BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WEST COAST MEDIA, LLC,
Petitioner,

vs.

CITY OF GLADSTONE,
Respondent.

LUBA No. 2002-098

FINAL OPINION
AND ORDER

Appeal from City of Gladstone.

Brian D. Chenoweth and Christopher W. Rich, Portland, filed the petition for review and argued on behalf of petitioners. With them on the brief was Rycewicz & Chenoweth, LLP.

John H. Hammond Jr., West Linn, and Timothy J. Sercombe, Portland, filed the response brief and argued on behalf of respondent. With them on the brief was Hutchinson, Hammond & Walsh PC., and Preston Gates and Ellis, LLP.

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

REVERSED 05/15/2003

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a letter from the city attorney denying petitioner's applications to construct four "billboards" in commercial and industrial zoned areas along Interstate 205.[1]

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to address an argument in the response brief that any interpretations of the city's code in the challenged decision are entitled to deference under ORS 197.829(1). We agree with petitioner that a reply brief is warranted, and the motion is allowed.

MOTION TO DISMISS

The city moves to dismiss this appeal, arguing that the petition for review fails to establish that petitioner has standing to appeal to LUBA.

To have standing to appeal to LUBA, petitioner must "appear" before the local government. ORS 197.830(2)(b). The petition for review must set forth the facts that establish petitioner's standing. ORS 197.830(12)(a); OAR 661-010-0030(4)(a). The petition for review does not explicitly address petitioner's standing. However, the petition for review asserts, and the city does not dispute, that petitioner is the applicant for the permits denied by the city. *See also* Record 16, 43, 71, 99 (building permit applications filed on petitioner's behalf). As the applicant for the disputed permits, petitioner satisfies the ORS 197.830(2)(b) requirement for a local appearance. The city's standing challenge is without merit.

FACTS

The pertinent facts in this case were stated in our order denying the city's motion to dismiss. *West Coast Media v. City of Gladstone*, 43 Or LUBA 585, 585-86 (2002):

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[1] As discussed below, each application sought a building permit for a "billboard." *See, e.g.,* Record 16. The city's code does not define "billboard," and the parties do not entirely agree on the exact nature of the proposed use or, relatedly, the precise basis for the city's denial. We resolve those disputes below.

> "On May 5, 2002, petitioner filed four building permit applications with the city, proposing to construct four billboards on property zoned for commercial and industrial uses, adjacent to Interstate 205. The proposed billboards are each 14 by 48 feet, with a total area of 672 square feet per billboard. Upon receipt of the applications, planning staff and the city attorney reviewed the proposal and concluded that such signs are not permitted within the city. The city attorney instructed county building officials to deny the applications and, on July 11, 2002, sent petitioner a letter stating that the city's code does not permit billboards in any zone within the city. Petitioner appeals the July 11, 2002 letter."

The city attorney's July 11, 2002 letter states, in relevant part:

> "Our office has instructed * * * [the] Clackamas County Building Official, to deny your client's four (4) building permits. As is true for any structure, in order for [petitioner] to be issued the building permits, billboards (or 'outdoor advertising signs') must be an outright permitted use in the relevant zone. Notwithstanding your argument to the contrary, as detailed in your May 31, 2002 letter, we believe it is quite clear that Gladstone's code does not permit billboards to be located anywhere within Gladstone's city limits." Record 2.

MOTION TO STRIKE

Petitioner moves to strike two statements in the response brief that petitioner contends are not based on the record: (1) an assertion that the city's basis for denial was the *size* of the proposed billboards, not the fact that the proposed signs were billboards; and (2) an assertion that the city council reviewed petitioner's applications and adopted the interpretation of the city's sign ordinance that is reflected in the city attorney's July 11, 2002 letter. Petitioner also moves to strike a June 18, 2002 letter attached to the response brief that is not in the record.[2]

[2] The June 18, 2002 letter was originally included in the record. Petitioner objected to a number of documents in the record, including the June 18, 2002, letter, on the grounds that the documents pertained to a separate proposal from petitioner to pay the city "user fees" in exchange for permission to locate up to five billboards in the city, and did not pertain to petitioner's building permit applications. The "user fee" proposal was apparently considered and rejected by the city council, at approximately the same time city staff and the city attorney were considering petitioner's building permit applications. We sustained petitioner's record objections, concluding in relevant part that the two proposals were directed at different decision makers and that the documents related to the "user fee" proposal were not properly in the record of the city attorney's decision. *West Coast Media*, 43 Or LUBA at 591.

The city responds that there is support in the record for the disputed assertions. In support of the first assertion, the city argues that the basis for denial in the city attorney's letter quoted above is nonspecific, and the denial could be based on a number of different considerations, including size of the proposed billboards. In support of the second assertion, the city points to a letter from the city attorney in the record that refers to "our review" of the code, and argues that use of the plural pronoun is some evidence that the city council, and not just the city attorney, interpreted the code in the challenged decision.[3]

With respect to the June 18, 2002 letter attached to the response brief, the city argues that LUBA may consider the letter for the limited purpose of determining whether the city council interpreted the city code to prohibit construction of the proposed billboards, as the city contends. However, the city does not request that we consider the letter, pursuant to OAR 661-010-0045.[4]

The cited record pages provide only the most tenuous factual support for the two disputed assertions. However, as discussed below, we disagree with the merits of the city's arguments that (1) the basis for denial was the size of the disputed billboards, rather than

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[3] The letter is from the city attorney to the building official, and states in part:

> "I am writing to you in our capacity as city attorneys for the City of Gladstone. As mentioned in my June 12, 2002 letter to you, the above-referenced building permit applications concern the placement of billboards on properties adjacent to I-205 in the City of Gladstone. We have completed our review of the relevant sections of the Gladstone Municipal Code and have concluded that billboards are clearly not a permitted land use within Gladstone's city limits. Therefore, we respectfully instruct your department to *deny* the permit applications." Record 1 (emphasis in original).

[4] OAR 661-010-0045(1) provides:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

their status as billboards, and (2) the interpretation reflected in the city attorney's letter is attributable to the city council, for purposes of our standard of review under ORS 197.829(1). Given our rulings on those legal arguments, we see no need to resolve whether the factual predicates for those arguments are supported by the record. Petitioner's motion to strike the two disputed assertions is denied.

As for the June 18, 2002 letter, we may not consider that document over petitioner's objection, in the absence of a motion to consider extra-record evidence pursuant to OAR 661-010-0045. Petitioner's motion to strike the June 18, 2002 letter is sustained.

MOTION TO TAKE EVIDENCE

Petitioner moves to take evidence not in the record, specifically an April 23, 2002 letter from petitioner's attorney to the city attorney. The April 23, 2002 letter was previously stricken from the record pursuant to petitioner's record objection. *See* n 2; Record 130. However, petitioner now asks that LUBA consider that letter, to resolve a factual dispute regarding whether the city was aware that the proposed billboards are "off-premises signs," *i.e.*, signs that advertise goods, services or facilities located some place other than the property on which the sign is located.

Petitioner explains that the city takes the position in its response brief that the allegedly "off-premises" nature of the proposed signs could not have been the basis for denial, and that nothing in the record indicates that petitioner proposed to construct "off-premises" signs. Respondent's Brief 8. Petitioner notes that the April 23, 2002 letter refers to petitioner's "proposal to erect as many as five off-premises signs in Gladstone," and argues that the city knew very well that petitioner sought approval for "off-premises signs." Record 130. The city objects to our consideration of the April 23, 2002 letter.

Our authority to consider evidence that is not included in the local government record is limited to the grounds stated in OAR 661-010-0045(1). Petitioner makes no attempt to demonstrate that the alleged factual dispute concerns the unconstitutionality of the decision,

standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or procedural irregularities not shown in the record. Absent that demonstration, we have no grounds to accept and consider the proffered evidence.[5] Petitioner's motion is denied.

INTRODUCTION

Because the city's sign code is the central issue in petitioner's interpretative and constitutional challenges to the city's decision, we begin by describing the sign code in some detail.

The sign code, at Gladstone Municipal Code (GMC) Chapter 17, Section 52, has nine subsections. GMC 17.52.010, entitled "Applicability," states in relevant part that "[t]he standards of this chapter shall apply to all signs." GMC 17.52.020 is entitled "Signs—Generally," and sets forth a number of general provisions governing all signs.[6] As relevant

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[5] One might fashion an argument that the city's alleged awareness of the alleged "off-premises" nature of the proposed signs has some bearing on the basis for denial and the constitutionality of that denial. However, petitioner does not advance such arguments, or address the requirements of OAR 661-010-0045(1) and (2) at all. In addition, the parties' dispute on this point is mooted by our conclusion later in this opinion, based on the challenged decision itself, that the basis for the city's denial was clearly the city's belief that the proposed billboards were "outdoor advertising signs," *i.e.*, signs that advertise off-premises goods, services or facilities.

[6] GMC 17.52.020 provides, in relevant part:

> "Signs shall be allowed in commercial and industrial zoning districts pursuant to the standards of GMC 17.52.020 through 17.52.070. * * * General provisions for signs shall be as follows:
>
> "(1). Sign Clearances. A minimum of eight feet (8') above sidewalks and fifteen feet (15') above driveways shall be provided under freestanding signs.
>
> "(2). Corner Vision. All signs shall be situated in a manner so as not to adversely affect safety, corner vision or other similar conditions. * * *
>
> "(3). Blanketing. No sign shall be situated in a manner that results in the blanketing of an existing sign.
>
> "(4). Illuminated Signs.
>
> "(a) Internally illuminated signs or lights used to indirectly illuminate signs shall be placed, shielded or deflected so as not to shine into dwelling units;

here, GMC 17.52.020 states that "[s]igns shall be allowed in commercial and industrial zoning districts pursuant to the standards of GMC 17.52.020 through 17.52.070." GMC 17.52.020(8) sets forth the method for calculating the maximum area for signs, where GMC Chapter 17.52 establishes a maximum area.

GMC 17.52.040 is entitled "Freestanding identification signs," and provides for "[f]reestanding signs oriented to off-site circulation and identifying the use of the premises," subject to a number of conditions.[7] GMC 17.52.050 is entitled "On-building identification

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"(b) No sign or other illuminating device shall have blinking, flashing or fluttering lights, except as provided for electronic message center signs in GMC 17.52.055 (electronic message center signs).

"(c) No colored lights shall be used at any location or in any manner that may be confused with or construed to be traffic signals or lights on emergency vehicles. * * *

"(5). Moving Signs. No sign, sign structure or portion thereof shall be designed to rotate, flutter or appear to move [except for messages displayed by an electronic message center sign or rotation of the louvers of tri-vision signs].

"* * * * *

"(8) Area Calculation.

"(a) Where this chapter establishes a maximum area standard for signs, the maximum shall apply on a per-side basis to a maximum of two sides.

"(b) Additional sides shall be of no greater area than that necessary to provide a frame or support structure for the sign faces.

"* * * * *"

[7] GMC 17.52.040 provides, as relevant:

"Freestanding signs oriented to off-site circulation and identifying the use of the premises shall be allowed subject to the following conditions:

"(1) Number. Generally only one (1) such sign shall be allowed for a development or complex, even when more than one tax lot or ownership is included in the development. * * *

"* * * * *

"(2) Height. The maximum height shall be twenty feet (20').

signs," and allows "[o]n-building signs identifying the use of the premises," subject to a number of conditions.[8]

GMC 17.52.055 allows an "electronic message center sign" to be incorporated into a permanent identification sign, subject to a number of conditions.[9] GMC 17.52.060 allows

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"(3) Area. The maximum area shall be forty (40) square feet. The maximum area standard may be exceeded in the following cases:

"(a) The request is reviewed pursuant to GMC Chapter 17.80 (design review) and a finding is made that the increased area is warranted due to one or more of the following factors. Under no circumstances shall the area exceed sixth (60) square feet. [Setting forth four factors].

"(b) The property has frontage on a major arterial, in which case the maximum area shall be one-half (1/2) of a square foot per linear foot of major arterial frontage or forty (40) square feet, whichever is greater.

"* * * * *"

[8] GMC 17.52.050 provides, in relevant part:

"On-building signs identifying the use of the premises shall be allowed subject to the following conditions:

"* * * * *

"(2) Area. Maximum on-building sign area shall be calculated as follows:

"(a) Where there is no freestanding identification sign for a development, the maximum on-building sign area for each tenant shall be one and one-half (1/2) square feet per linear foot of the tenant's primary building wall.

"(b) Where there is a freestanding sign for a development, the maximum on-building sign area for each tenant shall be one (1) square foot per linear foot of the tenant's primary building wall.

"(c) Each tenant shall be allowed a minimum of thirty-two (32) square feet of on-building sign area.

"(d) No individual on-building sign shall exceed two hundred (200) square feet in area."

[9] GMC 17.52.055 provides, as relevant:

"Electronic message center signs, and other changeable copy signs, may be incorporated into a permanent identification sign subject to the following conditions. Tri-vision signs shall not be subject to this section.

"(1) Only one such sign shall be allowed in a development.

for signs that direct the flow of traffic to and from or within a development, and also provides for directories that identify multiple tenants, uses or buildings within a development. GMC 17.52.070 permits for temporary signs that advertise special sales or events, subject to obtaining a temporary sign permit.[10]

"(2) The sign shall be included in the maximum area allowed under GMC subsections 17.52.040(3) or 17.52.050(2) for a freestanding or on-building sign, respectively, and shall not comprise more than eighty percent (80%) of the area of the identification sign of which it is a part.

"* * * * *

"(4) The sign shall be used only to advertise activities conducted or goods and services available on the property on which the sign is located, or to present public service information.

"(5) If the sign displays a segmented message, the entire message shall be completed within twelve (12) seconds."

[10] GMC 17.52.070 provides, in relevant part:

"Temporary signs may be displayed for the purpose of advertising special sales or events, subject to approval by the city administrator, or designee, of a temporary permit. Issuance of a temporary permit shall be subject to the following standards:

"(1) Number. Only one temporary sign shall be displayed on a development or complex at any given time.

"* * * * *

"(3) Area and Height.

"(a) The maximum area for a temporary sign shall be thirty-two (32) square feet.

"(b) The maximum height for a freestanding temporary sign shall be six feet (6').

"* * * * *

"* * * * *

"(6) Exception. No temporary sign shall be allowed for any development or complex that has a changeable copy sign incorporated into a permanent identification sign."

GMC 17.52.080 allows "[t]emporary campaign signs" on private property or in unimproved portions of a street right-of-way.[11] Finally, GMC 17.52.090 provides for a limited range of signs in residential zoning districts, subject to a number of conditions.[12]

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[11] GMC 17.52.080 provides, in full:

"(1) Temporary campaign signs shall not be allowed on public property or in improved street rights-of-way.

"(a) However, they shall be allowed on private property and in unimproved portions of street rights-of-way subject to the property owner's approval.

"(b) Where a campaign sign is to be placed in an unimproved portion of a street right-of-way, the approval of the owner of the property abutting the right-of-way shall be obtained.

"(2) Campaign signs shall comply with Chapter 17.54 (clear vision), shall be removed within two weeks following the election and shall comply with state law."

[12] GMC 17.52.090 provides, in relevant part:

"In residential zoning districts, signs shall be allowed subject to the following conditions:

"(1) Identification signs shall not exceed a total of one (1) square foot in area * * *

"(2) Signs pertaining to the lease, rental or sale of property shall be limited to two (2) signs per lot and shall not exceed six (6) square feet in area.

"(3) Signs advertising the sale of a tract or lots in a subdivision shall be limited to one (1) sign per tract or subdivision and shall not exceed thirty-two (32) square feet in area.

"(4) The following sign standards shall apply to commercial uses approved as conditional uses and to institutional uses that are non-conforming uses or that are approved as conditional uses.

"(a) Number. Generally only (1) sign shall be allowed for a development or complex * * *

"(b) Type. The allowed sign(s) may be freestanding or on-building;

"(c) Area. The maximum area shall be thirty-two (32) square feet.

"(d) Height. The maximum height for a freestanding sign shall be five (5) feet * * *

"* * * * *

"(f) Changeable Copy Signs. In addition to the sign(s) allowed under GMC subsection 17.52.090(4)(a), a church or school may have one (1) freestanding or on-building changeable copy sign. The changeable copy

With that introduction, we turn to the parties' arguments concerning GMC 17.52.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that, properly understood, GMC 17.52 permits the proposed billboards in commercial and industrial-zoned areas, and the city's conclusion to the contrary misconstrues GMC 17.52.

According to petitioner, the statement in GMC 17.52.020 that "signs shall be allowed in commercial and industrial zoning districts pursuant to the standards of GMC 17.52.020 through 17.52.070" operates as the general authorization for "signs" in such districts. *See* n 6. Petitioner notes that the city's code defines the term "sign" broadly enough to include the proposed billboards.[13] Petitioner argues that the proposed billboards comply with all of the general standards set forth in GMC 17.52.020. In particular, petitioner contends that nothing in GMC 17.52.020 limits the size or area of any sign.

Petitioner acknowledges that GMC 17.52.040 through 17.52.070 impose size or area limitations, but petitioner argues that those code sections apply only to specific types of signs, such as free-standing or on-building identification signs, and that the proposed billboards clearly do not fall within any of the categories of signs regulated by GMC 17.52.040 through 17.52.070.

> sign shall be internally or indirectly illuminated or non-illuminated but shall not be an electronic message center sign. The maximum area shall be thirty-two (32) square feet. The maximum height for a freestanding changeable copy sign shall be eight feet (8').
>
> "(g) Other Standards. Signs approved under this subsection shall be subject to GMC section 17.52.020 (signs-generally), except GMC subsection 17.52.020(4)(d)."

[13] GMC 17.06.500 provides:

> "'Sign' [means] an identification, description, illustration or device which is affixed to or represented, directly or indirectly, upon a building, structure, or land and which directs attention to a product, place, activity, person, institution or business."

For additional support, petitioner cites to previous versions of the city's sign code, attached to the petition for review. According to petitioner, a 1919 ordinance expressly allowed "billboards" within the city upon receiving a city permit. Similarly, a 1967 ordinance also allowed "billboards" in residential zones subject to a five-year permit. Ordinance 708, Section 16(3)(6), Petition for Review, Exhibit G, 11. Subsequent ordinances did not expressly reference or authorize "billboards," but did allow "signs" in nonresidential zones, subject to a limited number of restrictions. Ordinances 793, 848, 947. In 1981, the city adopted Ordinance 997, which petitioner argues resembles the structure of the current GMC by including a general authorizing statement that "[s]igns shall be allowed in commercial and industrial districts," followed by a set of limitations for specific types of signs, without including billboards in the types of signs that were subject to limitations. Ordinance 997.04(A), Petition for Review, Exhibit B, 8. Like the current GMC 17.052.040 through 17.052.070, petitioner argues, Ordinance 997.04 contained standards for "permanent identification signs," "on-building signs," "traffic control signs," and "temporary and portable signs." *Id.* at 10-12. According to petitioner, all subsequent versions of the city's sign code, including the current version, simply elaborate on that basic structure, principally by adding additional provisions regulating electronic message centers and campaign signs. Petitioner contends that this historical context supports its view that GMC 17.52 (1) broadly authorizes all "signs" within commercial and industrial zones, subject to general standards, while (2) specifically regulating certain types of signs. According to petitioner, because the proposed billboards fall within the broad authorization of GMC 17.52.020, and are not expressly prohibited or subject to the specific regulations governing particular types of signs at GMC 17.52.040 through 17.52.07, the city erred in determining that the proposed billboards are prohibited by the city's sign code.

Finally, petitioner notes that the city's codification of GMC 17.52 cites ORS chapter 377 as a statutory reference. ORS 377.700 *et seq.* is the Oregon Motorist Information Act of

1971 (OMIA). Petitioner notes the OMIA defines the term "sign" to include "billboard." ORS 377.710(29). Further, petitioner argues, the OMIA distinguishes between "on-premises signs," signs that advertise or identify activities conducted on the premises on which the sign is located and "outdoor advertising signs," signs that advertise goods, services, facilities, or activities that are not available or conducted on the premises on which the sign is located. ORS 377.710(22) and (23).[14] According to petitioner, the statutory definition of "on-premises signs" appears to include the types of "identification" signs regulated under GMC 17.52.040 and 17.52.050. Conversely, petitioner argues, the proposed billboards are clearly "outdoor advertising signs" under the OMIA. Petitioner argues that it is significant that the city's codification of GMC 17.52 references the OMIA, which defines "sign" to include "billboard," as authority for GMC 17.52.020, which broadly allows "signs." Further, petitioner argues that the express regulation of certain types of signs under the GMC, and the absence of specific regulations for billboards or outdoor advertising signs is explained by the fact that the size and placement of billboards are already regulated by the OMIA.

In sum, petitioner argues that if the city had intended GMC 17.52 to prohibit billboards in the city, contrary to previous versions of its code, it could have said so. The

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[14] ORS 377.710 provides, in relevant part:

> "(22) 'On-premises sign' means a sign designed, intended or used to advertise, inform or attract the attention of the public as to:
>
> > "(a) Activities conducted on the premises on which the sign is located; or
> >
> > "(b) The sale or lease of the premises on which the sign is located.
>
> "(23) 'Outdoor advertising sign' means a sign designed, intended or used to advertise, inform or attract the attention of the public as to:
>
> > "(a) Goods, products or services which are not sold, manufactured or distributed on or from the premises on which the sign is located;
> >
> > "(b) Facilities not located on the premises on which the sign is located; or
> >
> > "(c) Activities not conducted on the premises on which the sign is located."

fact that GMC 17.52 broadly authorizes "signs," while the codification of GMC 17.52 references a statute that allows and regulates billboards, suggests that the specific GMC regulations governing particular types of signs should not be read to limit the types of signs allowed in the city, or to implicitly prohibit billboards.

The city views the structure of GMC 17.52 very differently. As a preliminary matter, however, the city argues that the city attorney's interpretation of GMC 17.52 in the challenged decision reflects the city council's view of the code, making that interpretation entitled to deference pursuant to ORS 197.829(1). According to the city, petitioner attempted a two-pronged effort to site the proposed billboards in the city: (1) a proposal for the city to amend its code to expressly allow billboards, in return for a substantial "user fee"; and (2) submission of four building permit applications for the disputed billboards. The city argues that the city council considered petitioner's first offer in several executive sessions. In the course of that consideration, the city argues, the city council determined that the GMC does not currently allow billboards. The city contends that the city council then directed the city attorney to deny the pending applications for the proposed billboards, which resulted in the challenged decision. Under these circumstances, the city argues, it is appropriate to apply a deferential standard of review to the interpretation reflected in the city attorney's letter.

We disagree. Even if we assume the city's characterization of the events leading up to the challenged decision is accurate, it is not appropriate to apply a deferential standard of review to the interpretation in the city attorney's letter. We believe that an essential prerequisite for application of the deferential standard of review under ORS 197.829(1) is, at a minimum, a written decision or document that is adopted by the governing body and contains an express or implicit interpretation of the local provision at issue that is adequate

for review.[15] In the present case, the city's attempt to invoke a deferential standard of review under ORS 197.829(1) clearly fails. The record includes no document adopted by the governing body. Accordingly, we conclude that we need not apply a deferential standard of review to any interpretation in the city attorney's letter. The correct standard of review of any interpretation in the city attorney's letter is the whether the interpretation is "reasonable and correct." *McCoy v. Linn County*, 90 Or App 271, 752 P2d 323 (1988).

On the merits, the city argues that the city attorney correctly determined that the proposed billboards are not authorized by the city's sign code. The city disagrees with petitioner that GMC 17.52.020 is a general authorization for "signs," and does not agree that GMC 17.52.040 through 17.52.070 simply provide specific regulations for a subset of the signs authorized by GMC 17.52.020. On the contrary, the city views GMC 17.52.020 as providing general regulations for all signs that are authorized under MC 17.52.040 through 17.52.070. According to the city, the only signs authorized by GMC 17.52.040 through 17.52.070 are free-standing and on-building identification signs, electronic message signs, traffic control signs and temporary signs. The city argues that, to the extent the proposed signs fall within any of the foregoing categories, they violate the size limits applicable to all types of signs allowed under GMC 17.52.040 through 17.52.070. To the extent the proposed signs fall outside any of the foregoing categories, the city argues, they are simply not authorized at all.[16]

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[15] In the usual course of events, an interpretation entitled to deference under ORS 197.829(1) will be embodied in the challenged decision adopted by the governing body. We leave open the question of whether such deference would be appropriate where a lower body decision maker relies upon an interpretation adopted by the governing body in a different proceeding. However, even if deference is appropriate in such circumstances, at a minimum we believe that the decision or document adopting that interpretation must be in the record of the challenged decision and before the final decision maker.

[16] The city argues that there is no contention that the proposed signs are "temporary campaign signs" allowed under GMC 17.52.080.

Petitioner's view of GMC 17.52 is plausible, and has some textual support. However, the city's view is more consistent with the text, context and structure of GMC 17.52. As we noted in an earlier order in this case, GMC 17.52 is a detailed and comprehensive regulatory scheme for signs. The specific provisions at GMC 17.52.040 through 17.52.090 reflect an apparent attempt to closely regulate, among other things, the size and height of signs, in order to reduce perceived negative impacts of signs. It seems unlikely that the city would go to great lengths to impose such specific regulations on a particular subset of signs, and nevertheless allow the remaining universe of signs without any limit on size or height. It seems more likely that the city implicitly intended to prohibit signs that were not expressly authorized and regulated under GMC 17.52.040 through 17.52.070.

Petitioner is correct that the statement, at GMC 17.52.020, that "[s]igns shall be allowed in commercial and zoning districts," can be read to broadly authorize all sign types limited only by any applicable regulations at GMC 17.52.020 through 17.52.070. Petitioner is also correct that the city's contrary reading gives that language little independent meaning. However, the same argument can be made against petitioner's interpretation. The introductory sentences in GMC 17.52.040 through 17.52.070 each state that the signs regulated by those provisions "shall be allowed" or "may be displayed," or variations thereof. *See, e.g.*, GMC 17.52.040 ("Freestanding signs oriented to off-site circulation and identifying the use of the premises shall be allowed subject to the following conditions[.]"); n 7. That language appears to operate as a specific grant of authority. If petitioner is correct that GMC 17.52.040 through 17.52.070 simply provide limited additional regulations to some types of signs already authorized by GMC 17.52.020, that language is redundant.

In sum, although the issue is not without doubt, we disagree with petitioner that the city attorney erred in concluding that the proposed billboards are not authorized by the city's sign code.

The parties' arguments regarding the precise basis for denial remain. While it is not strictly necessary to resolve those arguments in order to resolve the first assignment of error, the resolution of those arguments has considerable significance for the constitutional issues raised under the second assignment of error. Accordingly, we now resolve those arguments.

As explained above, the city argues that only certain types of signs are authorized by GMC 17.52, and that the code does not permit the proposed "billboards." The city concedes that GMC 17.52 does not permit what the parties call "off-premises signs" or "outdoor advertising signs" within the meaning of the OMIA. However, the city argues that the basis for the city attorney's denial was *not* that petitioner proposed "billboards" or "outdoor advertising signs," but rather that the proposed signs were 672 square feet in size, far larger than allowed under any provision of GMC 17.52. According to the city, nothing in the record establishes that petitioner proposes to construct "off-premises" signs advertising "[g]oods, products, services which are not manufactured, sold, or distributed on or from the property on which the sign [would be] located," within the meaning of the OMIA, and thus such considerations could not have been the basis for the city attorney's denial. ORS 377.710(23)(a). The city argues that there is nothing in the record to indicate what the content of the proposed signs would be. Therefore, the city argues, the only logical conclusion is that the city attorney denied the proposed billboards because of their size.

The city's *post hoc* explanation for the basis for denial is unconvincing. In relevant part, the challenged decision states that "billboards," which the decision expressly equates with "outdoor advertising signs," are not permitted uses in any zone. Nothing in the decision even hints that that conclusion is based on the *size* of the proposed billboards.[17] On the

[17] In any case, the size limitations in GMC 17.52 apply by their terms only to specified types of signs, and not to all signs. In *Ackerley Communications v. City of Gresham*, 18 Or LUBA 541, 550-51 (1989), we concluded that the city could not apply sign area, height and number standards that were applicable only to certain types of signs to deny applications for "outdoor advertising signs," where it was clear that the city did not adopt such standards to apply to outdoor advertising signs. Like the ordinance at issue in that case, GMC 17.52 prohibits "outdoor advertising signs" but allows a defined set of other sign types, subject to various size

contrary, the language in the city attorney's decision strongly suggests that it was the fact that petitioner's applications proposed four "billboards" that was the basis for denial. More tellingly, the use of quotation marks around "outdoor advertising signs" makes it reasonably clear that the city attorney was referring to that term as it is used in the OMIA, where it is a term of art. As discussed below, the OMIA generally prohibits new "outdoor advertising signs" or "off-premises signs," while allowing "on-premise" signs that identify or advertise goods, services or facilities on the site. Finally, the city attorney's letter refers and responds to intervenor's May 31, 2002 letter, which describes the proposed billboards in a manner that leaves little doubt as to their nature and probable content. Record 9-11. In short, there is no reasonable doubt that the sole basis for denial was the city attorney's belief that the proposed billboards are not among the types of signs that are specifically allowed under the city's code, and therefore the proposed billboards are prohibited.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the event GMC 17.52 is understood to prohibit the proposed billboards, petitioner contends that GMC 17.52 is unconstitutional, both facially and as applied in the city's denial, because it is an unconstitutional restriction on free speech under the Oregon and United States Constitutions, an impermissible prior restraint on speech, and a violation of the Privileges and Immunities Clause of the state constitution and of the Equal Protection Clause of the federal constitution. Because we find petitioner's state constitutional claims to be dispositive, we do not address the federal constitutional claims.

Before turning to these arguments, we first resolve the parties' dispute regarding our scope of review.

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limitations. Thus, even if the city's *post hoc* explanation for denial was supported by the record or expressed in the city's decision, it is doubtful that the city could deny the proposed billboards based on the current GMC 17.52 size limitations that apply exclusively to other sign types.

A. Scope of Review

The bulk of petitioner's argument under this assignment of error contends that GMC 17.52 is facially unconstitutional, for a number of reasons. Petitioner also advances an "as-applied" challenge to GMC 17.52, in case LUBA concludes that GMC 17.52 "is not facially directed at expression." Petition for Review 24. The substance of petitioner's as-applied challenge is the same as its facial challenge. *Id* at 24-25.

The city protests that this appeal is necessarily an "as-applied" challenge to the city's decision, and that the constitutionality of GMC 17.52 as a whole may not be challenged. The city repeats its argument that the sole basis for denial was the size of the proposed billboards. That being the case, the city argues, the only aspect of GMC 17.52 that may be challenged in this appeal are the size restrictions. Further, the city points out that its code has a severance clause, at GMC 1.01.100, stating that if for any reason some part of the code is declared invalid or unconstitutional, such decision does not affect the validity of the remaining portions of the code.

The city is correct that this appeal is necessarily viewed as an "as-applied" challenge to the city's denial under GMC 17.52. *See City of Eugene v. Lincoln*, 183 Or App 36, 41, 50 P3d 1253 (2002) (a facial challenge asserts that lawmakers violated the constitution when they enacted the ordinance, while an as-applied challenge asserts that executive officials violated the constitution when they enforced the ordinance). The present appeal is not a declaratory ruling or other challenge to the facial validity of a legislative enactment. *See Lincoln City Chamber of Commerce v. City of Lincoln City*, 164 Or App 272, 276, 991 P2d 1080 (1999) (example of facial constitutional challenge to legislative enactment). The city is correct that we may not "invalidate" the entire code, or indeed any part of it; at best we may

only reverse or remand the city's decision denying the proposed signs.[18] For that reason, the city's severance clause has no bearing on our scope of review.

However, even in the context of an "as-applied" challenge in the foregoing sense, petitioner may argue that the legislation that the government applied is unconstitutional on its face. *See Newport Church of the Nazarene v. Hensley,* 161 Or App 12, 20-21, 983 P2d 1072 (1999), *aff'd in part, rev'd in part on other grounds* 335 Or 1, 56 P3d 386 (2002) (challenge to award of unemployment compensation, on grounds that the unemployment compensation statute and administrative rules are facially unconstitutional). In doing so, a petitioner must demonstrate that the applied legislation includes impermissible distinctions or other relevant constitutional infirmities. Depending on the particular constitutional challenge, it may be that a reviewing body must examine other parts of the city's legislation that were not directly applied to the petitioner, to resolve an argument that, for example, the city's code impermissibly distinguishes between types of protected speech, or that the city's code extends privileges and immunities to one class of citizens but denies those same rights to the petitioner.

Here, we disagree with the city that the "applied legislation" is limited to the size restrictions in GMC 17.52. As discussed above, there is no reasonable doubt that the basis for the city's denials of petitioner's applications was the fact that petitioner proposed "billboards" or "outdoor advertising signs," types of signs that are not allowed, and therefore implicitly prohibited, under GMC 17.52. In essence, the city's approach to petitioner's applications was to examine the whole of GMC 17.52, and ask whether the proposed signs were allowed under any provision of that code section. The city answered that inquiry in the negative, and in doing so necessarily "applied" the whole of GMC 17.52 to petitioner's

[18] Of course, the reasoning in such a reversal or remand might well apply with equal force to the city's actions with respect to other sign applications that come before the city, until the city amends its code to remove any unconstitutional provisions or distinctions.

proposals. More importantly, given the nature of petitioner's constitutional claims, petitioner may legitimately cite to pertinent portions of GMC 17.52, in support of its argument that the city's denials were based on impermissible distinctions or were otherwise unconstitutional.

With that introduction, we turn to petitioner's constitutional challenges.

B. Free Expression under Article 1, Section 8 of the Oregon Constitution

Article 1, section 8 of the Oregon Constitution provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatsoever * * *." Petitioner argues that GMC 17.52, as interpreted by the city, is invalid under Article 1, section 8 because it is (1) directed at the content of expression, and does not fit within any historical exception; and (2) expresses an impermissible preference for certain types of speech over others.

Article 1, section 8 "forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception * * *." *State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982). It is inconsistent with the constitutionally protected right of expression "on any subject whatever" to impose regulation on one kind of speech and no regulation on others, because of the difference in content. *Ackerley Communications, Inc. v. Mult. Co.*, 72 Or App 617, 623-24, 696 P2d 1140 (1985), *rev dismissed* 303 Or 165, 734 P2d 885 (1987) (an ordinance that regulates and limits billboards with "commercial" content but that allows without regulation billboards with "noncommercial" content violates Article 1, section 8).

Petitioner argues that GMC 17.52 categorizes and allows under different sets of regulations certain types of speech, while implicitly prohibiting others. According to petitioner, application of GMC 17.52 requires, in every case, inquiry into the content of the proposed sign in order to determine whether the sign is allowed or prohibited and, if allowed, what regulations apply. Because GMC 17.52 is facially directed at the content of signs, and

allows or prohibits signs based on the content or substance of those signs, petitioner argues, it plainly violates Article 1, section 8 under *Robertson*. Further, petitioner contends that the content distinctions drawn by GMC 17.52 are not subject to any historical exception. *See Ackerley*, 72 Or App at 624 (limitations based on whether a sign is commercial or noncommercial do not fall within any "historic exception").[19]

Relatedly, petitioner argues that GMC 17.52 is facially invalid because it prefers certain types of speech (identification signs, traffic control signs, temporary signs advertising sales or special events), while prohibiting all others, including off-premises advertising signs such as the proposed billboards. Petitioner recognizes that the Court of Appeals has held that the "on-premise/off-premises" distinction inherent in the OMIA is not a content-based distinction or otherwise inconsistent with Article 1, section 8. *Outdoor Media Dimensions v. State of Oregon*, 150 Or App 106, 118, 945 P2d 614 (1997), *aff'd on other grounds*, 331 Or 634 (2001). However, petitioner argues that *Outdoor Media Dimensions* is distinguishable, and that the distinctions drawn by GMC 17.52 are more selective and content-based than the on-premise/off-premises distinction found constitutional in that case.

Some background is necessary to understand the OMIA, *Outdoor Media Dimensions* and their relevance to this case. The OMIA was significantly amended in 1999, following the Court of Appeals' decision in *Outdoor Media Dimensions*.[20] Then, as now, the OMIA expressly prohibits new "outdoor advertising signs" visible to the traveling public from a state highway. It defined "outdoor advertising signs" as signs that advertise goods, products,

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[19] The city does not contend that any distinctions drawn by GMC 17.52 fit within any historical exception.

[20] The 1999 amendments altered the definition of "outdoor advertising sign" at ORS 377.710(23), quoted at n 14, and added the definition of "On-premises sign" at ORS 377.710(22), also quoted at n 14. Oregon Laws 1999, Ch. 877, Section 2. In addition, the amendments replaced the list of exceptions to the OMIA at ORS 377.735 with a shorter list that includes "on-premises signs." Oregon Laws 1999, Ch. 877, Section 7; ORS 377.735(1)(c). It is a reasonable supposition that the 1999 amendments were prompted by the court's decision in *Outdoor Media Dimensions*. As discussed below, the Section 7 amendments can be seen as an attempt to eliminate potential constitutional infirmities hinted at, but not addressed, in the court's decision.

or services that are not sold, manufactured or distributed on or from the premises where the signs are located. *Former* ORS 377.710(22).[21] The pre-1999 version of the OMIA did not declare what new signs visible from a state highway were allowed, although it contained a list of sign types, including "temporary political signs," that were exempt from the OMIA.[22]

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[21] ORS 377.710(22) (1997) defined the term "outdoor advertising sign" to mean

"* * * a sign which advertises:

"(a) Goods, products or services which are not sold, manufactured or distributed on or from the premises on which the sign is located; or

"(b) Facilities not located on the premises on which the sign is located."

[22] ORS 377.735 (1997) provided, in relevant part:

"(1). If applicable federal regulations are met, the permit requirements of ORS 377.700 to 377.840 do not apply to:

"(a) Signs with an area of not more than 260 square inches identifying motor bus stops or fare zone limits of common carriers.

"(b) Signs erected and maintained by a city showing the place and time of services or meetings of churches and civic organizations * * *.

"(c) Residential direction signs * * *

"(d) Official traffic control signs.

"(e) Signs of a governmental unit * * *.

"(f) Small signs displayed for the direction, instruction or convenience of the public * * *.

"(g) Signs maintained for not more than two weeks announcing an auction or a campaign, drive or event of a civic, philanthropic or educational organization.

"(h) Memorials signs or tablets.

"(i) Signs maintained for not more than six weeks by state or county fairs, rodeos, roundups and expositions.

"* * * * *

"(n) Church directional signs * * *

The court in *Outdoor Media Dimensions* rejected several arguments that the OMIA impermissibly distinguished between certain types of commercial and noncommercial speech based on content, or preferred some types of speech over others. For example, petitioner in that case argued the OMIA would prohibit noncommercial off-premises signs such as "Attend First Baptist Church," because they advertise services or facilities not located on the premises, but would allow a sign reading "Save the Whales" because it does not advertise off-premises goods, products, services or facilities and is therefore not an "outdoor advertising sign." 150 Or App at 116. The court rejected that and similar arguments, based on the court's interpretation of the OMIA to implicitly allow *all* "on-premise" signs, while prohibiting *all* "off-premises" signs, whatever their content and whether or not they advertise off-premises goods, products, services or facilities and thus meet the definition of "outdoor advertising sign." *Id.* at 117. Relying on that neutral distinction, the court found that the OMIA did not impermissibly distinguish between commercial and noncommercial speech, or between types of noncommercial speech, as the petitioner in that case argued.[23] Instead, the court found that it imposed a content-neutral distinction between speech related to the use of the premises and speech that is not:

> "* * * Exempting billboards that advertise on-premises activity, while not similarly exempting those advertising off-premises activity, is not a *content*-based distinction. Although a billboard's *messag*e must be evaluated to determine whether it relates to an activity on or off the premises, it is not the content, subject or viewpoint of that message that determines whether a permit is required. * * *

> "(o) Temporary political signs erected or maintained by candidates or political committees on private property, if the sign area does not exceed 32 square feet and if the sign is removed within 30 days after the date of the election for which erected."

[23] The correctness of the view that an "on-premise/off-premises" distinction is content-neutral has been questioned, on the grounds that it is arguably irreconcilable with recent Oregon Supreme Court jurisprudence under Article 1, section 8. *Outdoor Media Dimensions, Inc. v. Driver and Motor Vehicles Services Branch*, 184 Or App 495, 56 P3d 935 (2002) (Landau, PJ, concurring).

> "The OMIA does not require the state to evaluate competing messages in an effort to decide which subjects or viewpoints are permissible and which are not. It only requires that the billboard, whatever its content, have some relationship to the property on which it is located. Such a requirement is not content-based. * * *" 150 Or App at 117-18 (emphasis original).

We understand petitioner to argue that GMC 17.52 is structured very differently than the OMIA. Rather than a single content-neutral distinction between speech related to the premises and speech that is not, GMC 17.52 in relevant part defines by content six types of signs that are allowed in commercial and industrial zones, and implicitly prohibits all other signs in such zones. For example, under GMC 17.52.040 and 17.52.050, freestanding and on-building identification signs are limited to speech "identifying the use of the premises." GMC 17.52.040; 17.52.050. Similarly, electronic messages signs are limited to advertising "activities conducted or goods and services available on the property on which the sign is located," and "public service information." GMC 17.52.055. GMC 17.52.070 allows a permit for temporary signs limited to advertising "special sales or events." Campaign signs under GMC 17.52.080 are apparently limited to speech regarding pending election campaigns.

As a result of these limitations and distinctions, we understand petitioner to argue, GMC 17.52 allows certain types of "on-premise" speech (identification signs, electronic message center signs advertising on-site activities, goods and services, traffic control signs, and temporary advertising signs), and allows some but not all "off-premises" speech (campaign signs, public service information).[24] Petitioner contends that, because the distinctions drawn by GMC 17.52 do not correspond to the on-premises/off-premises

[24] Actually, it is not clear that "temporary signs" under GMC 17.52.070 are limited to advertising "special sales or events" that are *related to the premises*. Nothing in GMC 17.52.070 states such a limitation. Arguably, GMC 17.52.070 would permit an applicant to advertise off-premises "special sales or events." We understand the city to argue, however, that with the possible exception of campaign signs and public service information, no provision of GMC 17.52.070 allows an off-premises sign of any kind. Given its context, that reading of GMC 17.52.070 is plausible. In addition, petitioner does not argue otherwise. Accordingly, we assume for purposes of our analysis that "temporary signs" allowed under GMC 17.52.070 are implicitly limited to advertising on-premise "special sales or events."

distinction found by the Court of Appeals to be content-neutral in *Outdoor Media Dimensions, Inc.*, nor any other content-neutral distinction, the reasoning in that case cannot save GMC 17.52 from running afoul of Article I, section 8.

In addition, petitioner argues, GMC 17.52 grants preferential treatment to certain signs. Petitioner points out that all signs except for campaign signs are subject to height and area restrictions, and that some types of signs may be permanent and other types may not. Petitioner argues that the city cannot regulate one type of speech, while not regulating others. *Ackerley Communications, Inc.*, 72 Or App at 625. For the foregoing reasons, petitioner argues, the GMC 17.52 is facially inconsistent with Article 1, section 8.

The city's responses take three main forms.[25] First, as discussed above, the city argues that the sole basis for denial was the *size* of the proposed billboards, not the fact that they are "billboards" or "outdoor advertising signs." Relatedly, the city argues that nothing in the record reflects the content of the proposed signs and, therefore, the city could not have based its denial on their content. Second, as discussed above, the city contends that LUBA may only review those provisions of GMC 17.52 that were actually applied to petitioner, and therefore distinctions drawn in other provisions of GMC 17.52 do not offer a basis for reversal or remand. Third, the city argues that if LUBA concludes that the basis for denial was the allegedly "off-premises" nature of the signs, GMC 17.52 permissibly distinguishes between "on-premise" and "off-premises" signs. *Outdoor Media Dimensions, Inc.*, 150 Or App at 117-18.

We have already resolved the first contention adversely to the city. For the reasons discussed above, it is clear that the sole basis for denial was the fact that petitioner proposed

[25] The city also argues, mostly in response to petitioner's First Amendment claims, that any distinctions drawn by GMC 17.52 are permissible as "time, place and manner" restrictions. However, as discussed below, GMC 17.52 impermissibly distinguishes between permitted and prohibited speech based on content. Therefore, GMC 17.52 cannot be salvaged, even if those distinctions are viewed as "time, place and manner" restrictions. *Ackerley Communications, Inc.*, 72 Or App at 624.

"billboards" or "outdoor advertising signs," types of signs not allowed in the city's code. While the city is correct that the record does not reflect the *specific* content of the proposed signs, we do not see that the lack of information regarding the specific content of the proposed billboards is important. As the court noted in *Outdoor Media Dimensions Inc.*, "there is typically no particular message to evaluate [in an application for a billboard] because billboard signs are constantly changing." 150 Or App at 120, n 21. It is clear that the city attorney believed that the proposed signs were not among the types of signs allowed under GMC 17.52. As discussed, GMC 17.52 allows and regulates certain types of signs, which in turn allow certain categories of speech. Because the types of signs permitted under GMC 17.52 are essentially defined by content, the city attorney's decision reflects, at the very least, a belief or assumption about the types of speech the proposed billboards would *not* include.

We have also resolved the city's second contention adversely to the city. As discussed above, the city "applied" the entirety of GMC 17.52 to deny petitioner's proposals. Further, the nature of petitioner's constitutional challenges makes it necessary to consider the entirety of GMC 17.52 in determining whether the city's denials were based on impermissible distinctions.

We turn to the parties' dispute regarding the applicability of the reasoning in *Outdoor Media Dimensions, Inc.* to GMC 17.52. We generally agree with petitioner that GMC 17.52 is structured differently than the OMIA, and that the distinctions the code draws cannot be reduced to a content-neutral distinction between on-premises and off-premises signs. As interpreted by the Court of Appeals, the central over-arching feature of the OMIA is a distinction between on-premises signs, which are universally allowed whatever the content, and off-premises signs, which are universally prohibited whatever the content. GMC 17.52 does not share that central overarching feature, and the distinctions it draws are considerably more refined. GMC 17.52 in relevant part allows six types of signs in commercial and

industrial zones, and implicitly prohibits all others. It is simply impossible to apply GMC 17.52 without inquiry into the *content* of the proposed sign, in order to determine which if any of the six permitted categories and the six different sets of standards apply.

It is true that most of the categories of permitted speech under GMC 17.52 can be described as "on-premise" speech, under the OMIA's nomenclature. However, there are at least two express exceptions: campaign signs and public service information. Unlike the OMIA as interpreted by the Court of Appeals, GMC 17.52 does not universally and impartially lump speech into one of two content-neutral categories (on-premises or off-premises). Rather, it selectively allows some off-premises speech and prohibits others, based on the content of that speech.[26]

It is worth noting in this regard that the Court of Appeals pointedly did not include in its analysis in *Outdoor Media Dimensions, Inc.* the exceptions set forth under the OMIA. *See* 150 Or App at 117, n 16 ("Plaintiff does *not* argue that the exceptions in ORS 377.735 involve content-based distinctions that exempt particular off-premises signs based on their messages * * *. Because that issue was neither argued nor briefed, we decline to address it.") (emphasis in original); and 150 Or App at 119, n 19 ("[P]laintiff does not argue that the exceptions in ORS 377.735 are directed at the content of expression * * *"). Equally noteworthy is the fact that, following the court's opinion, the list of exceptions at ORS 377.735, which included exceptions for "[t]emporary political signs" and certain types of public information, was eliminated and replaced with an arguably more content-neutral set of exceptions. Unlike the plaintiff in *Outdoor Media Dimensions, Inc.*, petitioner in the

[26] In addition, it is not clear that GMC 17.52 allows *all* on-premises speech, regardless of content. For example, it seems clear that the headquarters of a group devoted to conserving maritime species could identify that headquarters on a freestanding or on-building identification sign under GMC 17.052.040 or .050. Any "activities conducted" or "services available" on the premises could be advertised by means of an electronic message center, under GMC 17.52.055. However, it is not clear if a sign on the premises advocating "Save the Whales" would be allowed under GMC 17.52. Arguably, such a sign would be an "on-premise" sign, because it is related in some way to the use of the premises. However, if so, nothing in GMC 17.52 would appear to expressly allow such a sign.

present case challenges the entire regulatory scheme, and argues that to the extent GMC 17.52 is understood to embody an "on-premise/off-premises" distinction, the content-neutrality of that distinction is undermined by the exceptions that cut across GMC 17.52. We agree with petitioner that the distinctions drawn by GMC 17.52 do not correspond to the "on-premises/off-premises" distinction approved in *Outdoor Media Dimensions, Inc.*, and therefore that case does not dispose of petitioner's Article I, section 8 challenge.

In sum, GMC 17.52 distinguishes between permitted and prohibited signs based on content. As written, GMC 17.62 does not contain, and the city did not apply in this case, any content-neutral distinction that would permit the city to deny petitioner's proposed billboards in a manner consistent with Article I, section 8. Therefore the city's denials are inconsistent with Article 1, section 8.

C. Privileges and Immunities under Article I, section 20

Article I, section 20, provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Petitioner argues that because GMC 17.52 allows certain types of speech and prohibits others based on content in violation of Article 1, section 8, it follows that GMC 17.52 also violates the equal privileges and immunities clause of Article I, section 20. *See Ackerley Communications, Inc.*, 72 Or App at 625 (ordinance that impermissibly regulates one kind of speech and not another based on content in violation of Article I, section 8 also violates Article I, section 20, because a local government cannot have a constitutionally acceptable interest in regulating types of expression differently based on content); *see also Outdoor Media Dimensions, Inc.*, 150 Or App at 122 (under federal equal protection clause, strict scrutiny is appropriate where the law imposes content-based infringements on the fundamental right of freedom of speech).

The city response is based on its view that GMC 17.52 does not make content-based distinctions. We reject that argument, for the reasons expressed above. While it is not clear

to us that an ordinance that is found to violate Article I, section 8 because it is directed at the content of speech *necessarily* violates Article I, section 20 as well, as *Ackerley Communications, Inc.* can be read to suggest, the city does not provide any reason to reach a different conclusion in the present case. As in *Ackerley Communications, Inc.*, it is difficult to imagine what constitutionally acceptable reason the city has for allowing some speech but prohibiting other speech based on distinctions that require inquiry into the content of speech. Accordingly, we conclude that the city's denial of petitioner's sign applications in violation of Article I, section 8 is also a violation of Article I, section 20. *Ackerley Communications, Inc.*, 72 Or App at 625.

D. Petitioner's Federal Constitutional Challenges.

Having concluded that the city impermissibly denied petitioner's applications in violation of Article I, section 8, and Article I, section 20, we need not and do not address petitioner's similar claims under the federal constitution. *See Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981) (state law must be analyzed before reaching federal constitutional issues, because the state does not deny any right claimed under the federal constitution when the claim is fully met by state law); *State v. Scharf*, 288 Or 451, 455, 605 P2d 690 (1980) (federal issues should be decided only if state law is determined to be adverse to the party asserting a violation of constitutional rights).

CONCLUSION

Petitioner requests that we reverse the city's decision. OAR 661-010-0071(1)(b) (LUBA shall reverse a land use decision that is unconstitutional). For the foregoing reasons, the city's decision to deny petitioner's applications was unconstitutional. Therefore, we must reverse.

The city's decision is reversed.