

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEC 15 2 06 PM '89

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2
3 ACKERLEY COMMUNICATIONS OF THE)
4 NORTHWEST, INC.,)
5 Petitioner,)
6 vs.)
7 CITY OF GRESHAM,)
8 Respondent.)

LUBA No. 89-075

FINAL OPINION
AND ORDER

9 Appeal from City of Gresham.

10 Donald Joe Willis and Steven W. Abel, Portland, filed the
11 petition for review, and Donald Joe Willis argued on behalf of
12 petitioner. With them on the brief was Schwabe, Williamson &
Wyatt.

13 Elizabeth K. Reed, Gresham, filed the response brief and
argued on behalf of respondent.

14 SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON,
Referee, participated in the decision.

15 REVERSED

12/15/89

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals nineteen orders of the Gresham Planning
4 Commission denying nineteen applications for development permits
5 for free-standing outdoor advertising signs.¹

6 FACTS

7 On February 21, 1989, petitioner filed with the City of
8 Gresham (city) applications for nineteen sign permits for free
9 standing outdoor advertising signs. Fifteen signs were proposed
10 to be located in the General Commercial district, two in the
11 Exclusive Commercial district and two in the Exclusive Extensive
12 district. The proposed signs were to be approximately 300
13 square feet in area, with heights of 25 to 35 feet. On
14 April 17, 1989, petitioner was notified that its nineteen
15 applications had been denied by the city community development
16 director.

17 On April 27, 1989, petitioner appealed the nineteen denials
18 to the planning commission. After a public hearing, the
19 planning commission issued nineteen orders denying the
20 applications on June 6, 1989. Each order states that the city's
21 decision is "based solely on location, size, and number of
22

23 ¹The parties do not question petitioner's ability to challenge nineteen
24 orders in one LUBA appeal proceeding. We note that in previous cases where
25 more than one land use decision was identified in the notice of intent to
26 appeal and this issue was raised by the parties, we did not dismiss the
appeal, but rather required additional filing fees and deposits for costs
for each land use decision challenged. Whitesides Hardware v. City of
Corvallis, 8 Or LUBA 419, 422 (1983); Seneca Sawmill Company v. Lane
County, 6 Or LUBA 454 (1982); Osborne v. Lane County, 4 Or LUBA 368 (1981).

1 signs." E.g., Record 2, 42, 82. Each order also adopts the
2 findings and conclusions set out in the staff report on each
3 application. All the staff reports include the following
4 findings: -

5 "In Ackerley Communications, Inc. v. Multnomah County,
6 72 Or App 617, 696 P2d 1140 (1985), review dismissed,
7 303 Or 165, 734 P2d 885 (1987) the Oregon Court of
8 Appeals held that Multnomah County's sign regulation
9 that made distinctions based on the content of the
10 sign violated the Oregon Constitution. Gresham's
current regulations are based on Multnomah County's
regulations. Therefore, those specific provisions of
Gresham's regulations that make distinctions based on
content are unconstitutional and should not be
enforced.

11 "Gresham Development Code section 10.8220 and
12 Standards Document 7.030 both state that the
13 provisions of the code and standards are severable.
14 Therefore, if one section is invalid for any reason,
that does not affect the validity of the remaining
sections of the Development Code or Standard's [sic]
Document.

15 "The City cannot enforce the sections of its
16 Development Code and Standards Document that do not
17 meet the constitutional test established in Ackerley.
The following sections of the Standards Document
should not be enforced because the provisions are
content based:

18 "* * * * *

19 "These sections should be eliminated or modified as
20 discussed above. All of the remaining sign provisions
21 are valid and should be enforced as written.
22 Therefore, billboards should be treated as any other
23 sign and should be allowed if they meet the
requirements of the remaining sign regulations."
E.g., Record 4-5, 44-45, 84-85.

24 Each staff report also states that the particular
25 application was denied because it violated provisions of the
26 city Community Development Standards (CDS) ordinance concerning

1 sign area, sign height, number of signs on a site or a
2 combination of these provisions. In sum, all nineteen
3 applications were denied for failure to comply with sign area
4 requirements, some were also denied for failure to comply with
5 sign height requirements and some were also denied for failure
6 to comply with limitations on the number of signs on a site.
7 Petition for Review Appendix B.

8 On June 27, 1989, petitioner filed with LUBA a notice of
9 intent to appeal the nineteen planning commission orders.

10 SECOND ASSIGNMENT OF ERROR

11 "The City of Gresham's code bans outdoor advertising
12 in violation of the Oregon Constitution."

13 Petitioner points out both the Gresham Development Code
14 (GDC) and CDS provide that the placement of signs within the
15 city requires a development permit. GDC 10.5400; CDS 3.0410.
16 Petitioner argues that CDS 3.0430.K.1 prohibits "billboards" or
17 "outdoor advertising signs" as follows:

18 "It shall be unlawful for any person to erect, display
19 or maintain, any sign or advertising structure falling
20 within any of the following descriptions:

21 "* * * * *

22 "K. Outdoor advertising signs and commercial
23 messages or commercial advertising.

24 "1. No commercial messages or commercial
25 outdoor advertising may be displayed in the
26 city."

27 An outdoor advertising sign is defined by the CDS as:

28 "A sign which advertises (A) goods, products or
29 services which are not sold, manufactured or
30 distributed on or from the premises on which the sign

1 is located, (B) facilities not located on the premises
2 on which the sign is located, or (C) a product or
3 service which is only incidental to the principal use
4 carried out on the premises on which the sign is
5 located." CDS 1.0500.

6 "Billboard" is simply defined by the CDS as "an Off-Premise
7 sign." Id. Commercial messages or commercial advertising is
8 defined by the CDS as:

9 "A message or advertising appearing on an outdoor
10 advertising sign which seeks to induce or influence
11 the reader to buy, use or consume products or services
12 advertised to the eventual benefit of the advertisers
13 and which is not noncommercial advertising." Id.

14 Petitioner contends that it is clear from these CDS
15 provisions that the intent of the CDS is to ban "billboards" and
16 "outdoor advertising signs" on the basis of their content.
17 Petitioner argues the Oregon Constitution is violated by such
18 content-based discrimination.² Ackerley Communications, Inc. v.
19 Multnomah County, supra; Apalategui v. Washington County,
20 14 Or LUBA 261, rev'd in part on other grounds, 80 Or App 508
21 (1986). Petitioner further argues that the city conceded in its
22 decision that the CDS sign provisions are based upon the
23 Multnomah County regulation that was struck down by the Court of
24 Appeals in Ackerley Communications, Inc. v. Multnomah County,
25 supra, and that the city acknowledged some of the sign
26

27 ²Petitioner also argues under this assignment of error that the city
28 cannot effectively amend the CDS, through interpretation, to mask that
29 unconstitutional content-based discriminatory intent. However, we address
30 petitioner's arguments with regard to proper application of the CDS to the
31 subject permit applications, in view of the unconstitutional content-based
32 discrimination contained in the CDS, under the first and third assignments
33 of error, infra.

1 provisions of the CDS violate the Oregon Constitution.³

2 Respondent acknowledges, and we agree, that certain
3 content-based provisions of the CDS sign regulations, including
4 the prohibition of CDS 3.0430.K against outdoor advertising
5 signs and commercial messages or commercial advertising, are
6 unconstitutional, for the reasons stated in Ackerley
7 Communications, Inc. v. Multnomah County, supra. However, the
8 county's decision does not purport to deny the subject sign
9 permit applications because of violation of the CDS 3.0430.K
10 prohibition against commercial outdoor advertising signs.⁴
11 Thus, our agreement with petitioner on this point provides no
12 basis for reversal or remand of the city's decision.

13 The second assignment of error is denied.

14 FIRST ASSIGNMENT OF ERROR

15 "The Planning Commission of the City of Gresham is
16 without the legislative power to amend the City Code
17 of the City of Gresham, and the attempted amendment to
the code is of no effect upon the Petitioner's land
use requests."

18 THIRD ASSIGNMENT OF ERROR

19 "The City of Gresham's free-standing sign criteria is
20 [sic] not applicable to Petitioner's land use requests
and may not be used to deny petitioner's permit

21
22 ³Unless otherwise specified, all further references in this opinion to
23 the constitutionality of the CDS provisions at issue refer to the Oregon
Constitution.

24 ⁴As mentioned in n 2, whether the city misconstrued the applicable law
25 by interpreting certain CDS sign regulations as severable and applying CDS
26 sign area, height and number limitations to deny the subject sign permit
infra.

1 requests."

2 Under these assignments of error, petitioner argues that
3 the planning commission's decisions denying its sign permits
4 (1) constitute improper, unauthorized amendments of the GDC, and
5 (2) misconstrue the CDS sign regulations in denying the sign
6 permits based on inapplicable or unenforceable restrictions on
7 sign area, height and number. We address each of these
8 contentions separately below.

9 A. Amendment of the GDC

10 Petitioner asserts that the planning commission attempted
11 to amend the GDC by deleting what it considered to be the
12 unconstitutional provisions. Petitioner argues, however, that
13 the planning commission has no power to enact legislation.
14 Petitioner points out that GDC 10.6410 provides that amendments
15 to the GDC are legislative acts which require Type IV
16 procedures. Under GDC 10.2030, the city council is required to
17 take final action in Type IV, legislative proceedings, and the
18 planning commission's role is only advisory. Petitioner also
19 contends that under the City of Gresham Charter, Chapter VIII,
20 Section 34, only the city council has the authority to enact an
21 ordinance.

22 Respondent argues that the court, in Ackerley
23 Communications, Inc. v. Multnomah County, 72 Or App at 625,
24 declared that a county "can have no constitutionally acceptable
25 interest in regulating commercial and noncommercial expression
26 differently because of the content." Respondent contends it is

1 thus this decision, not the city planning commission, which
2 rendered unenforceable those provisions of the GDC which attempt
3 to regulate commercial and noncommercial signs differently based
4 on content. According to respondent, the planning commission
5 merely applied the court's ruling in interpreting the GDC. The
6 planning commission did not attempt to "amend" the GDC.

7 We agree with respondent. The planning commission's
8 decisions attempt only to interpret and apply the GDC and CDS in
9 light of the decision in Ackerley Communications, Inc. v.
10 Multnomah County, supra. They do not purport to "amend" the
11 GDC.

12 This subassignment of error is denied.

13 B. Interpretation of the CDS

14 Petitioner points out that CDS 7.0300 provides:

15 "The provisions of this ordinance are severable. If
16 any section, sentence, clause or phase [sic] of this
17 ordinance is adjudged by a court of competent
jurisdiction to be invalid, the decision shall not
affect the validity of the remaining portions of this
ordinance."

18 Petitioner argues that this provision allows a court to sever
19 the provisions of the CDS, if severance can be accomplished
20 without destruction of the city's legislative intent, but does
21 not allow the planning commission to sever the ordinance on its
22 own initiative. Petitioner also argues that even if the
23 planning commission had the authority to sever provisions of the
24 CDS, its interpretation of the CDS in this case is not in accord
25 with recognized principles of law regarding severance.
26

1 Petitioner points out that with regard to construction of
2 statutes, the principles of severability are set out in
3 ORS 174.040 as follows:

4 "It shall be considered that it is the legislative
5 intent, in the enactment of any statute, that if any
6 part of the statute is held unconstitutional, the
remaining part shall remain in force unless:

7 "(1) The statute provides otherwise;

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

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

13 Petitioner argues that the principles embodied in ORS 174.040
14 are also applicable to city ordinances. City of Portland v.
15 Dollarhide, 300 Or 490, 504, 714 P2d 220 (1986); Ivancie v.
16 Thornton, 250 Or 550, 443 P2d 612, cert den 393 US 1018 (1968).

17 Petitioner argues that in this case, the severance of the
18 unconstitutional content-based provisions from the CDS sign
19 regulations makes the entire sign portion of the CDS
20 nonsensical. Petitioner contends the unconstitutional
21 content-based provisions of the CDS sign regulations are
22 inseparable from other CDS sign regulation provisions.
23 Petitioner cites, for example, CDS 3.0420 ("Exemptions"), which
24 describes, in content-based language, classes of signs exempt
25 from the development permit requirement of CDS 3.0410.
26 According to petitioner, all of the CDS 3.0420 exemptions are,

1 therefore, unconstitutional. Petitioner further contends that
2 because the "exemptions" section is unconstitutional, numerous
3 other CDS sections which refer to the exemptions section become
4 unintelligible as well.⁵

5 According to petitioner, the city contends that severing
6 the unconstitutional CDS 3.0430.K prohibition against outdoor
7 advertising signs from the CDS leaves the standards of
8 CDS 3.0442.A.1 for free-standing signs in commercial districts
9 applicable to petitioner's applications. However, petitioner
10 argues that such a severance would be improper because the city
11 never intended that the free-standing sign standards of
12 CDS 3.0442.A.1 be applied to billboards or outdoor advertising
13 signs, and they are not appropriate for that purpose.

14 Petitioner argues that the criteria for free-standing signs
15 in commercial districts clearly contemplate only on-premises
16

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18 ⁵Petitioner refers to CDS 3.0441.A and 3.0442.A, which provide with
19 regard to the city's residential and commercial/industrial zoning
20 districts, respectively:

21 "Signs Permitted. No sign shall be erected or maintained in
22 the LDR-5, LDR-7, MDR-12, MDR-24, and HDR-60 Districts except
23 as allowed under 'Exemptions' or as otherwise noted in this
24 section."

25 "Signs Permitted. No sign shall be erected or maintained in
26 mixed Commercial/Residential districts, Commercial and
Industrial Districts except as allowed under Exceptions [sic
Exemptions], or as otherwise noted in this section."

According to petitioner, under the above-quoted provisions, in order to
determine whether the standards of CDS 3.0441 or 3.0422 apply to a proposed
sign in these districts, the exemption provisions of CDS 3.0420 must be
analyzed. However, since the exemption provisions are unconstitutionally
content-based, such an analysis cannot be performed.

1 signs, citing the following standard:

2 "Number. One (1) multi-faced free-standing sign
3 identifying the business, designating the principal
4 goods, products, or facilities or services available
on the premises shall be permitted." CDS 3.0442.A.1.d.

5 Petitioner points out that "sign, billboard" and "sign, outdoor
6 advertising" are defined in the CDS as off-premises signs.
7 CDS 1.0500.⁶ Petitioner argues it would be improper, through
8 severance, to force billboards and outdoor advertising signs to
9 be reviewed under criteria which were never intended to be
10 applied to these types of signs.⁷ Petitioner contends that
11 having unconstitutionally banned billboards, the city cannot,
12 through severance, create standards for billboards where none
13 were intended.

14 Respondent contends that under CDS 7.0300, quoted supra,
15 the portions of the CDS sign regulations which are
16 unconstitutionally content-based are severable from the
17 remaining sign regulations. Respondent argues that when a

18 ⁶See CDS definitions quoted under the second assignment of error, supra.

19 ⁷As further support for its argument that the CDS 3.0442.A.1
20 free-standing sign criteria were never intended to be applied to billboards
21 or outdoor advertising signs, petitioner cites the following portion of
CDS 3.0442.A.1.a:

22 "Area. The maximum permitted area of a free-standing sign
23 shall be 40 square feet per sign face or up to 100 sq. ft. per
24 sign face, as determined by a factor of 4 sq. ft. per sign face
for each 20 ft. of the developed linear footage upon which a
sign will be located. * * * " (Emphasis added.)

25 According to petitioner, the emphasized term "developed" reflects the
26 assumption that the area standard applies only to on-premises signs. There
would be, therefore, no possibility of a sign being allowed on undeveloped
property.

1 provision of law is found unconstitutional, "the presumption is
2 in favor of severability." Regan v. Time, Inc., 468 US 641,
3 653, 104 Sct 3262, 3269, 82 LEd2d 487 (1984). According to
4 respondent, in Regan v. Time, Inc., the court found that the
5 provisions of the federal statute governing reproduction of
6 illustrations of federal currency were severable. Although the
7 court held the purpose and publication requirements of the
8 statute violated the U.S. Constitution, it decided that the
9 color and size limitations of the statute were severable and
10 could constitutionally be applied.

11 Respondent argues that the CDS free-standing sign area,
12 height and number requirements are similarly severable and can
13 constitutionally be applied to the permit applications at issue
14 in this case.⁸ Respondent states:

15 "When the content based criteria are removed from
16 respondent's sign code, there remains [sic] explicit,
17 precise requirements for height, size and number.
18 * * * Furthermore, there is no need for respondent to
19 evaluate the nature of the message on the signs in
20 order to enforce the height, size and number
21 limitations." (Footnote omitted.) Respondent's
22 Brief 5.

19 Respondent identifies, both in its decisions and in its
20 brief, the following CDS provisions as content-based provisions
21

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23 ⁸Respondent claims that petitioner does not contend the CDS sign area,
24 height and number requirements, if severable, are not constitutionally
25 valid time, place and manner restrictions which can be applied
26 independently of sign content. Respondent argues that courts have found
similar restrictions do not violate the U.S. constitution. Regan v. Time,
Inc., 104 Sct at 3271; St. Louis Poster Advertising Co. v. City of St.
Louis, 249 US 269, 39 Sct 274, 63 LEd 599 (1919); Temple Baptist Church v.
City of Albuquerque, 98 NM 138, 646 P2d 565, 573 (1982).

1 which do not meet the standard for constitutionality established
2 in Ackerley Communications, Inc. v. Multnomah County, supra,
3 and, therefore, cannot be enforced -- (1) CDS 1.0500 definitions
4 for "sign,- commercial message or commercial advertising," "sign,
5 noncommercial messages or noncommercial advertising," "sign, off
6 premise," "sign, on premise" and "sign, outdoor advertising;
7 (2) CDS 3.0430.K (prohibition against outdoor advertising signs
8 and commercial messages or commercial advertising), (3) the word
9 "developed" in the free-standing sign area standard of
10 CDS 3.0442.A.1.a; and (4) everything after "[o]ne (1)
11 multi-faced free-standing sign" in the free-standing sign number
12 standard of CDS 3.0442.A.1.d.⁹

13 The CDS sign regulations differentiate, in many instances
14 based on content, between four categories of signs - (1) signs
15 which are exempt from the sign regulations;¹⁰ (2) signs which
16 are exempt from the sign regulations, so long as they do not
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19 ⁹We note, however, the city does not identify numerous other
20 content-related provisions in the "exemptions" and "prohibited signs"
sections, CDS 3.0420 and 3.0430, which petitioner argues are also
unconstitutional.

21 ¹⁰An example of this category is "[t]raffic or other municipal signs,
22 directional signs for hospital or emergency services, legal notices,
23 railroad crossing signs, and danger signals." CDS 3.0420.D. We also note
that CDS 3.0430.K.4 states "[t]he Code does not apply to any public sign
* * *." While the CDS does not define "public sign," CDS 1.0500 defines
"sign, public service information" as:

24 "Any sign intended to promote items of general interest to the
25 community such as time, temperature, date, atmospheric
26 conditions, news or traffic control; hospital, libraries and so
forth. No advertising shall appear on any public service
information sign."

1 exceed a specified area limitation;¹¹ (3) signs which are
2 prohibited;¹² and (4) other signs. Under the CDS sign
3 regulations, it is only the fourth category of signs to which
4 the area,- height, number, location and other criteria of
5 CDS 3.0442 are intended to apply.¹³ In this case, the city
6 essentially argues that its sign regulations can be severed by
7 reading the content-based provisions it recognizes to be
8 unconstitutional out of the ordinance, including portions of
9 CDS 3.0442 itself, and applying the remaining provisions of
10 CDS 3.0442 to outdoor advertising signs, as well as to the types
11 of signs to which they were originally intended to be applied.

12 We have been provided with no legislative history for the
13 CDS sign regulations. However, it is clear from the regulations
14 themselves that the city did not originally intend the sign
15 area, height and number limitations, which it now seeks to apply
16 to petitioner's proposed outdoor advertising signs, to apply to
17 types of signs exempted or prohibited by the sign regulations.

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20 ¹¹An example of this category is "[r]eal estate signs not exceeding
21 twelve (12) square feet in area which advertise the sale, rental or lease
22 of the premises upon which said signs are located." CDS 3.0420.F.

23 ¹²In addition to the prohibition of CDS 3.0430.K against "outdoor
24 advertising signs and commercial messages or commercial advertising," an
25 example of this category is found in CDS 3.0430.M, which states "[n]o sign
26 shall be erected in a residential district containing information other
than property numbers, post office box numbers, names of occupants or
premises."

¹³Furthermore, CDS 3.0442 itself cross-references the exemptions of
CDS 3.0420 in determining its applicability, and some of the sign standards
set out in CDS 3.0442 are also based on, or at least influenced in their
application by, the content of the regulated signs.

1 Content-based provisions permeate the definition, exemption,
2 prohibition and standards provisions of the CDS sign
3 regulations, all of which provisions are interrelated. Deleting
4 even those content-based references from the sign regulations
5 which respondent concedes are unconstitutional would leave the
6 remaining parts of the CDS regulations incomplete and incapable
7 of being executed according to the original legislative intent
8 of the city.¹⁴

9 We conclude that the free-standing sign area, height and
10 number standards of CDS 3.0442.A.1 cannot be severed from the
11 unconstitutional portions of the city's sign regulations and
12 applied to petitioner's applications for outdoor advertising
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14 ¹⁴The situation in this case is different from that in City of Portland
15 v. Dollarhide, supra, where the court determined that an unconstitutional
16 mandatory minimum penalty provision was severable from the remainder of a
17 prostitution ordinance. In that case, the court concluded the remaining
18 provisions defining and prohibiting prostitution could be enforced
19 according to the original legislative intent, with a defendant, upon
conviction, being sentenced to the penalty provided for in the city code's
general penalty provision. However, in this case, the severance advocated
and applied by the city effectively results in the deletion of words and
phrases from particular standards, and the application of those standards
in a manner which was not originally intended.

20 This case can also be distinguished from Regan v. Time, Inc., supra, in
21 which a 5-4 majority of the court concluded that the color and size
22 restrictions of the federal statute governing reproduction of illustrations
23 of federal currency were severable from its unconstitutional purpose and
24 publication provisions. Under that statute, reproductions of federal
25 currency were prohibited unless published for certain purposes. If
26 allowed, reproductions were subject to the color and size restrictions. In
that case, the majority reasoned that Congress intended the color and size
restrictions to apply to all legally allowed reproductions and, therefore,
could be enforced even though the statute's purpose and publication
requirements were unconstitutional. Here, however, it is clear that the
city did not intend the area, height and number standards of CDS 3.0442 to
apply to all allowable signs. The standards of CDS 3.0442 apply only to
those signs neither prohibited by CDS 3.0430 nor exempted by CDS 3.0420.

1 sign permits.

2 This subassignment of error is sustained.

3 The first and third assignments of error are sustained, in
4 part. -

5 The city's decision is reversed.

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