BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MATSON HAUG,
Petitioner,

vs.

CITY OF NEWBERG,
Respondent,

and

NEWBERG DODGE,
Intervenor-Respondent.

LUBA No. 2002-040

FINAL OPINION
AND ORDER

Appeal from City of Newberg.

Barry Adamson, Lake Oswego, and J. Richard Forester, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by City of Newberg.

David H. Griggs, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief were Martin C. Dolan and Dolan, Griggs and McCulloch.

HOLSTUN, Board Chair, and BRIGGS, Board Member, participated in the decision.

REMANDED 07/29/2002

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision that grants approval for an auto sales lot sign that
4 includes a 30 square foot electronic reader board.

5 **FACTS**

6 Intervenor-respondent Newberg Dodge (intervenor) wishes to construct a new sign
7 for its auto sales lot. The new sign would include a 30 square foot electronic reader board
8 that would display changeable messages in illuminated letters. Under Newberg
9 Development Code (NDC) 10.50.183(3), electronic reader boards are allowed, but may not
10 exceed 10 square feet in area without discretionary approval of a sign program.[1] NDC
11 10.50.191 provides that limits on signs may be exceeded through approval of a sign
12 program.[2] Intervenor submitted an application for sign program approval to allow its

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[1]NDC 10.50.183 imposes a number of limitations on signs. NDC 10.50.183(3) provides that "[n]o animated sign shall exceed 10 square feet in area except as permitted in a sign program." There is no dispute that the proposed sign qualifies as an animated sign under the NDC.

[2]NDC 10.50.191 provides:

> "The sign standards of this Code may only be increased through approval of a sign program, not through an adjustment or variance. * * * The Planning Commission shall approve, approve with conditions, or deny the application in accordance with all the criteria below:
>
> "(1) The program provides a consistent theme through the use of colors, materials, letter styles or other design features.
>
> "(2) The location, texture, lighting, movement, and materials of all exterior signs shall be compatible with or superior to the other elements of the site, including buildings[,] structures, and surrounding properties.
>
> "(3) The use of bold and bright colors, lighting, and designs is minimal.
>
> "(4) If more than one tenant or owner is part of the sign program, there is a written agreement that requires all parties to conform to the requirements of the sign program.
>
> "(5) The height of any major freestanding sign allowed shall not exceed 30 feet. If multiple freestanding signs are allowed on any lot frontage, no more than one sign may be higher than 8 feet.

1 proposed sign. The planning commission found that intervenor's proposed sign did not
2 comply with three of the six sign program approval criteria in NDC 10.50.191.[3]

3 Intervenor appealed the planning commission's decision to the city council. In its
4 notice of local appeal, intervenor took the position that the planning commission decision
5 erroneously concluded that the proposed sign program does not comply with NDC
6 10.50.191(1) through (3) and that application of the sign program criteria to its proposal
7 violates its rights under the First, Fifth and Fourteenth Amendments to the United States
8 Constitution. Record 41-55. Intervenor's notice of local appeal does not identify any other
9 grounds for the local appeal. The city council approved the application, referencing concerns
10 that the city might be liable for damages and attorney's fees if intervenor brought legal action
11 to challenge denial of the sign program on constitutional grounds. This appeal followed.

"(6) Animated signs shall not exceed 30 sq. ft. in size."

[3]The challenged decision finds that the criteria at NDC 10.50.191(4) through (6) either do not apply or are met. *See* n 2. The planning commission's findings concerning NDC 10.50.191(1) through (3) are set forth below.

"[1] The site contains no structures other than site lighting. The approved site lighting design included 'old fashioned' style light poles and fixtures adjacent to the site entrance on Portland Road. The proposed message center is not 'old fashioned' in style and does not maintain the existing theme.

"[2] As noted under (1) above, the site contains no structures other than the site lighting. Approval of the parking lot lighting plan was subject to inclusion of 'old fashioned' style light poles and fixtures at the Portland Road entrance. The proposed message center is not 'old fashioned' in style and is therefore not compatible with or superior to other elements on the site. The sign is the maximum size and does not meet the 20 ft. front yard setback from the property line. Although the applicant did not request the maximum height allowed under a sign program, the proposed sign is the maximum allowed outright by the Code. There are no other structures on the site to help mitigate the visual impact of the sign by allowing it to blend into the background. Landscaping on the site is minimal.

"[3] The electronic message center constitutes one-third of the proposed sign. The size of the electronic message center is disproportionate as it relates to the balance of the sign. As a result, the impacts of the electronic message center lighting cannot be considered minimal. In addition, the sign incorporates two spotlight style lights shining in a downward direction. The lights on the balance of the sign are bright and not minimal. The site lighting for the vehicle sales lot already exceeds the city standard for brightness and was only allowed through approval of a variance." Record 57.

1 **FIRST ASSIGNMENT OF ERROR**

2 For purposes of this opinion, we assume the city relies on Article I, section 8, of the
3 Oregon Constitution and the First, Fifth and Fourteenth Amendments to the United States
4 Constitution in concluding that it would be unconstitutional to apply its sign regulations to
5 intervenor's request for sign program approval.[4] In his first assignment of error, petitioner
6 argues that the city council erred by basing its decision, in whole or in part, on Article I,
7 section 8, of the Oregon Constitution.[5] Petitioner argues that Article I, section 8, was not
8 raised during the proceedings before the planning commission and was not raised in
9 intervenor's notice of local appeal. Petitioner also argues the city committed reversible error
10 by considering intervenor's federal constitutional arguments, because they were advanced for
11 the first time in the notice of local appeal.

12 **A. NDC 10.12.030(3) (Scope of Review)**

13 The challenged decision is the city council's decision reviewing the planning
14 commission's Type III decision. NDC 10.12.030(3) sets out the city council's scope of
15 review in such review proceedings:

16 "The scope of review for an appeal of a Type III decision that does not require
17 the adoption of an ordinance shall be a Record Hearing."

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[4]The city council's decision only specifically mentions Article I, section 8, of the Oregon Constitution. However, the challenged decision mentions a letter that was submitted by intervenor's attorney. That letter contends that the city's sign regulations are unconstitutional on their face and as applied in this case. Record 16-17. The letter contends the city's sign regulations violate the First Amendment to the United States Constitution because they regulate signs based on content and represent an improper prior restraint on protected speech, because they allow city officials "unbridled discretion" in reviewing sign programs. Record 16. The letter also contends the sign regulations are "void for vagueness and overbroad [and deprive intervenor] of due process rights guaranteed by the First, Fifth and Fourteenth Amendments." Record 17. Finally, the letter contends that the sign regulations violate "the Equal Protection Clause of the Fourteenth Amendment because [they prohibit intervenor's] application, yet [permit] other signs solely on the basis of their content." *Id.*

[5]Article I, section 8 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."

NDC 10.12.030(4)(B) states that the "record" includes "[a]ll exhibits, material, pleadings, memoranda, stipulations, and motions submitted by any party and reviewed or considered in reaching the decision under review." Petitioner reads these two NDC provisions together to limit the *legal arguments* that the city council may consider in an appeal of a Type III decision to the legal arguments that were presented to the planning commission.

We do not agree. Although petitioner does not cite it, the NDC includes a definition of "Hearing, Record." That definition is as follows:

> "Hearing, Record. A hearing in which no new evidence or testimony is considered. These hearings shall be a review of the existing 'record' or evidence previously submitted." NDC 10.06.010.

With the above definition as context, NDC 10.12.030(3) and (4)(B) simply limit the *evidence* that the city council may consider in an appeal of a planning commission Type III decision. Those provisions say nothing about the *legal issues* or arguments that the city council can or must consider.

B. NDC 10.12.020(1) (Notice of Local Appeal)

Petitioner also cites NDC 10.12.020(1), which provides the following requirement for a local notice of appeal:

> "An appeal for Type I, II, and III decisions shall include an identification of the decision sought to be reviewed, the date of the decision and shall be accompanied by a Notice of Appeal form provided by the Community Development Department. The Notice of Appeal shall be completed by the applicant and shall contain:
>
> "* * * * *
>
> "C. A detailed statement of the specific grounds on which the appeal is filed."

In *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997), a decision that is neither cited nor discussed by the parties, the Court of Appeals construed similar language to limit the issues that a party could raise in an appeal of a permit decision that was rendered

1 initially by the planning director without a hearing.[6] In *Johns*, LUBA had reached the
2 opposite conclusion, distinguishing the relevant Lincoln City code language from the
3 Douglas County code language that was at issue in *Smith v. Douglas County*, 93 Or App 503,
4 763 P2d 169 (1988), *aff'd* 308 Or 191, 777 P2d 1377 (1989), which expressly limited the
5 scope of review in a local appeal to the legal issues that are presented in a local notice of
6 appeal. The Court of Appeals rejected LUBA's reasoning and concluded that the city's code
7 requirement that the issues in a local appeal be listed in the notice of local appeal carried
8 with it an implicit limitation on the issues that a party may later raise in such an appeal:

> 9 "The ordinance requires that a notice of appeal from the planning director's
> 10 decision 'shall indicate the interpretation that is being appealed and the basis
> 11 for the appeal.' As noted, LUBA found 'nothing in [section] 9.040 that
> 12 prohibits the planning commission from considering' or 'anyone from raising'
> 13 issues 'beyond those indicated as the basis for appeal' in the notice. LUBA
> 14 distinguished section 9.040 from the ordinance we considered in *Smith*, which
> 15 expressly 'limited [the appellate body's review] to the grounds relied upon in
> 16 the notice of review * * * if the review is initiated by such notice.' It is of
> 17 course true that the provision in *Smith* was express in limiting the review to
> 18 the issues specified in the notice, while the provision here simply requires that
> 19 the issues be specified. However, it is not readily apparent why such a
> 20 specification would be required if it carried no limitation with it. In addition
> 21 to the fact that requiring issues to be defined in advance would serve no clear
> 22 purpose if the issues that may later be considered were not correspondingly
> 23 limited, such a requirement without such a limitation would *dis*serve the
> 24 objective of providing the other parties to the proceeding with notice of the
> 25 issues that they must *actually* be prepared to meet. *See Smith*, 93 Or App at
> 26 506-07, 763 P2d 169." 146 Or App at 601-02 (emphases in original; footnote
> 27 omitted).

28 In the omitted footnote, the Court of Appeals emphasized that the above-quoted conclusion
29 was limited to the facts presented in that case.

> 30 "We emphasize that there is no question in this case about the scope of the
> 31 issues that the reviewing bodies may consider if a hearing is initiated other

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[6] The relevant code language in *Johns* provided:

> "* * * The Notice of Appeal that is filed with the City shall indicate the interpretation that is being appealed and the basis for the appeal. * * *" 146 Or App at 596.

than by a party's notice. We imply no answer to that question. We also imply no view as to whether the reviewing body may raise questions of its own, beyond those specified in the notice. The only question we consider in this part of our discussion is what a *party* may raise at the hearing under the circumstances and the ordinance provision in question." 146 Or App at 602 n 1 (emphasis in original).

Johns lends indirect support to petitioner's argument that NDC 10.12.020(1) limited *intervenor's* right to raise issues before the city council to those NDC and federal constitutional issues that it identified in its notice of local appeal.[7] However, it appears that it was the city council rather than intervenor, that raised concerns about potential violation of Article I, section 8, of the Oregon Constitution. The above-quoted footnote leaves open whether it would be error for the *city council* to raise or consider issues that go beyond the local notice of appeal.

Following the Court of Appeals' first decision in *Johns*, which required that the city's decision to deny the permit be remanded to identify the legal issues that had been adequately specified in the local notice of appeal, the city in its decision on remand identified an entirely new issue on its own and again denied the application based in part on that new issue. In a subsequent LUBA appeal of that city decision on remand, LUBA affirmed that decision. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999). In a subsequent appeal of LUBA's decision, the Court of Appeals reversed, concluding that, notwithstanding the above-quoted footnote, the city council could not raise a new issue on its own. *Johns v. City of Lincoln City*, 161 Or App 224, 984 P2d 864 (1999). However, in reaching that conclusion, the court relied on the peculiar posture of the decision before it, which was the city's decision

[7]We say indirect support, because *Johns* involved a permit decision that had been decided initially without a hearing before it was appealed locally. In this case there was a hearing before the planning commission and a second hearing before the city council. Legislative amendments that are codified at ORS 227.175(10)(a)(E) overruled the Court of Appeals' first decision in *Johns*. The statute expressly provides that the hearing provided in an appeal of a permit decision that is rendered initially without a hearing may not be limited to the legal issues that are specified in the local notice of appeal. In view of that legislative action, there is some question in our mind whether the Court of Appeals would reach the same conclusion that it did in *Johns*, where both the initial local decision and the decision following a local appeal provide an evidentiary hearing, even though ORS 227.175(10)(a)(E) does not apply to such appeals.

following a remand that was necessitated by the Court of Appeals' first decision in *Johns*. In that posture, the Court of Appeals concluded, the city was precluded by law of the case from expanding the legal issues it would consider. 161 Or App 229-30.

The rule that emerges from the Court of Appeals' decisions in *Johns* and whether that rule has any bearing on whether NDC 10.12.020(1) limits the issues that the city council could consider in this matter is not clear. The Court of Appeals' first decision in *Johns* expressly takes no position regarding whether a local appellate body could, on its own, raise issues that are not presented in a notice of local appeal where the relevant code requires that the notice of local appeal identify the grounds for the local appeal. The law of the case principle that the Court of Appeals relied on in its second decision in *Johns* to limit the issues the city could consider is not applicable here, because the city council's decision in this case was not in response to a remand by LUBA. Accordingly, we do not believe the Court of Appeals' decisions in *Johns* support a conclusion that the city council violated NDC 10.12.020(1) by considering whether applying NDC 10.50.191 to deny the requested sign program approval would violate Article I, section 8, of the Oregon Constitution.

SECOND AND THIRD ASSIGNMENTS OF ERROR

There is no dispute that the city's decision is a land use decision. ORS 197.175(2)(d) requires that the city's land use decisions must be "in compliance with" its acknowledged "land use regulations." NDC 10.50.191 is an acknowledged land use regulation that establishes mandatory approval criteria that the city council must find are satisfied before it may approve the proposed sign program. As long as NDC 10.50.191 is in effect, and absent some legally adequate reason to reach a contrary conclusion, ORS 197.835(8) requires that

we reverse or remand the city's decision if we find that the challenged decision does not demonstrate that intervenor's proposed sign program complies with those criteria.[8]

The decision that is before us on appeal adopts the city attorney's recommendation, which is set out in relevant part below:

> "**RECOMMENDATION:**
>
> "Approve the sign application for a 30 ft. electronic reader board for Newberg Dodge.
>
> "**Motion by City Council: APPROVE sign application for participation in the sign program.**
>
> "• Findings of Fact – Consistent theme throughout the sign.
>
> "• Animated portion of the sign does not exceed 30 feet in size.
>
> "• The sign is consistent with the other sign located on Portland Road for the Newberg Dodge dealer which is due east of the present location.
>
> "**BACKGROUND**
>
> "1. Sign regulations are always tough regulations to uphold because the sign content is protected by Article I, Section 8, of the Oregon Constitution (freedom of speech). The protection furnished [under] Oregon's Constitution is stronger than the protection furnished under the freedom of speech contained in the Bill of Rights of the United States Constitution.
>
> "2. Consequence of this protection set out in court rulings is that sign regulations have continually been held to infringe on the constitutional rights of the owner or applicant whose sign is being considered.
>
> "3. The first test the court applies to such regulations is whether the sign regulations are content based. The City's regulation is not content-based. The applicant has agreed to this fact as he states in his submittals.
>
> "4. Another test is whether or not the regulation as applied is restrictive as to the exercise of the speech. Often the [forum] is hard to separate

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[8] ORS 197.835(8) provides that "[LUBA] shall reverse or remand a decision involving the application of a plan or land use regulation provision if the decision is not in compliance with applicable provisions of the comprehensive plan or land use regulations."

from the content – flashy or reader signs. The question is, 'Are you regulating the content or the forum?'

"5. If it regulates the content or as applied is restrictive upon the content of the sign, the regulations must be clear, precise, limited and meet a compelling governmental need. Regulations can rarely meet this test.

"6. The City met with the applicant to discuss the regulations and the sign program criteria. There was no agreement that could be reached. Both the City and applicant's representative agreed that there was no use in meeting further.

"7. In examining this request and the consequences of likely appeal of a denial to the court[, t]he following advice is given:

"a. Legal Advice: The denial of the application would not have much of a chance of being upheld in the face of a constitutional challenge. The City could be liable for damages plus attorney's fees if the applicant is successful upon appeal.

"b. Manager's Advice: In considering the limited resources of the City, the sign and the location, this office would recommend approval of the sign application.

"8. Attached is a letter dated March 2, 2002, from the applicant's attorney, David Griggs. I received this letter after preparing the Request for Council Action. Some of the assertions by Mr. Griggs I disagree with slightly, but that is just 'lawyers splitting hairs.' The recommendation is the same as he requests in the letter." Record 4-5.

Although the planning commission found the disputed sign program does not comply with three of the NDC 10.50.191 criteria, we have no way of knowing whether the city council agreed with the planning commission. The first bulleted portion of the city's decision indicates some disagreement with the bases for the planning commission's conclusion that the proposed sign program does not comply with NDC 10.50.191, but those findings are not adequate to demonstrate that the city council found that all criteria are met.[9]

[9]Intervenor suggests that the city's decision adopts and incorporates documents that intervenor submitted below to establish that the proposal complies with NDC 10.50.191. We do not agree.

1 The city's decision appears to be based entirely on its belief that a decision to deny
2 the requested sign program approval would violate the Oregon Constitution and perhaps the
3 federal constitution and thereby expose the city to a legal challenge that could lead to an
4 award of damages and attorney fees against the city. We are aware of no explicit statutory
5 authority for the city to approve a sign program that does not meet the applicable approval
6 criteria, if denying the requested sign program approval would violate the state or federal
7 constitution. However, LUBA would be required to reverse a city decision that denied
8 intervenor's request for sign program approval, if we concluded that denying the application
9 violates either the Oregon Constitution or federal constitution.[10] It would be strange if the
10 city could not approve such a request, when LUBA would be required on appeal to reverse a
11 decision that denied the request. We therefore assume the city could approve a sign program
12 that would have to be denied under NDC 10.50.191, if the city correctly concludes that
13 denying the sign program would violate the federal or state constitution. The question
14 becomes whether the city has established that a decision denying the application would be
15 unconstitutional.

16 The city's decision is clearly inadequate to establish that applying NDC 10.50.191 to
17 deny the proposed sign program would violate Article I, section 8, of the Oregon
18 Constitution or the federal constitution.[11] It is little more than an observation that some

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[10]ORS 197.835(9)(a)(E) requires that we reverse or remand a city land use decision if we find that the city "[m]ade an unconstitutional decision."

[11]Findings 1 and 2 are general observations. Finding 3 states that NDC 10.50.191 is *not* a content-based regulation. Finding 4 appears to question finding 3 and suggests that NDC 10.50.191 may regulate content. Finding 5 states that the vague and subjective criteria in NDC 10.50.191 would likely be invalidated if they constitute a content-based regulation of speech. Finding 6 does not address any constitutional issues. Finding 7 apparently is the city attorney's and city manager's advice that the request should be approved to avoid legal action that the city "would not have much chance" of successfully defending. Finding 8 refers to an attached March 2, 2002 letter from the applicant's attorney and indicates that the city attorney generally agrees with the position taken in the letter. No such letter is attached to the copy of the decision in the record and no letter dated March 2, 2002, from the applicant's attorney is included in the record. The intended reference is probably to the March 6, 2002 letter that is included at Record 16-17. We previously noted the content of this letter. *See* n 4. That letter does not specifically address NDC 10.50.191 and does not cite a single appellate

unspecified sign regulations, particularly those that regulate content directly or make regulatory distinctions based on the content of protected speech, are frequently held to be unconstitutional. The decision makes no attempt to identify what aspects of NDC 10.50.191 the city believes would be found to be unconstitutional if they were applied to deny the proposed sign program. Perhaps equally as important, the decision does not appear to recognize that NDC 10.50.191 is a quasi-variance provision. If the quasi-variance provisions of NDC 10.50.191 are unconstitutional, it would seem that an equally plausible consequence is that the limit that the applicant here seeks to avoid (the NDC 10.50.183(3) 10 square foot area limit on animated signs) applies until the city replaces NDC 10.50.191 with a quasi-variance process that is constitutional.[12]

We might reach a different conclusion if it were obvious to us that NDC 10.50.191 is unconstitutional. If the city believes that NDC 10.50.191 constitutes a content-based regulation of protected speech, and that belief is correct, NDC 10.50.191 likely is unconstitutional. However, it is at least doubtful that the challenged decision takes the position that NDC 10.50.191 is a content-based regulation of protected speech, and it is certainly not obvious to us that it is.

Intervenor makes a number of arguments in its brief in support of its view that a city decision denying the application would be unconstitutional.[13] Intervenor argues that NDC 10.50.191 is a content-based regulation of protected speech, and would not survive the strict scrutiny that is applied in challenges to such regulations under the First Amendment.

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court case in support of its arguments that a denial of the request would violate the First, Fifth and Fourteenth Amendments to the United States Constitution.

[12]No question is presented in this appeal concerning whether it would be unconstitutional for the city to limit animated signs to 10 square feet in area and provide no discretionary permit process for exceeding that 10 square foot limit.

[13]We note and reject intervenor's argument that the city's decision that denying the proposed sign program would be unconstitutional should receive the deferential standard of review required under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). That deference is limited to interpretations of the meaning of local land use legislation. No such interpretations are at issue in this appeal.

1 Intervenor next argues that even if NDC 10.50.191 were subjected to the intermediate level
2 of scrutiny that is applied to First Amendment challenges of regulation of truthful,
3 nonmisleading commercial speech, it would be held unconstitutional. Intervenor next
4 contends that the highly discretionary criteria in NDC 10.50.191 render it an unconstitutional
5 system of prior restraint of protected speech. Finally, intervenor argues that because Article
6 I, section 8 is more protective of speech than the First Amendment, a decision denying the
7 application would violate the Oregon Constitution as well.

8 It may be that some of intervenor's constitutional arguments have merit.[14] However,
9 without a clearer understanding of the constitutional provisions that the city believes would
10 be violated by applying the city's discretionary process for relaxing its sign standards, and
11 why the city believes those constitutional provisions would be violated, we are left to
12 speculate. We are in no position to do so. Even if we were, we are also unsure of the
13 appropriate remedy in the event that NDC 10.50.191 is unconstitutional, and no party has
14 addressed that issue in this appeal.

15 On remand the city should first address the applicant's arguments that the challenged
16 sign complies with NDC 10.50.191(1) through (3), because if the city council disagrees with
17 the planning commission and finds that those criteria are met, the sign program would have
18 to be approved without regard to the constitutional concerns expressed in the decision. In the
19 event the city council agrees with the planning commission that NDC 10.50.191(1) through

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[14]Like the city, we question intervenor's contention that NDC 10.50.191 constitutes a content-based regulation of speech. The only case intervenor cites that lends any support for that proposition is *North Olmsted Chamber of Com. v. North Olmsted*, 86 F Supp 2d 755 (ND Ohio 2000). In that case the court stated:

> "The City's permit system is not content neutral. The sign ordinance requires the building official to consider the design, color, orientation, visual impact and influence * * * in deciding whether or not to issue a permit. * * *" 86 F Supp 2d at 776.

Although we do not decide the question here, we question the correctness of that statement and whether it necessarily supports a conclusion that NDC 10.50.191(1) through (3) are content-based regulation of protected speech.

1 (3) are not met, it must deny the proposal or explain why it believes it would be
2 unconstitutional to do so. If the city selects this latter option, it must adopt a reviewable
3 decision that explains in more detail what constitutional provisions the city believes would
4 be violated by applying NDC 10.50.191(1) through (3) in this case. It this regard it likely
5 will not be sufficient simply to cite appellate court decisions that have invalidated other sign
6 regulations without making some effort to explain why those decisions would also support a
7 finding that applying the particular provisions of NDC 10.50.191(1) through (3) to deny the
8 proposed sign program would be unconstitutional. Finally, if the city concludes that
9 applying NDC 10.50.191(1) through (3) in this case would be unconstitutional, it should
10 consider whether the appropriate remedy is to approve the request or to deny the request to
11 exceed the 10 square foot limit imposed by NDC 10.50.183(3) until a constitutional
12 replacement for NDC 10.50.191(1) through (3) can be adopted.
13 The city's decision is remanded.