

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MEDIA ART, INC.,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF TIGARD,
10 *Respondent.*

11
12 LUBA Nos. 2003-068/069, 2003-084,
13 2003-085 and 2003-112

14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from City of Tigard

19
20 Steven W. Abel, Portland, filed the petition for review and argued on behalf of
21 petitioner. With him on the brief was Timothy L. McMahan, Michelle Rudd and Stoel Rives,
22 LLP.

23
24 Gary F. Firestone, Portland, filed the response brief and argued on behalf of
25 respondent. With him on the brief was Timothy V. Ramis and Ramis Crew Corrigan &
26 Bachrach, LLP.

27
28 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,
29 participated in the decision.

30
31 AFFIRMED

12/19/2003

32
33 You are entitled to judicial review of this Order. Judicial review is governed by the
34 provisions of ORS 197.850.

2 **NATURE OF THE DECISION**

3 Petitioner appeals several decisions denying applications to construct five large
4 billboards.

5 **REQUEST FOR OFFICIAL NOTICE**

6 Following oral argument in this case, petitioner filed a request that the Board take
7 official notice of a document issued by the Department of Land Conservation and
8 Development (DLDC) entitled “Notice of Proposed Amendment,” attached to which are
9 proposed revisions to the city’s sign ordinance. The document indicates that the city will
10 conduct its first evidentiary hearing on the proposed revisions January 5, 2004. The city
11 does not object to the request.

12 It is not clear to us that the DLCD notice is subject to official notice under
13 ORS 40.090(2) and Oregon Evidence Code 202(2) or, if it is, that it is relevant to any issue in
14 this case. However, in the absence of an objection from the city, we grant the request.

15 **FACTS**

16 On April 21, 2003, petitioner submitted building permit applications for five signs to
17 be located along Highway 217 and Interstate-5 within the city of Tigard. The proposed signs
18 are double-sided, with each sign face totaling 672 square feet. Two of the sign structures are
19 77 feet high; the remaining three are 45 feet high. City planning staff denied the building
20 permits on the grounds that the proposed signs exceeded height and dimensional standards in
21 the city’s sign ordinance for freestanding freeway-oriented signs. Petitioner appealed those
22 denials to LUBA.

23 On May 23, 2003, the city withdrew the challenged decisions for reconsideration,
24 pursuant to OAR 661-010-0021. The city council held a hearing on July 8, 2003 and voted
25 to affirm the planning staff interpretation of the sign ordinance. Based on the city council’s
26 decision, the city again denied the requested building permits. The city then filed the

1 decisions on reconsideration with LUBA, and all pending appeals in this matter were
2 ultimately consolidated.

3 INTRODUCTION

4 Because the principal issue in this case is the interpretation and the constitutionality
5 of the city’s sign ordinance, we begin by describing the sign ordinance in some detail.

6 The city’s sign ordinance is found in Tigard Municipal Code (TMC) chapter 18.780.
7 TMC 18.780.010(A) defines the purposes of the sign ordinance to include minimization of
8 “distractions for motorists on public highways and streets,” among other things.¹ TMC
9 18.780.010(D) adopts by reference the provisions the Oregon Motorist Information Act
10 (OMIA), found at ORS 377.700 *et seq.* As a brief digression, the OMIA regulates signs
11 located within 660 feet of certain state and interstate highways, including Highway 217 and
12 Interstate 5. In order to obtain a state permit to construct or relocate certain signs along
13 highways, including the signs proposed here, the applicant must submit an affidavit from the
14 city or county in which the sign will be located, certifying that “the proposed sign would

¹ TMC 18.780.010 provides, in relevant part:

“A. General purposes. The purposes of this chapter are:

- “1. To protect the health, safety, property and welfare of the public;
- “2. To promote the neat, clean, orderly and attractive appearance of the community;
- “3. To accommodate the need of sign users while avoiding nuisances to nearby properties;
- “4. To insure for safe construction, location, erection and maintenance of signs;
- “5. To prevent proliferation of signs and sign clutter, and
- “6. To minimize distractions for motorists on public highways and streets.

“* * * * *

“D. Oregon Motorist Information Act. This chapter adopts by reference the provisions of the Oregon Motorist Information Act, ORS Chapter 377.”

1 comply with all applicable ordinances, plans, rules and other requirements of the city or
2 county.” ORS 377.723(2).² The OMIA does not permit a person to construct or maintain
3 any sign that is prohibited by a local governmental unit. ORS 377.740.³ The OMIA
4 prescribes height and dimensional standards for “outdoor advertising signs,” which in
5 relevant part limit such signs to a height of 14 feet or a sign area of 825 square feet.
6 ORS 377.745. There is no dispute in the present case that the proposed signs are “outdoor
7 advertising signs” within the meaning of the OMIA.

8 Returning to the city’s sign ordinance, the code does not explicitly reference “outdoor
9 advertising signs” or other signs regulated by the OMIA. The code does allow “freestanding
10 freeway-oriented signs,” defined as signs designed to be read by motorists along highways
11 within the city, specifically Highway 217 and Interstate 5.⁴ Such signs require city approval

² ORS 377.723 provides:

“Notwithstanding any other provision of ORS 377.700 to 377.840, the Department of Transportation 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.”

³ ORS 377.740 provides:

“Nothing in ORS 377.700 to 377.840 and 377.992 is intended to permit a person to erect or maintain any sign that is prohibited by any governmental unit.”

⁴ TMC 18.780.015 provides in relevant part:

“A. Definitions. As used in this title, unless the context requires otherwise, the following words and phrases shall have the meanings set forth in this chapter. The definitions to be used in this chapter are in addition to Chapter 18.110, Definitions, and are as follows:

“* * * * *

1 under TMC 18.780.090(E), and are allowed if the proposed sign is located within 200 feet of
2 Highway 217 or Interstate 5, the maximum height does not exceed 35 feet and the sign area
3 does not exceed 160 square feet per face.⁵ The central dispute between the parties in this

“(8) ‘Billboard’ means a sign face supported by a billboard structure;

“(9) ‘Billboard structure’ means the structural framework which supports a billboard;

“* * * * *

“(24) ‘Freeway-oriented sign’ means a sign primarily designed to be read by a motorist traveling on a highway designated by the Oregon State Highway Department as a freeway or expressway; specifically, these shall be Interstate 5 and Oregon State Highway #217, and shall not include Highway 99W;

“* * * * *

“(48) ‘Sign’ means materials placed or constructed primarily to convey a message or other display and which can be viewed from a right-of-way, another property or from the air[.]”

⁵ TMC 18.780.090 provides in relevant part:

“A. Applicability. Special-condition signs shall have special or unique dimensional, locational, illumination, maximum number or other requirements imposed upon them in addition to the regulations contained in this chapter.

“* * * * *

“E. Free-standing freeway-oriented signs.

“1. Anyone who qualifies for a permit from the State of Oregon under the provisions of the Oregon Motorist Information Act need not seek separate approval from the City of Tigard;

“2. Freeway-oriented signs shall be permitted only in the C-G, I-P, I-L and I-H zoning districts;

“3. Freeway-oriented signs shall be permitted to be located within 200 feet of Highway 217 and/or Interstate Freeway No. 5 rights-of-way as shown in the Freeway-Oriented Sign (FOS) overlay zone maps in Figure 1; (Figure 1 is on file in the City Recorder’s office.)

“4. One freestanding freeway-oriented sign shall be allowed per premises;

“5. The maximum height of a freeway-oriented sign shall not exceed 35 feet from the ground level at its base;

1 case is the meaning of TMC 18.780.090(E)(1), which provides that “[a]nyone who qualifies
2 for a permit from the State of Oregon under the provisions of the [OMIA] need not seek
3 separate approval from the City of Tigard.” *See* n 5.

4 The other sign ordinance provision that bears on the question of whether the proposed
5 signs are allowed under the code is TMC 18.780.070(M), which provides simply that
6 “[b]illboards are prohibited.” TMC 18.780.070(M) was adopted in 1993 pursuant to
7 Ordinance 93-12. Record 176-178. Prior to adoption of that ordinance, the city’s sign
8 ordinance expressly permitted “billboard signs” as a “special condition sign” in certain zones
9 if located within 660 feet of Highway 217 or Interstate 5. Ordinance 93-12 deleted those
10 provisions from the sign ordinance.⁶ The current city sign ordinance defines the term

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- “6. For freestanding signs a total maximum sign area of 160 square feet per face (320 square feet total) shall be allowed. If the sign is a billboard, then the provisions of Subsection 18.780.090 shall apply;
 - “7. Freeway-oriented signs shall be oriented to be viewed from the freeway;
 - “8. In addition to a freeway-oriented sign, each parcel, development complex or premises shall be allowed one freestanding sign provided all other provisions of this chapter can be met and both signs are located on separate frontages with different orientations;
 - “9. Freeway-oriented signs are not permitted as roof, tenant, temporary, balloon, wall and awning signs;
 - “10. Freeway-oriented signs shall be allowed by administrative approval of a sign permit application or by approval of a sign ordinance exception by the Commission.”

⁶ Ordinance 93-12 adds to the sign ordinance the prohibition on billboards currently codified at TMC 18.780.070(M). In addition, Ordinance 93-12 *deletes* the following language from *former* TMC 18.114.090(A), the predecessor to TMC 18.780.090:

- “1. Billboard:
 - “a. Billboard sign regulations shall be as follows:
 - “(i) Zones Permitted:
 - “(1) Billboard signs shall be permitted only in a C-G commercial zone or I-P, I-L and I-H industrial zones and

1 “billboard” in a circular manner that, for present purposes, is almost devoid of semantic
2 content. *See* n 4.

3 There appears to be no dispute in this case that the proposed signs are “billboards” in
4 the generic dictionary sense of the word. The parties also appear to agree that, despite the
5 broad prohibition on billboards at TMC 18.780.070(M), other sections of the sign ordinance
6 in fact permit some signs that are “billboards” in that generic dictionary sense. As discussed
7 below, the city views the code to allow only that subset of “billboards” that meet the
8 definition of and height and dimensional limitations applicable to “freestanding freeway-
9 oriented signs.” Because the proposed signs do not meet the height and dimensional
10 standards applicable to “freestanding freeway-oriented signs” and are not allowed by any
11 other code provision, the city concludes, they fall within the general prohibition on
12 “billboards.” Petitioner believes that TMC 18.780.090(E)(1) allows or exempts from city
13 regulation another, distinct subset of “billboards”: outdoor advertising signs permitted under
14 the OMIA within 660 feet of a highway. Petitioner argues that such signs are neither
15 “freestanding freeway-oriented signs,” subject to the limitations imposed on such signs, nor
16 signs that fall within the general prohibition on “billboards.”

then only within 660 feet of Oregon State Expressway
No. 217 and/or Interstate Freeway No. 5 right-of-ways;

“2. All new proposed billboard sign(s) within 660 feet of the public right-of-way of a
state highway must obtain the necessary permit(s) from the State Highway Division
and all billboard sign(s) must be maintained to conform with applicable state
requirements pertaining to billboards[.]

“3. All signs * * * shall be kept in good repair and shall be maintained in a safe
condition:

“a. All signs * * * shall be maintained in a neat, clean, and attractive condition;

“b. Signs shall be kept free from excessive rust, corrosion, peeling paint, or
other surface deterioration; and

“c. The display surfaces of all signs shall be kept neatly painted or posted[.]”
Record 177.

1 With that overview of the city’s sign ordinance and the terminology used by the
2 parties, we turn to petitioner’s challenge to the city council’s code interpretation.

3 **FIRST, SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

4 Petitioner argues that the city misinterpreted the definition of “billboard” at
5 TMC 18.780.015(A)(8), the prohibition on billboards at TMC 18.780.070(M), and the
6 provisions governing free-standing freeway-oriented signs at TMC 18.780.090, particularly
7 TMC 18.780.090(E)(1) and (6). Petitioner contends that TMC 18.780.090(E)(1), properly
8 understood, exempts the proposed signs from city regulation or allows them outright, subject
9 only to a demonstration that the applicant qualifies for a permit under the OMIA.

10 **A. The City’s Interpretation**

11 The city rejected petitioner’s argument that TMC 18.780.090(E)(1) exempts OMIA-
12 regulated signs from city regulation or allows as a permitted use any sign that is permissible
13 under the OMIA.⁷ According to the city council, TMC 18.780.090(E)(1) simply clarifies that

⁷ The city council adopted the following planning director’s interpretation of TMC 18.780.090(E)(1):

“[TMC 18.780.090(E)(1)] is ambiguous because it does not clearly define what ‘qualifying for a permit’ means. The provision could be interpreted to mean that the City should make an independent evaluation in each case whether a person meets all the qualifications for a permit from the State under the [OMIA]. This interpretation is unacceptable and unreasonable because it would have the City make an independent evaluation of a decision that only the Oregon Department of Transportation has authority to make. *See* ORS 377.725. * * *

“It could also be interpreted as meaning that a person does not need to seek separate City approval if the person has obtained an OMIA permit for a location in the City. This is a reasonable and acceptable interpretation of the code provision.

“TMC 18.780.090.E.1 must be read in context of the OMIA. A person can qualify for an OMIA permit only if that person obtains an affidavit from the City that the sign is permitted under the City codes. ORS 377.723. The provision that a person need not obtain a ‘separate approval’ from the City makes sense when interpreted in light of the provision in ORS 377.723, which includes the City as part of the OMIA process. If the City issues an affidavit certifying compliance under ORS 377.723, it will have verified that the applicant meets City standards, and a second City process would be superfluous. However, if no affidavit certifying compliance is issued, then the City would not have determined whether its code has been complied with and a separate City process is needed. The intent of the provision is to avoid two separate City processes for a single sign, while requiring at least one City process to determine whether a sign complies with City standards.

1 once a person obtains a permit under the OMIA for a freestanding freeway-oriented sign that
2 the city has certified pursuant to ORS 377.723(2), the person need not obtain a *second* permit
3 issued by the city, as would otherwise be required by TMC 18.780.090(E)(10). In short, the
4 city council viewed TMC 18.780.090(E)(1) as a permit streamlining provision, not as a
5 provision that exempts OMIA-permitted signs from city regulation or that allows OMIA-
6 permitted signs as outright permitted uses within the city, as petitioner contended.

7 The city then interpreted other sign ordinance provisions to determine, essentially,
8 that the proposed signs are “freestanding freeway-oriented signs” and allowable only if they
9 comply with the requirements governing those signs at TMC 18.780.090(E). Because the
10 proposed signs exceed the height and dimensional standards applicable to freestanding
11 freeway-oriented signs, the city determined that the proposed signs are “billboards” and
12 hence prohibited under its sign ordinance.⁸

“Therefore, TMC 18.780.090.E.1 should be interpreted as meaning that a person may avoid obtaining a City permit (the ‘separate approval’) if the person has obtained an affidavit from the City under ORS 377.723 stating that the proposed sign complies with all applicable City regulations. If a person has not obtained the ORS 377.723 affidavit indicating compliance the person has not ‘qualifie[d] for a permit from the State of Oregon under the Oregon Motorist Information Act.’” Record 9.

⁸ The city council adopted the following interpretation by the planning director:

“The two definitions (of ‘billboard’ and ‘billboard structure’) are circular and provide little guidance as to what constitutes a billboard or a billboard structure. Dictionary definitions are not very helpful. For example, the most relevant definition in Webster’s Ninth New Collegiate Dictionary is ‘a large panel designed to carry outdoor advertising.’ This definition does not provide much detail but is in accord with the common conception of a billboard as a very large sign.

“TMC 18.180.070.M prohibits billboards. Before billboards were prohibited, they were only allowed in certain zones and only if within 660 feet of Highway 217 or Interstate 5. (*See* Ordinance 93-12). However, it is clear that when the Council prohibited billboards, it did not prohibit all freeway-oriented signs because freestanding freeway-oriented signs are expressly permitted, subject to certain standards. TMC 18.780.090.E.

“Given the dictionary definition and common understanding of billboard as a very large sign and that the Council’s obvious intent as to freeway-oriented signs was to prohibit certain signs while allowing others, it appears that the Council intended the term ‘billboard’ in the context of freeway-oriented signs to mean a sign that is larger than the maximum size allowed for a freeway-oriented sign. The normal maximum area for a freeway-oriented sign is 160

1 **B. Petitioner’s Arguments**

2 Petitioner challenges the city’s code interpretation from a number of different
3 directions. We understand petitioner to argue that its interpretation of
4 TMC 18.780.090(E)(1) is compelled by the text and context of the sign ordinance, and that
5 the city’s contrary interpretation cannot be affirmed under the deferential standard of review
6 applicable to a governing body’s interpretation of local ordinances. ORS 197.829(1);
7 *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003).⁹

8 The text of TMC 18.780.090(E)(1) is ambiguous, in our view. It can be reasonably
9 understood to provide, as petitioner understands it, that OMIA-permitted signs are exempt
10 from city regulation or outright permitted uses within the city. It can also be understood to
11 provide, as the city understands it, that no duplicate permit is required for OMIA-permitted
12 signs that also qualify as “freestanding freeway-oriented signs.” However, the textual
13 plausibility of petitioner’s interpretation does nothing in itself to demonstrate that the city’s

square feet per sign face and 320 square feet for a two-sided sign. TMC 18.780.090.E.6. However, provided an application can meet all of the applicable review criteria for an adjustment, the code allows adjustments of up to 25 percent in sign area. TMC 18.780.140.A, TMC 18.370.020.C.6. Therefore, a freeway-oriented sign that does not exceed 200 square feet per side and 400 square feet total may be approved through the adjustment process and would not be a billboard.

“In the context of freeway-oriented signs, a billboard therefore is a sign with any one sign face greater than 200 square feet or with a total sign area greater than 400 square feet. As applied to freeway-oriented signs, TMC 18.780.070.M prohibits signs with any one sign face greater than 200 square feet or with a total sign area greater than 400 square feet.” Record 8.

⁹ ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 interpretation is inconsistent with the express language of TMC 18.780.090(E)(1), for
2 purposes of ORS 197.829(1).

3 Petitioner relies heavily on context to demonstrate that the city's interpretation of
4 TMC 18.780.090(E)(1) is reversible under ORS 197.829(1). *See Church*, 187 Or App at
5 525-26 (analysis under ORS 197.829(1) requires viewing the ordinance provision in
6 context). Petitioner first notes that TMC 18.780.010(D) adopts the OMIA by reference. *See*
7 n 1. According to petitioner, the only logical purpose in adopting the OMIA by reference is
8 to ensure that OMIA-permitted signs are allowed in the city, consistent with petitioner's
9 interpretation of TMC 18.780.090(E)(1).

10 Although it is not clear to us what the adoption of the OMIA by reference at
11 TMC 18.780.010(D) is intended to accomplish, we do not see that it advances petitioner's
12 contextual argument. If TMC 18.780.010(D) literally adopts the substantive provisions of
13 the OMIA into the city's code, among those provisions is the requirement, at ORS 377.723,
14 that an applicant for an outdoor advertising sign obtain certification from the local
15 government with jurisdiction that the sign is permitted, and not prohibited, under the local
16 ordinance. The OMIA says nothing about whether outdoor advertising signs, or any other
17 signs, are permitted within the City of Tigard. TMC 18.780.010(D) almost certainly
18 indicates that the city intended to allow at least some OMIA-permitted signs under the city's
19 sign ordinance. But it does not state or necessarily suggest that *all* OMIA-permitted signs
20 are allowed under the sign ordinance, much less that such signs are not subject to city
21 regulation. The city's interpretation allows some OMIA-permitted signs in the city (those
22 that also qualify as freestanding freeway-oriented signs), and therefore the context provided
23 by TMC 18.780.010(D) neither compels petitioner's interpretation of TMC 18.780.090(E)(1)
24 nor demonstrates that the city's interpretation is inconsistent with the text of
25 TMC 18.780.090(E)(1).

1 The strongest contextual support petitioner cites is TMC 18.780.090(E)(6). The first
2 sentence of that provision sets forth the dimensional standards for freeway-oriented signs.
3 The second sentence states “[i]f the sign is a billboard, then the provisions of Subsection
4 18.780.090 shall apply.” *See* n 5. Petitioner contends that the quoted sentence and its
5 juxtaposition with the preceding sentence setting forth dimensional standards for freeway-
6 oriented signs suggests that “billboards” are regulated differently than “freeway-oriented
7 signs,” at least with respect to dimensional standards. Petitioner argues that to give the
8 second sentence of TMC 18.780.090(E)(6) any meaning at all it must be understood as a
9 reference to TMC 18.780.090(E)(1), which in turn must be understood as allowing or
10 exempting from city regulation “billboards” that comply with the dimensional and other
11 requirements of the OMIA.

12 The reference to “the provisions of [TMC] 18.780.090” is confusing, to say the least,
13 since nothing in TMC 18.780.090 expressly provides standards for “billboards,” and in fact
14 the sign ordinance elsewhere prohibits “billboards.” The city literally interpreted the second
15 sentence of TMC 18.780.090(E)(6) to require that “billboards” comply with all applicable
16 requirements of TMC 18.780.090, including those that apply to freestanding freeway-
17 oriented signs.¹⁰ In other words, if a proposed sign is both a “billboard” and a “freestanding

¹⁰ The city interpreted TMC 18.780.090(E)(6) as follows:

“The first sentence of this section is clear and unambiguous. The second sentence is confusing and ambiguous. That sentence states that if a sign is a billboard, the provisions of subsection 18.780.090 apply. This statement is ambiguous for two reasons. Most importantly, any reference to standards being applicable to billboards is confusing, given the express prohibitions on billboards in TMC 18.780.070.M. Second, there may be some possible ambiguity as to whether the ‘provisions of Subsection 18.780.090’ includes the first sentence of TMC 18.780.090.E.6.

“Dealing with the second possible area of ambiguity, the first sentence of TMC 18.780.090.E.6 is one of the provisions of Subsection 18.780.090. There is no language in the second sentence that would exclude the first sentence of TMC 18.780.090.E.6 from being applicable. It would have been easy to include an express provision stating that the first sentence did not apply to billboards, or to add the word ‘but’ between the two sentences. The Council in adopting the provision did not do that. To interpret the second sentence of TMC 18.780.090.E.6 in a way that would make the first sentence not applicable to billboards would

1 freeway-oriented sign,” it must comply with the dimensional standards governing the latter,
2 among other standards. The city’s interpretation is consistent with its view that any
3 “billboards” that do not comply with the standards applicable to freestanding freeway-
4 oriented signs are prohibited. Petitioner faults that interpretation for “inserting what is
5 omitted” and “omitting what is inserted,” among other interpretational errors.

6 The city’s interpretation of TMC 18.780.090(E)(6) is not without its problems.
7 However, it is difficult to imagine any interpretation purporting to make sense of the second
8 sentence of TMC 18.780.090(E)(6) that does not employ interpretational gymnastics.
9 Petitioner’s preferred interpretation also requires a considerable degree of insertion, omission
10 and implication. In any case, the city’s interpretation of TMC 18.780.090(E)(6) harmonizes
11 that provision with other pertinent sign ordinance provisions, and is at least as consistent
12 with the express language, purpose and policy of the sign ordinance as petitioner’s preferred
13 interpretation.

14 To the extent it is permissible or necessary to examine legislative history, the
15 legislative history available to us supports the city’s interpretation. It is reasonably clear that
16 in adopting Ordinance 93-12 the city council intended to sharply reduce if not eliminate
17 construction of new “billboards” within the city. *See* Record 176 (Whereas clause to
18 Ordinance 93-12 finding that “there has been a public outcry concerning the proliferation,
19 number, spacing and aesthetics of billboards”). Most pertinently, in addition to prohibiting
20 “billboards,” Ordinance 93-12 deleted express language then codified at TMC 18.114.090(A)

be to insert a provision that is not there. The second sentence of TMC 18.780.090.E.6 should therefore be interpreted as making the size limitation of the first sentence of that subsection applicable to billboards.

“In interpreting this provision, it should be noted that the code definition of billboard—a sign supported by a billboard structure—applies to this provision. The apparent intent was therefore that any sign that had a billboard structure could not exceed the other requirements of freeway-oriented signs, including the first sentence of TMC 18.780.090.E.6. The best interpretation of the second sentence of TMC 18.780.090.E is therefore that signs with billboard structures that are greater than the maximum allowed by the first sentence of TMC 18.780.090.E.6 (plus any adjustments allowed by code as discussed above), are not permitted.” Record 10.

1 that *allowed* billboards within 660 feet of Highway 217 and Interstate 5 that have obtained
2 permits from the State Highway Division. *See* n 6. In other words, the city council chose to
3 delete language in the former sign ordinance that appeared to do precisely what petitioner
4 asserts TMC 18.780.090(E)(1) does in the current sign ordinance: allow all OMIA-permitted
5 billboards within the city.¹¹

6 Finally, we note that the purposes of the sign ordinance include prevention of the
7 “proliferation of signs and sign clutter” and minimization of “distractions for motorists on
8 public highways and streets.” TMC 18.780.010(A)(5) and (6). To the extent petitioner
9 argues that the city’s interpretation of TMC 18.780.090(E)(1) and other pertinent code
10 provisions is inconsistent with the purpose or underlying policy of those provisions, under
11 ORS 197.829(1)(b) or (c), we disagree. The city’s interpretation will result in considerably
12 smaller and lower signs along public highways than would result under petitioner’s
13 interpretation, which seems more consistent with the cited purposes than does petitioner’s.

14 In sum, we cannot say that the city’s interpretation of TMC 18.780.090(E)(1) and
15 other relevant code provisions is inconsistent with the express language of those provisions,
16 their purpose or underlying policy.

¹¹ At LUBA’s request, the city forwarded copies of the city’s sign ordinance from 1989 to the present, and the Board has taken official notice of those ordinances, pursuant to OEC 202. Consideration of the evolution of the city’s sign ordinance is of some assistance in resolving the parties’ interpretational dispute, and generally tends to support the city’s interpretation. We note first that the language currently found at TMC 18.780.090(E)(1) existed in the 1989 version of the sign ordinance that was amended by Ordinance 93-12. The 1993 deletion of the express provision allowing “billboards” approved under the OMIA at *former* TMC 18.114.090(A) and the city’s failure to delete or modify TMC 18.780.090(E)(1) at the same time suggests that the city did not understand the latter to provide, as petitioner contends, that OMIA-permitted signs are allowed in the city.

Second, we note that from 1989 through 1994 the second sentence of what is currently TMC 18.780.090(E)(6) stated that “If the sign is a billboard then the provisions of [TMC] 18.114.090.A.3.b shall apply.” TMC 18.114.090.A.3.b was deleted in 1993, along with the other code provisions that allowed OMIA-approved “billboards,” by adoption of Ordinance 93-12. Sometime prior to 1998 the second sentence of TMC 18.780.090(A)(6) was amended to read, as it does today, to state that billboards are subject to “[TMC] 18.780.090.” Although the intended reference of that second sentence remains obscure to us, consideration of these superseded ordinances does not support petitioner’s view that the reference to “[TMC]18.780.090” in the second sentence of TMC 18.780.090(E)(6) is intended to reference TMC 18.780.090(E)(1).

1 The first through fourth assignments of error are denied.

2 **FIFTH, SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**

3 In the event that the city’s interpretation of the sign ordinance is sustained, petitioner
4 contends that the ordinance as interpreted violates the Oregon and United States
5 Constitutions because it is (1) directed at the content of speech, (2) overbroad and (3) vague.

6 **A. Severance**

7 As a preliminary matter, we note that with one minor exception each of petitioner’s
8 constitutional challenges is directed at the prohibition on billboards at TMC 18.780.070(M),
9 rather than at the city’s interpretation of TMC 18.780.090(E)(1) or (6). As discussed above,
10 the immediate basis for denial of the proposed signs was the city’s interpretation of
11 TMC 18.780.090(E), affirmed above, to the effect that the proposed signs are properly
12 characterized as freestanding freeway-oriented signs, and subject to the regulations
13 applicable thereto. Under that interpretation, there is no possible dispute that the proposed
14 signs are not allowed under the city’s code, because they do not comply with applicable size
15 and height limitations. As far as we can tell, the prohibition on billboards at
16 TMC 18.780.070(M) plays only a limited role, if any, in the city’s denials. Under these
17 circumstances, even if we agree with petitioner that the billboard prohibition is
18 constitutionally infirm, we question whether the unconstitutionality of TMC 18.780.070(M)
19 necessarily provides a basis to reverse or remand the challenged decisions. *See Valley*
20 *Outdoor, Inc. v. County of Riverside*, 337 F3d 1111, 1114-15 (9th Cir 2003) (an
21 unconstitutional provision of a sign ordinance is not a basis to declare the ordinance
22 unconstitutional as applied to the petitioner’s signs, where the invalid provision is severable
23 and the disputed signs are illegal under valid size and height restrictions).

1 We note further that the TMC has an express severability clause, at TMC 1.01.060.¹²
2 Where such a severability clause applies, a reviewing body must give effect to that
3 expression of legislative intent by severing invalid code language, at least where doing so
4 leaves the remaining portions of the code capable of independent functioning. *Advocates for*
5 *Effective Regulation v. City of Eugene*, 176 Or App 370, 376-77, 32 P3d 228 (2001).¹³
6 Questions of severability tend to arise in facial constitutional challenges, where the issue
7 becomes whether the code or statute must be invalidated in its entirety. The present case is
8 an as-applied challenge, but the general principle also seems pertinent: if the city properly
9 denied the disputed signs under valid size and height standards, the alleged
10 unconstitutionality of TMC 18.780.070(M) should not provide a basis for reversal or remand.

11 However, for several reasons we will fully address petitioner’s constitutional
12 challenges. First, while the billboard prohibition at TMC 18.780.070(M) was not the
13 immediate basis for denial, it at least formed the backdrop for the city’s interpretations of
14 TMC 18.780.090(E)(1) and (6). Second, we are uncertain whether it is appropriate to apply
15 the above-discussed severance principles or the city’s severance clause in the present
16 circumstances. *See West Coast Media v. City of Gladstone*, 44 Or LUBA 503, 524 (2003),
17 *appeal pending* (A121694) (questioning the applicability of a code severance clause in an as-
18 applied challenge to the constitutionality of the city’s sign ordinance). The parties do not

¹² TMC 1.01.060 provides, in relevant part:

“If any section, subsection, sentence, clause or phrase of this Code is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Code. The council declares that it would have passed this Code, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional * * *.”

¹³ Even where there is no express severability clause, ORS 174.040 provides a presumption of severability with respect to statutes, which may be overcome only if “(1) the enactment provides that the remaining parts shall not remain in effect; (2) the remaining parts are so dependent on the invalid part that the remaining parts would not have been enacted without the invalid part; or (3) the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with legislative intent.” *Advocates for Effective Regulation*, 176 Or App at 376.

1 assist us on this point, and we find little relevant case law. Third, we cannot avoid a
2 constitutional analysis in any case, because petitioner does present a brief challenge to the
3 constitutionality of the size and height restrictions in TMC 18.780.090(E)(5) and (6).

4 That said, it is impossible to ignore the fact that the prohibition on billboards at
5 TMC 18.780.070(M) played only an indirect role, if any, in the challenged permit denials.
6 Accordingly, we will not address the constitutionality of TMC 18.780.070(M) in isolation, as
7 petitioner seemingly invites us, but rather in light of the city’s interpretation of that provision
8 and related provisions, and as those interpretations were applied to this case.

9 **B. As Interpreted and Applied, the City’s Sign Ordinance is Not Directed at**
10 **Speech**

11 Article 1, section 8 of the Oregon constitution states in relevant part that “[n]o law
12 shall be passed restraining the free expression of opinion, or restricting the right to speak,
13 write, or print freely on any subject whatever[.]” Article 1, section 8 “forecloses the
14 enactment of any law written in terms directed to the substance of any ‘opinion’ or any
15 ‘subject’ of communication,” subject to exceptions not relevant here. *State v. Robertson*, 293
16 Or 402, 412, 649 P2d 569 (1982). Similarly, a regulation imposed on one kind of speech
17 without a regulation on others, because of different content, violates the constitutional right
18 of expression. *Ackerley Communications, Inc. v. Mult. Co.*, 72 Or App 617, 623-24, 696 P2d
19 1140 (1985), *rev dismissed* 303 Or 165, 734 P2d 885 (1987).

20 Petitioner contends that the billboard prohibition at TMC 18.780.070(M) is directed
21 at the content of speech because it requires the city to examine the content of a proposed sign
22 to determine whether it is a “billboard” and thus prohibited. Petitioner notes that the city’s
23 decision relies in part on the dictionary definition of “billboard” as a “large panel designed to
24 carry outdoor advertising.” Record 3. According to petitioner, inquiry into whether a
25 proposed sign is a “billboard” under the city’s approach necessarily requires inquiry into
26 whether the sign is designed to carry “outdoor advertising,” which in turn is necessarily an

1 inquiry into the *content* of the sign. Because the city’s code as interpreted prohibits certain
2 signs based on content, petitioner argues, it is inconsistent with Article 1, section 8.¹⁴

3 Viewed in isolation, the prohibition on “billboards” at TMC 18.780.070(M) is
4 certainly problematic, not least because the term “billboard” and hence the scope of the
5 prohibition is so poorly defined under the code. However, we disagree with petitioner that
6 the pertinent sign ordinance provisions, as interpreted, distinguish between signs based on
7 their content, for purposes of Article 1, section 8. The essence of the city’s interpretation is
8 that the proposed signs are “freestanding freeway-oriented signs,” subject to all of the
9 standards applicable to such signs, including size and height limitations. We agree with the
10 city that whether a sign is a freestanding freeway-oriented sign or whether a sign can be
11 approved as a freestanding freeway-oriented sign under the city’s code has nothing to do
12 with the content of that sign.

13 Admittedly, the city’s decision examines the code and dictionary definitions of
14 “billboard,” and expressly concludes that the proposed signs are “billboards,” and hence
15 prohibited. However, the part of the dictionary definition the city relies upon is the “large
16 panel” language, not the “outdoor advertising” language. The city cites the dictionary
17 definition to support its interpretation that as applied here “billboards” are large signs that,
18 depending on their location, size and height may or may not be allowed under the code as
19 freestanding freeway-oriented signs. That interpretation and its application in the present
20 case does not rely upon a content-based distinction, or require inquiry into the content of the
21 proposed signs.

¹⁴ Petitioner also argues that the city’s approach necessarily imports the off-premise/on-premise distinction in the OMIA into the city’s code and applies it here to effectively prohibit “off-premise” signs. Petitioner further argues that the Court of Appeals erred in *Outdoor Media Dimensions, Inc. v. State of Oregon*, 150 Or App 106, 945 P2d 614 (1997), *aff’d on other grounds* 331 Or 634, 20 P3d 180 (2001), in concluding that the OMIA off-premise/on-premise distinction is not content based. However, nothing in the sign ordinance suggests a distinction between off-premise and on-premise signs, and we do not see anything in the city’s decision that imports or applies such a distinction in the present case.

1 **C. Overbreadth**

2 Petitioner next argues that even if the billboard prohibition at TMC 18.780.070(M) is
3 not directed at the content of speech, it is overbroad and thus in violation of Article 1, section
4 8. In *Robertson*, the Supreme Court stated that even if a prohibition is directed at a forbidden
5 effect rather than speech it “must be scrutinized to determine whether it appears to reach
6 privileged communication or whether it can be interpreted to avoid such ‘overbreadth.’” 293
7 Or at 417-418.

8 Petitioner first contends that the code definitions of billboard and billboard structure
9 are so broad and ill-defined that they potentially include almost all external signs. Under
10 those definitions and the broad prohibition on “billboards,” petitioner argues, a vast range of
11 signs and communication is potentially prohibited in the city. According to petitioner, the
12 billboard prohibition at TMC 18.780.070(M) is not subject to any narrowing construction
13 that might avoid its overbreadth.

14 Petitioner advances a similar argument under the First Amendment to the federal
15 constitution. According to petitioner, a prohibition on commercial speech such as the
16 challenged prohibition on billboards is constitutional only if the prohibition (1) seeks to
17 implement a substantial government interest, (2) directly advances that interest, and (3)
18 reaches no further than necessary to establish the objective. *Metromedia, Inc. v. City of San*
19 *Diego*, 453 US 490, 507, 101 S Ct 2882, 69 L Ed 2d 800 (1981). Petitioner contends that the
20 billboard prohibition does not directly advance a substantial government interest and, to the
21 extent it does, it reaches further than necessary to achieve that interest. In addition,
22 petitioner argues that a prohibition on commercial speech must leave open ample channels of
23 communication. *Id.* at 516. Petitioner contends that the height and size limitations the city
24 applies to freestanding freeway-oriented signs results in signs that are too small to be viewed
25 by motorists on a freeway. Therefore, petitioner argues, the city’s code as interpreted fails to
26 provide “ample channels of communication.”

1 If TMC 18.780.070(M) were viewed in isolation, we might well agree with petitioner
2 that it is overbroad. However, we disagree with petitioner that any overbreadth is not subject
3 to a narrowing construction. The city’s decision in the present case supplies such a
4 construction. As noted, the essence of the city’s interpretation is that a “billboard” is a large
5 sign that is allowed only if it meets applicable standards in the sign ordinance, in this case
6 those governing freestanding freeway-oriented signs. The purpose of the billboard
7 prohibition, judging from the whereas clauses adopted in Ordinance 93-12, is to address the
8 perceived harmful effects caused by the “proliferation, number, spacing and aesthetics of
9 billboards.” Record 112. The cited harmful effects might well justify a complete city-wide
10 prohibition on “billboards,” or “large signs” as the city interprets the term. Be that as it may,
11 the sign ordinance as interpreted allows “billboards” in certain zones and locations within the
12 city, subject to size and height limitations. Any lack of clarity regarding the meaning of
13 “billboard” and any concern regarding the scope of the billboard prohibition is effectively
14 resolved by that interpretation: either a proposed sign complies with applicable standards,
15 such as those governing freestanding freeway-oriented signs, or it does not. Petitioner has
16 not demonstrated that the sign ordinance, as interpreted, reaches privileged communication
17 beyond that necessary to ameliorate the cited harmful effects, or is otherwise overbroad.

18 Petitioner’s federal constitutional arguments fare no better. The city argues, and we
19 agree, that local governments have a substantial interest in ameliorating aesthetic and visual
20 clutter caused by large signs, and that such interests may justify a content-neutral prohibition
21 or limitation on such signs. *See Metromedia*, 453 US at 532-34. For the foregoing reasons,
22 petitioner has not demonstrated that the city’s sign ordinance, as interpreted, fails to directly
23 advance that interest, or that it reaches further than necessary to fulfill the stated objective.

24 Finally, we agree with the city that petitioner has not demonstrated that the sign
25 ordinance, as interpreted, fails to provide “ample alternative channels of communication.”
26 Petitioner merely offers its opinion that a 200-square foot sign is too small to adequately

1 convey messages to highway drivers, but fails to explain why that is the case, or to cite to
2 any evidence supporting that opinion. Further, the city argues, and petitioner makes no effort
3 to dispute, that the city provides many opportunities for expression, including many types of
4 signs in most zoning districts, with no restriction on content.

5 **D. Vagueness**

6 Petitioner argues that the billboard prohibition at TMC 18.780.070(M) is
7 impermissibly vague in violation of the free speech guarantees of the federal constitution, for
8 many of the same reasons asserted for that prohibition’s overbreadth. According to the
9 petitioner, the sign ordinance does not make clear what is prohibited and what is allowed,
10 which grants the city “unbridled discretion” in determining what signs are permitted. *Desert*
11 *Outdoor Advertising v. City of Moreno Valley*, 103 F3d 814, 818 (9th Cir 1996), *cert denied*,
12 522 US 912, 139 L Ed 2d 227, 118 S Ct 294 (1997). Petitioner argues that the prohibition on
13 billboards, as defined in the code, lacks “narrow, objective and definite” standards to guide
14 the city’s discretion, and thus TMC 18.780.070(M) is unconstitutionally vague. *Id.*

15 The city responds, and we agree, that as the city interprets the sign ordinance it is
16 clear whether a sign that may be described as a “billboard” is allowed or prohibited. In the
17 context of signs, such as the present ones, that are oriented to Highway 217 or Interstate 5, a
18 determination whether those signs are permitted or not is resolved under objective and
19 definite locational and dimensional standards at TMC 18.780.090(E). Such standards do not
20 grant the city “unbridled discretion” to allow or prohibit such signs. The city’s sign
21 ordinance, as interpreted, is not unconstitutionally vague.

22 The fifth, sixth and seventh assignments of error are denied.

23 **EIGHTH ASSIGNMENT OF ERROR**

24 Article 1, section 20 of the Oregon Constitution provides in relevant that “[n]o law
25 shall be passed granting to any citizen or class of citizens privileges, or immunities, which
26 upon the same terms, shall not equally belong to all citizens.” Petitioner argues that the

1 billboard prohibition violates petitioner’s rights under Article 1, section 20, because
2 petitioner “will be treated differently than other applicants whose signs may fall within the
3 broad definition of sign in the Code but are allowed to build their signs.” Petition for Review
4 37. Petitioner also argues that the billboard prohibition “treats on-premise signs and signs
5 with political content differently than other signs and is therefore a violation of an OMIA
6 sign-owner’s” rights under Article 1, section 20. *Id.* Petitioner advances similar arguments
7 under the federal equal protection clause.

8 Petitioner does not explain how the sign ordinance as interpreted treats petitioner
9 differently than other applicants. As the city interprets the code, any applicant who proposes
10 a freeway-oriented sign or any other type of sign that fails to meet applicable size and height
11 standards will, like petitioner, be denied. We do not understand petitioner’s arguments
12 regarding on-premise signs and political signs. Petitioner does not cite to any code
13 provisions that expressly or implicitly distinguish between on or off-premise signs, or
14 between signs with or without political content. Petitioner has not demonstrated that the sign
15 ordinance as interpreted violates either Article 1, section 20 or the federal equal protection
16 clause.

17 The eighth assignment of error is denied.

18 **NINTH ASSIGNMENT OF ERROR**

19 Finally, petitioner argues that for the reasons expressed in the first through eighth
20 assignments of error the billboard prohibition at TMC 18.780.070(M) is unconstitutional and
21 the city cannot apply the size and height limitations in TMC 18.780.090(E) to deny
22 petitioner’s signs. The arguments under this assignment of error are derivative and fail for
23 the reasons expressed in our resolution of the first through eighth assignments of error.

24 The ninth assignment of error is denied.

25 The city’s decision is affirmed.