a] structure.' A 'freestanding sign' is a 'sign erected and maintained on a freestanding frame, mast or pole not attached to any building.' CDC 106-193.4. CDC 201-2 states that, 'Except as excluded in Section 201-2, and Section 702, no person shall engage in our cause a development to occur, as defined in Section 106-57, without first obtaining a Development Permit * * *' Signs are not listed in Section 201-2 or 702. Each district has a setback, defined as 'an open space on a lot or parcel which is * * * unobstructed by structures from the ground upward, * * * except as

[8] We understand this practice to be based on the language in CDC 414-5 that exempts some signs from both the regulations imposed by CDC Section 414 and the CDC requirement that development be approved via a development permit. *See* n 1.

1 provided in * * * other sections of this code.' CDC 106-220. *See e.g.*,
2 Community Business District, CDC 313-5.1, 6.2 – 20 foot front yard
3 requirement.

4 "Petitioner is correct that the county 'has not historically applied the general
5 development standards from the underlying zone to exempt signs,' but that is
6 because of the specific provisions governing signs in CDC Section 414. If
7 those are voided, then signs are simply 'development' that must comply with
8 the standards of the district in which it is located just like any other
9 development. The applications do not comply and must be denied."
10 Respondent's Brief 19 (citations to appendices omitted).

11 We agree with the county. Signs fall within the county definition of "development."
12 Development must comply with the development standards set out in the CDC. CDC
13 Section 414 removes the requirement that signs comply with many of those development
14 standards and either imposes alternative development standards or fully exempts signs from
15 regulation under the CDC. But if the pre-Ordinance 735 version of CDC Section 414 is
16 unconstitutional in its entirety, signs no longer are development afforded partial or full
17 exemptions from regulation under the CDC by CDC Section 414. In that event, petitioner's
18 proposed signs must comply with applicable development standards like any other
19 development.

20 The third and fourth assignments of error are denied.

21 The county's decision is affirmed.