BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MEDIA ART COMPANY,	)	
	)	
Petitioner,	)	
	)	LUBA No. 97-196
vs.	)	
	)	FINAL OPINION
CITY OF GATES,	)	AND ORDER
	)	
Respondent.	)	

Appeal from City of Gates.

Andrew H. Stamp, Portland, filed the petition for review. With him on the brief was O'Donnell Ramis Crew Corrigan & Bachrach. D. Daniel Chandler, Portland, argued on behalf of petitioner.

Vance M. Croney, Salem, filed the response brief and argued on behalf of respondent.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

AFFIRMED 09/22/98

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioner appeals the city's denial of a zoning compliance affidavit required to complete an Oregon Department of Transportation (ODOT) off-premise outdoor advertising sign permit.

FACTS

Petitioner sought approval to construct an off-premise outdoor advertising sign, or billboard, on a parcel within the city limits. The subject property, adjacent to State Highway 22, is zoned Light Industrial (IL) and contains an existing commercial structure. The proposed billboard is unrelated to the use of the existing commercial structure.

Off-premise advertising signs along state highways are regulated under the Oregon Motorist Information Act (OMIA), codified at ORS 377.700 to 377.840.[1] The OMIA generally prohibits the installation of any off-premise outdoor advertising sign visible to motorists travelling on the state highways, unless it complies with the OMIA.[2] Pursuant to ORS

---

[1]ORS 377.710(22) defines an "outdoor advertising sign" as a sign that advertises "[g]oods, products or services which are not sold, manufactured or distributed on or from the premises on which sign is located" or "[f]acilities not located on the premises on which the sign is located." The OMIA thus distinguishes between signs that are "off-premise," i.e. meet the definition of "outdoor advertising sign," and other signs, deemed here "on-premise," that are not subject to the OMIA.

[2]The OMIA prohibits construction of new billboards, but, pursuant to ORS 377.767, allows a billboard that existed before June 12, 1975, to be relocated within 100 miles of the existing location. We understand that petitioner's application to construct a billboard structure in this case

377.725, ODOT requires parties seeking to construct a billboard along state highways to submit to ODOT a permit application titled "Off-Premise Outdoor Advertising Sign." In addition to obtaining approval from ODOT, ORS 377.723 requires the applicant to obtain an affidavit from the local zoning authority certifying that the applicant's outdoor advertising sign complies with all applicable local ordinances.[3]

Petitioner submitted the ODOT off-premise outdoor advertising sign permit application to the city on August 7, 1997, and the city conducted a public hearing December 17, 1997. The city does not have a sign ordinance or comprehensive plan policy that addresses the siting of a billboard structure. Instead, the city evaluated the application for compliance with Gates Zoning Ordinance (GZO) 17.020, which lists uses allowed in the IL zone, to ascertain

---

involves a relocation. Record 76.

[3]ORS 377.723 provides:

> "Notwithstanding any other provision of [the OMIA], [ODOT] shall not issue a permit under ORS 377.725 or 377.767 unless the applicant for the permit submits affidavits that meet the following requirements:
>
> "(1) The applicant must submit an affidavit from each city or county that would have jurisdiction over the proposed sign.
>
> "(2) Each affidavit must contain a certification by the respective city or county that the proposed sign would comply with all applicable ordinances, plans, rules and other requirements of the city or county.
>
> "(3) Each affidavit must be on a form prepared by the department."

whether the proposed structure complies with the city's zoning code.[4]

Following a public hearing on the application, the city determined that GZO 17.020 permits billboards or signs in the IL zone only where they are "clearly accessory and subordinate" to permitted uses on the property.[5] The city

---

[4]GZO 17.020 provides, in relevant part:

> "Permitted Uses. Within the IL zone, no building, structure or premise shall be used, arranged or designed to be used, erected, structurally altered, or enlarged except for the following uses and activities:
>
> "* * * * *
>
> "(B) Commercial activities:
>
> "1. Lumber yard, building material supply.
>
> "2. Special trade contractor facilities for plumbing, roofing, sheet metal, electrical, heating and air-conditioning, tents and awnings, cabinet and carpentry, and similar construction and construction related activities. * * *
>
> "3. Automotive repair and maintenance * * *.
>
> "4. Repair and maintenance activities for other vehicles * * *.
>
> "5. Tractor, farm equipment, heavy construction equipment, and logging equipment, rental, sales and service.
>
> "6. Welding and blacksmith shop.
>
> "7. Freight terminals * * *.
>
> "(C) Industrial Uses:
>
> "* * * * *
>
> "(D) Uses clearly accessory and subordinate to the above."

[5]GZO 2.020 defines "Accessory Use" as "[a] use incidental, appropriate and subordinate to the main use of the parcel, lot or building."

then examined petitioner's application to see if the proposed use is "accessory and subordinate" to the permitted use on the parcel. Relying in part on the fact that petitioner's application was for an "off-premise outdoor advertising sign," the city concluded the proposed billboard would not be an accessory and subordinate use to the main use on the premises, and thus that petitioner's proposed use did not comply with GZO 17.020.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city's use of GZO 17.020 to regulate billboards violates Article I, section 8, of the Oregon Constitution,[6] because the city's review under GZO 17.020 is necessarily content-based, in that determining whether the billboard is accessory to commercial or industrial use on the property requires the city to review the content of the message.

Petitioner explains that the analytical framework for determining whether a statute violates Article I, section 8, is described in State v. Robertson, 293 Or 402, 649 P2d 569 (1982), and its progeny. Under that framework, the first

[6]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."

inquiry is to determine under which of three categories the challenged enactment falls. The first category is enactments directed at the content of speech, that is, enactments written in terms directed to the substance of any opinion or subject of communication. Robertson, 293 Or at 412; State v. Stoneman, 323 Or 536, 543-544, 920 P2d 535 (1996); Moser v. Frohnmayer, 315 Or 372, 375, 845 P2d 1284 (1993); State v. Plowman, 314 Or 157, 164-65, 838 P2d 558 (1992), cert den 508 US 974 (1993). An enactment in the first category is facially invalid, unless it fits wholly within an historical exception. Frohnmayer, 315 Or at 376.

The second category is those enactments focused on forbidden results but that expressly prohibit speech used to achieve those results. Plowman, 314 Or at 164. Enactments in the second category are subject to an overbreadth analysis. Robertson, 293 Or at 412. The third category is those laws focused on forbidden results but that do not refer to expression at all. Enactments in the third category, apart from challenges for vagueness, are not subject to facial challenge. Id. Such cases must be challenged "as applied," meaning that the enactment cannot be invalidated in toto, but the local government's application of that enactment to petitioner may be invalid if that application in fact infringes on privileged communication without some rational basis for doing so. City of Eugene v. Miller, 318 Or 480, 490, 871 P2d 454 (1994).

Petitioner argues that GZO 17.020, or more precisely the city's use of GZO 17.020 as a means to regulate signs, falls within the first category identified in Robertson: enactments that are directed at the content of speech, or the substance or subject of communication. Petitioner contends that the city's application of GZO 17.020 requires the city to examine the content of proposed billboard messages in order to determine whether the billboard is accessory and subordinate to on-site commercial or industrial uses. Accordingly, petitioner concludes, use of GZO 17.020 to regulate signs requires impermissible content-based distinctions, and thus GZO 17.020 is facially invalid and unconstitutional, at least insofar as the city uses it to regulate signs.

Petitioner also makes a second, related argument that the city's use of GZO 17.020 creates an impermissible distinction between commercial and noncommercial speech, citing Ackerly Communications v. Multnomah County, 72 Or App 617, 620-24, 696 P2d 1140 (1985). In Ackerly, the court concluded that an ordinance that regulates billboards with "commercial" content while exempting billboards with "noncommercial" content violates Article I, section 8, because it distinguishes between two types of speech based on content.

Petitioner explains that because all of the permitted uses in the IL zone are classified as either "commercial" or "industrial," the only permitted signs in the zone would be those accessory and subordinate to the commercial and

industrial uses permitted in the zone. Thus, according to petitioner, the city's application of GZO 17.020(D) impermissibly favors commercial over noncommercial speech by allowing some commercial signs (those that are on-premise) while effectively banning all noncommercial signs in the IL zone, because a noncommercial sign would never be "accessory" to any primary use in the IL zone.

In the same vein, petitioner makes what appears to be a subassignment of error arguing that the city erred in allegedly determining that the proposed use of petitioner's sign is for commercial advertising, a determination that, according to petitioner, is not supported by substantial evidence. Petitioner contends that its application for an "Off-Premise Outdoor Advertising Sign" does not limit the proposed billboard to commercial messages, and that the proposed billboard can and probably will be used for noncommercial messages as well as commercial ones. Petitioner states that, viewed in isolation, the city's determination seems harmless, but petitioner raises the issue because it is a "precedent to establishing that the city has favored commercial over noncommercial speech." Petition for Review 10.

Petitioner's arguments are founded on the incorrect premise that the city's use of GZO 17.020 to regulate signs falls within the first category of enactments identified in Robertson. The terms of GZO 17.020 are manifestly not

directed at the content of speech or the substance of communication. GZO 17.020 is simply a list of commercial and industrial uses allowed in the IL zone. Nor does GZO 17.020 fit within the second category described in Robertson: those laws that are focused on forbidden results but that expressly prohibit speech used to achieve those results. GZO 17.020 does not mention, much less expressly prohibit, speech or any type of communication. To the extent GZO 17.020 or the city's use of it implicates Article I, section 8, it must therefore fall under the third category identified in Robertson: those laws focused on forbidden results but that do not expressly prohibit speech.

In Miller, the court addressed the application of an ordinance forbidding sidewalk vending with exceptions for food, beverages, flowers or balloons. The city applied the ordinance to cite the defendant for selling books on the sidewalk. The court determined that the ordinance fell within the third Robertson category because it is not directed at speech and does not expressly prohibit speech in order to prohibit certain forbidden effects. 318 Or at 490. The court then proceeded to analyze whether the city applied the ordinance to the defendant in a way that reached privileged communication. The court stated that:

> "It may be that the city could, within its legitimate powers and without violating Article I, section 8, ban all sidewalk vending, including the sale of expressive material. It also may be that the city could permit the sale only of certain

> narrowly drawn categories of goods, where a special public need for such goods could be shown. On those points, we express no opinion. So long as the city chooses to make its sidewalks available for some general commercial activity, however, it may not treat a vendor of expressive material more restrictively than vendors of other merchandise –- at least, not without being able to offer some explanation as to how the sale of the other material meets a special need or how the sale of the expressive material in question gives rise to special problems reasonably justifying the regulation of the vendor of expressive material differently and more stringently than other vendors. No such explanation has been made in these cases. Indeed, * * * there does not appear to be any rational basis for the burden that the city has chosen to place on defendant's expressive activity. In the absence of such a basis, Article I, section 8, requires that defendant be given the same opportunity for the public sale of his expressive material goods that is given to vendors of other products." 318 Or at 491-92 (emphasis in original; footnotes omitted).

Thus, analysis of an ordinance in the third category requires inquiry into whether the ordinance was applied so as to reach privileged speech. In the present case, we must inquire whether the city's application of GZO 17.020 included petitioner's rights of free expression within the scope of its prohibition on forbidden results without some "rational basis" to burden that expression. Miller, 318 Or at 491.

Neither party's arguments quite fit the analytical framework described above. Petitioner, in particular, does not acknowledge the need for analysis beyond the first Robertson category. Notwithstanding, we will examine the parties' contentions in light of the analysis required by Robertson and Miller.

Petitioner argues that the city's application of GZO 17.020 to petitioner is unconstitutional because (1) it distinguishes between off-premise and on-premise signs, a distinction that is without a rational basis and that requires an impermissable evaluation of the content of the sign; and (2) it favors some commercial speech (on-premise signs) over noncommercial speech, without any rational basis for that distinction.

The city responds that its use of GZO 17.020 does not require or allow the city to make content-based distinctions or impermissibly favor commercial over noncommercial speech, relying on Outdoor Media Dimensions Inc. v. State of Oregon, 150 Or App 106, 945 P2d 614 (1997), rev allowed 326 Or 627 (1998). In Outdoor Media, the court addressed a number of facial constitutional challenges to the OMIA, under both the First Amendment to the United States Constitution and Article I, section 8, of the Oregon Constitution, within the context of a civil rights action under 42 USC § 1983.[7]

[7]The analytical context of Outdoor Media corresponds to the first Robertson category; moreover, the discussion the city relies on most heavily is the court's discussion under the federal constitution. Nonetheless, we find Outdoor Media particularly relevant and persuasive in the present case. The plaintiff in Outdoor Media made arguments that are nearly identical to petitioner's in this case: that the OMIA violated both constitutional provisions because the OMIA requires evaluation of content and because it distinguishes between commercial and noncommercial speech. The court in Outdoor Media summarily rejected the plaintiff's state constitution challenge because the plaintiff made no argument different from those raised under the federal constitution. 150 Or App at 119.

The plaintiff in Outdoor Media argued that by distinguishing between on-premise and off-premise billboards, the OMIA necessarily and impermissibly requires evaluation of the content of those billboards. The court rejected this argument:

> "To the extent that plaintiff is arguing that the OMIA's on-premises/off-premises distinction imposes a content-based restriction on speech, we * * * reject that argument. 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 message 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." 150 Or App at 117 (footnote omitted, emphasis in original).

The city here contends, and we agree, that the court's holding in Outdoor Media undermines petitioner's first argument, that evaluation under GZO 17.020 requires impermissible content-based distinctions. The off-premise/on-premise distinction authorized in the OMIA and found to be consistent with both the federal and state constitutions in Outdoor Media is similar if not identical to the distinction the city finds and applies in GZO 17.020. See also Southlake Property Associates Ltd. v. City of Morrow, Georgia, 112 F3d 1114, 1117 (11th Cir. 1997) (federal constitution permits off-premise/on-premise distinction). That the city must evaluate a proposed billboard to determine if it is related to an

activity on the premises does not entail that the city thereby makes a content-based distinction.

Nor is the on-premise/off-premise distinction without a rational basis. The purpose of the IL zone is to "provide for a mixture of light industrial activities and heavier commercial activities, and their accessory uses." GZO 17.010. The on-premise/off-premise distinction is a rational means to ensure that the IL zone is preserved for listed commercial and industrial activities and their accessory uses.

The Outdoor Media decision is also persuasive regarding the slightly different issue raised in petitioner's second argument, whether the city's application of GZO 17.020 allows the city to discriminate against noncommercial speech in favor of commercial speech. The court in Outdoor Media rejected a similar argument, interpreting the OMIA as applying equally to commercial or noncommercial signs. 150 Or App at 114. The court explained that the OMIA permits all on-premises signage and prohibits all off-premises signage (subject to exceptions named in the statute),[8] without regard to the message or whether the sign displays commercial or noncommercial speech, and thus the OMIA does not favor commercial speech over noncommercial speech. Id. at 115.

[8]Petitioner does not argue to us that similar exceptions are required in GZO 17.020 before the city can constitutionally apply it to regulate signs. We express no opinion in that regard.

The city similarly interprets GZO 17.020 to allow all on-premises signage and to prohibit all off-premises signage, without regard to content. Indeed, it is the sweeping consistency of the city's application of GZO 17.020 that offends petitioner. Petitioner contends that, as applied to uses within the IL zone, the city's comprehensive ban on off-premises signs necessarily results in permitting some commercial signs (those that are on-premises), while excluding all off-premises noncommercial and off-premises commercial signs, a result that, according to petitioner, impermissibly favors certain types of speech and is without a rational basis.

We disagree. The same result occurs under the OMIA's similar framework, which the court in Outdoor Media found to pass constitutional muster. Id. at 115. Like the OMIA, GZO 17.020 as applied by the city permits all on-premises signage, no matter what the content of the signage. GZO 17.020 makes no distinction whatsoever between commercial and noncommercial speech. That the content of signage in commercial zones may reflect the commercial uses in those zones is an incidental consequence of the on-premises/off-premises distinction. We determined above that the city may rationally distinguish between on and off-premise signage in preserving the IL zone for its intended uses, and that that distinction does not offend Article I, section 8. It follows that consequences

incident to that distinction also do not offend Article I, section 8.

Finally, with respect to petitioner's substantial evidence challenge to the city's alleged determination that petitioner's proposed use was limited to commercial signs, we disagree with petitioner that the city made any such determination. The city looked at petitioner's application for an "Off-Premise Outdoor Advertising Sign" not to determine whether the proposed use was for commercial as opposed to noncommercial advertising, but rather to determine whether the proposed use was accessory to the commercial use on the subject property, i.e. was "off-premise." Record 7-8. The lack of substantial evidence supporting a finding the city did not make nor need to make does not provide a basis to reverse or remand the challenged decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the city's decision violates the First Amendment to the United States Constitution, for the same reasons raised with respect to Article I, section 8: because the city's application of GZO 17.020 requires a content-based evaluation and impermissibly favors commercial over noncommercial speech. In addition, petitioner argues that the city's application of GZO 17.020 gives the city unbridled discretion to deny a sign application and thus results in an unconstitutional prior restraint of speech.

Our determination in the first assignment of error that the city's application of GZO 17.020 does not require a content-based evaluation nor favor commercial over noncommercial speech also resolves petitioner's identical claims under the federal constitution. Outdoor Media, 150 Or App at 117; see also Messer v. City of Douglasville, 975 F2d 1505 (11th Cir 1992)(a sign ordinance prohibiting off-premise billboards is constitutional where it regulates based on location of the sign as opposed to viewpoint); Wheeler v. Commissioner of Highways, 822 F2d 586, 591 (6th Cir 1987), cert den, 484 US 1007 (1988) (a distinction between on-site and off-site noncommercial signs is constitutionally permissible).

We need only address petitioner's remaining argument that the city's application of GZO 17.020 grants the city unbridled discretion over sign applications and results in prior restraint of speech. Petitioner explains that, under the First Amendment, an ordinance cannot subject the exercise of speech to the prior restraint of a license, without narrow, objective and definitive standards to guide the licensing authority. Shuttlesworth v. City of Birmingham, 394 US 147, 150-51, 89 S Ct 935, 22 L Ed 2d 162 (1969); Desert Outdoor Advertising v. City of Moreno Valley, 103 F3d 814 (1996). Petitioner particularly relies on Desert Outdoor Advertising, where the court overturned a sign ordinance that allowed off-site advertising signs in three of the city's zones upon

issuance of a conditional permit. The conditional use standards allowed the city to approve a sign permit only if the sign or structure

> "will not have a harmful effect upon the health or welfare of the general public and will not be detrimental to the welfare of the general public and will not be detrimental to the aesthetic quality of the community or surrounding land uses." 103 F3d at 817.

The court found that such standards gave the city "unbridled discretion in determining whether a particular structure or sign will be harmful to the community's health, welfare, or aesthetic quality." 103 F3d at 819.

Petitioner argues that, like the city in Desert Outdoor Advertising, the city's application of GZO 17.020 in the present case results in "unbridled discretion." Petitioner contends that whether a proposed use is "clearly accessory and subordinate" to a use allowed in the IL zone under GZO 17.020 depends on whether it meets the definition of "accessory" uses at GZO 2.020. GZO 2.020 defines an accessory use as "[a] use incidental, appropriate and subordinate to the main use of the parcel, lot or building." Petitioner focuses on the term "appropriate" in the GZO 2.020 definition, and argues that whether a proposed sign is "appropriate" for the main use of the property and hence accessory to that use is an inherently subjective inquiry, one that grants the city too much discretion in evaluating applications for sign permits, thus allowing an impermissible prior restraint of free expression.

We disagree. The term "appropriate" does not stand alone, but rather is part of a three-part definition of "accessory use," the meaning of which in any particular circumstance is sharply limited by the nature of the primary use on the property and the narrow list of permitted uses in the IL zone. Whether a proposed use is "incidental, appropriate and subordinate," and hence accessory to the primary use of the property, will depend upon the circumstances, most particularly the nature of the primary use, but that inquiry is so factually and legally circumscribed that it does not rise to the level of "unbridled discretion." Unlike the broad and subjective criteria at issue in Desert Outdoor Advertising, GZO 2.020 and 17.020 do not make enjoyment of constitutional rights "contingent upon the uncontrolled will of an official." Outdoor Media, 150 Or App at 119, quoting FW/PBS, Inc. v. Dallas, 493 US 215, 225-26, 110 S Ct 596, 107 L Ed 2d 603 (1990).

The second assignment of error is denied.

The city's decision is affirmed.