BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LAMAR ADVERTISING COMPANY,
Petitioner,

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 2006-210

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Michael M. Reeder, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Arnold Gallagher Saydack Percell Roberts & Potter, PC.

Ross M. Williamson, Eugene, filed the response brief and argued on behalf of respondent. With him on the brief were Emily N. Jerome and Harrang Long Gary Rudnick, PC.

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

AFFIRMED 05/23/2007

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

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a hearings officer's decision affirming the planning director's
4 denial of applications for permits to replace three existing billboards with electronic signs.

5 **FACTS**

6 Petitioner applied for permits to replace three billboards with "light emitting diode"
7 (LED) displays. The planning director denied the permit applications, based on his
8 determination that the LED technology petitioner proposed to use on the existing billboard
9 faces meant that the signs were "electronic message centers" (EMCs) under Eugene City
10 Code (EC) Section 9.0500. The EMCs exceeded the maximum size limits for EMCs found
11 in EC Section 9.6640(9).[1] Petitioner appealed the planning director's decision to the
12 hearings officer. The hearings officer affirmed the planning director's conclusion that the
13 proposed signs were EMCs. In addition, in response to petitioner's constitutional challenges
14 to EC Section 9.6440(9), which we discuss in more detail below, the hearings officer found
15 that petitioner had waived its right to raise the constitutional issues. This appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 In its first assignment of error, petitioner argues that the hearings officer incorrectly
18 interpreted the EC's definition of "electronic message center" to include petitioner's

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[1] EC 9.0500 defines "electronic message center" as follows:

> "A sign, or portion of a sign, that conveys information through a periodic automatic change of message on a lampbank, through the use of fiber optics, or through mechanical means. A sign on which any portion less than an entire sign rotates shall be considered an electronic message center."

EC Section 9.6640(9) provides in relevant part:

> "Except electronic message centers operated as public signs by governmental agencies, no electronic message center, or portion of a sign used as an electronic message center, shall be larger than 3 square feet in area, display a message containing more than 5 characters, or change the displayed message at intervals of less than once every 3 seconds. * * *"

proposed signs. Petitioner argues that the LED technology its signs use does not meet the definition of EMC set forth in EC 9.0500 because that technology does not convey information "on a lampbank, through the use of fiber optics, or through mechanical means." *See* n 1. The city responds that the hearings officer's conclusion that a billboard that uses LED technology is an EMC is reasonable and correct and should be affirmed.

In response to petitioner's arguments, the hearings officer found that the proposed signs were EMCs because the signs convey information through mechanical means, as follows:

> "* * * Viewed in context with the phrase 'electronic message center,' the Hearings Official concludes that the mechanical means described in the definition include computer generated images projected on a special board that uses LED technology to convey its message. This interpretation is consistent with the definition of 'mechanical' set out in Webster's Third New International Dictionary (2002 ed.) 1400-1401:
>
> "'**1 a** of or relating to, or concerned with machinery or tools * * *: produced or operated by a machine or a tool[.]'
>
> "It appears logical that an 'electronic message center' would include those mechanical signs that use 'electronic' technology to convey a message. 'Electronic' is defined as: 'of or relating to electronics * * * utilizing devices constructed or working by the methods or principles of electronics (an [electronic] circuit * * *').
>
> "The above definitions, when read together, make it relatively clear that the electronic process used in LED technology is a type of mechanics. Appellant may be correct that LED technology does not use a 'mechanical' process in that it uses weights, levers and other relatively simple tools to alter the billboard face. Instead, LED technology uses a mechanical means (computers, electrical currents and diodes) to transmit a message that alters automatically at programmed intervals. * * * [The city] did not err by categorizing appellant's proposed technology as a form of electronic message center and regulating it accordingly." Record 3-4 (internal citations omitted).

Petitioner disputes the above interpretation, arguing that the various definitions of "mechanical," "means," and "machinery" suggest that the phrase "mechanical means" as used in EC 9.0500 means "using a machine," and that if a sign does not have parts that physically move, the message on the sign is not conveyed by "mechanical means."

1 However, petitioner has not explained why the hearings officer's finding that a computer is a
2 machine, and that signs that convey information onto a screen by use of a computer convey
3 that information through "mechanical means" was unreasonable and incorrect. The hearings
4 officer's interpretation of the phrase "mechanical means" as applying to petitioner's signs to
5 determine that those signs were EMCs was reasonable and correct. *McCoy v. Linn County*,
6 90 Or App 271, 275-76, 752 P2d 323 (1988) (LUBA's acceptance or rejection of local
7 interpretation is determined by whether interpretation is right or wrong).
8 The first assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioner's second assignment of error contains three subparts. In the first subpart,
11 petitioner argues that the hearings officer erred by refusing to consider its constitutional
12 arguments. In the second subpart, petitioner argues that EC Section 9.6640(9) violates
13 Article I, Section 8 of the Oregon Constitution. In the third subpart, petitioner argues that
14 that section violates Article I, Section 20 of the Oregon Constitution.
15 Petitioner argues that the hearings officer erred by refusing to consider its
16 constitutional arguments. The city responds that the hearings officer's conclusion was
17 correct and should be affirmed. In the alternative, the city alleges that the decision at issue
18 in the present case is a "limited land use decision" as defined in ORS 197.015(13), because
19 the applications required the use of discretionary standards designed to regulate the
20 characteristics of a use permitted outright.[2] We reject that argument. First, the city denied

[2] ORS 197.015(13) provides:

"'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

"(a) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).

1 the requested signs in part because it determined that the signs as proposed were not
2 permitted. Thus, the signs cannot be said to be a "use permitted outright" under ORS
3 197.015(13). Second, the city does not allege that it processed the application under a
4 procedure to make limited land use decisions that is separate from the procedure for
5 processing other development review applications.[3] *See Papst v. Clackamas County*, ___Or

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"(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

[3] ORS 197.195(3) provides in relevant part:

"A limited land use decision is subject to the requirements of paragraphs (a) to (c) of this subsection.

"(a) In making a limited land use decision, the local government shall follow the applicable procedures contained within its acknowledged comprehensive plan and land use regulations and other applicable legal requirements.

"(b) For limited land use decisions, the local government shall provide written notice to owners of property within 100 feet of the entire contiguous site for which the application is made. The list shall be compiled from the most recent property tax assessment roll. For purposes of review, this requirement shall be deemed met when the local government can provide an affidavit or other certification that such notice was given. Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

"(c) The notice and procedures used by local government shall:

"(A) Provide a 14-day period for submission of written comments prior to the decision;

"(B) State that issues which may provide the basis for an appeal to the Land Use Board of Appeals shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue;

"(C) List, by commonly used citation, the applicable criteria for the decision;

"(D) Set forth the street address or other easily understood geographical reference to the subject property;

"(E) State the place, date and time that comments are due;

"(F) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost;

1 LUBA __ (LUBA No. 2006-170, February 8, 2007); *see also Fechtig v. City of Albany*, 27
2 Or LUBA 480, 485, *aff'd* 130 Or App 433, 882 P2d 138 (1994) (local governments wishing
3 to utilize the statutory procedures for limited land use decisions must make some initial effort
4 to identify in their plan or land use regulations which kinds of uses they view as qualifying
5 for approval as a limited land use decision). Appeals of sign permits are processed initially
6 as administrative decisions, but thereafter are processed in the same manner as other Type II
7 applications. Thus, the decision cannot be said to be a "limited land use decision."

8 **A. First Subpart - Waiver**

9 Petitioner appealed the planning director's decision denying petitioner's three sign
10 permit applications, based on the director's determination that the proposed signs were
11 "electronic message centers" that exceeded the maximum size requirement of three square
12 feet. Record 36. Petitioner appealed the planning director's decision to the city hearings
13 officer on the form the city provides to the public. Record 29. The form provides multiple
14 boxes describing various types of land use actions, and instructs the party appealing to check
15 one of the boxes. Petitioner checked the box next to the phrase "Code Interpretation." The
16 form does not contain a box for "permits."

17 The form also contains the following instruction consistent with EC 9.7605(3), which
18 states:

19 "The appeal shall include a statement of issues on appeal and be limited to the
20 issues raised in the appeal.* * *"

21 Petitioner's written appeal statement attached to the form contained the following statement:

"(G) Include the name and phone number of a local government contact person;

"(H) Provide notice of the decision to the applicant and any person who submits comments under subparagraph (A) of this paragraph. The notice of decision must include an explanation of appeal rights; and

"(I) Briefly summarize the local decision making process for the limited land use decision being made."

1 "The only issue on appeal is whether the act of installing an LED face on a
2 billboard converts a billboard into an 'electronic message center' as defined
3 by EC 9.0500 * * *." Record 32 (footnote omitted).

4 During the proceedings before the hearings officer, petitioner advanced an additional
5 argument, that denial of the proposed billboards under the city's code violated the Oregon
6 Constitution. The hearings officer concluded that petitioner's failure to include its
7 constitutional challenge to the city's sign code in its appeal statement barred the hearings
8 officer from considering that issue. Specifically, the hearings officer found that the planning
9 director's decision on the sign permit application was not a decision on a "permit" to which
10 ORS 227.175(10)(a) applied because it was a decision on a request for interpretation of a
11 code provision, apparently pursuant to EC 9.0040(1).[4] EC 9.0040(1) sets out a process by
12 which persons may request a code interpretation from the planning director, and provides
13 that such interpretations may be appealed to the hearings officer.

14 We disagree with the hearings officer's determination that the decision was a decision
15 on a request for interpretation of a code provision. The only applications that were filed
16 were applications for sign permits, and the planning director's decision that was before the
17 hearings officer was a decision denying those permit applications, not a decision responding
18 to a request for a code interpretation under EC 9.0040(1).

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[4] ORS 227.175(10)(a)(D) and (E) state in relevant part:

"(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the city. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.

"(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:

"* * * * *

"(ii) *The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal*[.]" (Emphasis added).

1 ORS 227.160(2) defines "permit" as the "discretionary approval of a proposed
2 development of land, under ORS 227.215 or city legislation or regulation." But not all
3 decisions that apply land use standards and involve the kind of discretion that makes them a
4 "land use decision," as defined by ORS 197.015(11), are also "permit" decisions, as ORS
5 227.160(2) defines that term. In *Tirumali v. City of Portland*, 41 Or LUBA 231, *aff'd* 180 Or
6 App 613, 45 P3d 579, *rev den* 334 Or 632 (2002) (*Tirumali II)*, we concluded that the city's
7 interpretational exercise in interpreting the phrase "finished surfaces" in connection with a
8 building permit application for a use that was unquestionably permitted in the applicable
9 zone did not involve the type of exercise of legal, factual or policy discretion that rendered it
10 a "permit" decision, as defined in ORS 227.160(2). We noted that the "discretion" the city
11 exercised was not of a kind that involved some question as to the nature of the proposed use,
12 or whether the use was permitted at all in the zone. We held:

13 "In sum, because the challenged decisions involve building permits for a use
14 allowed by right, as reflected in the city's development ordinance, and do not
15 involve the 'discretionary approval of a proposed development of land' within
16 the meaning of ORS 227.160(2), the challenged building permits are not
17 'permits' defined by ORS 227.160(2). * * *" *Tirumali II*, 41 Or LUBA at 242.

18 In contrast, in *Frymark v. Tillamook County*, 45 Or LUBA 486, 493 (2003), we held
19 that a decision approving a building permit for a sign was a statutory "permit" under
20 ORS 215.402(4), the statutory analogue to ORS 227.160(2) that applies to counties. We
21 distinguished *Tirumali II* on the basis that the decision at issue in *Frymark* necessarily
22 involved the exercise of discretion in determining the nature of the proposed sign and
23 therefore what standards applied and whether the sign was allowed at all in the applicable
24 zone.[5] We held that exercise of that kind of discretion in the context of a development

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[5] The proposed sign in *Frymark* was located on a different parcel than the RV park that the sign advertised, which arguably meant that the proposed sign was not an outright permitted use in the applicable zone, as the county's decision presumed, but rather a use that could be approved only under one or more sets of discretionary standards that the county did not apply.

1 approval constitutes the "discretionary approval of a proposed development of land," and
2 therefore qualifies as a statutory permit. *See also Hollywood Neigh. Assoc. v. City of*
3 *Portland*, 22 Or LUBA 789, 796 (1991) (order denying motion to dismiss because the
4 determination of whether a use was a "medical clinic" required exercise of factual and legal
5 judgment).

6 In the present case, the city was required to determine the nature of the proposed
7 use—whether the proposed sign is an "electronic message center" subject to one set of
8 standards, or something else subject to a different set of standards—which led to a decision
9 to deny petitioner's application for sign permits because the proposed signs did not meet the
10 maximum size requirement applied to electronic message centers. The city's decision is
11 much more like the decision at issue in *Frymark* than the decision at issue in *Tirumali II*.
12 Much like the determination at issue in *Frymark*, the decision in the present case involved a
13 discretionary determination of the nature of the proposed use and the standards under which
14 the use is allowed or denied. That determination involves the "discretionary approval of a
15 proposed development of land" within the meaning of ORS 227.160(2). The decision was
16 therefore a statutory permit decision subject to the provisions of ORS 227.175(10)(D) and
17 (E). *See* n 4. The hearings officer erred in finding that petitioner was precluded from
18 advancing its constitutional arguments.

19 This subpart of the second assignment of error is sustained.

20 **B. Second Subpart - Article I, Section 8**

21 At issue in this case is EC Section 9.6440(9), which provides:

22 "*Except electronic message centers operated as public signs by governmental*
23 *agencies*, no electronic message center, or portion of a sign used as an
24 electronic message center, shall be larger than 3 square feet in area, display a

message containing more than 5 characters, or change the displayed message at intervals of less than once every 3 seconds.* * *."[6] (Emphasis added.)

Petitioner argues that the city's exemption of EMCs "operated as public signs by governmental agencies" (hereafter Public EMCs) from size limitations, limitations on the number of the EMC's characters, and limitations on the frequency of the displayed message applicable to all other EMCs (Private EMCs) violates Article I, Section 8 of the Oregon Constitution.

Article I, Section 8 of the Oregon Constitution provides in relevant part:

> "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 * * *."

Petitioner argues that by excluding Public EMCs from the standards applicable to Private EMCs, the city has provided the operators of those signs with a more prominent means of displaying their messages and an avenue of communication that is not uniformly available to all speakers. The city responds that the exemption freeing Public EMCs from the size and other limitations set forth in EC Section 9.6440(9) is not related to the content, or subject matter, of the EMCs and is therefore a reasonable, content neutral restriction on speech.

1. Background

Our analysis of this constitutional issue is guided by the Oregon Supreme Court's recent decision in *Outdoor Media Dimensions v. Department of Transportation*, 340 Or 275, 132 P3d 5 (2006). *Outdoor Media* reaffirmed that constitutional claims under Article I,

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[6] EC Section 9.6610 exempts "public signs" (as described therein and below) from certain sign standards set forth in EC Sections 9.6600 through 9.6680 and from the requirement of obtaining a permit, as follows:

> "Public signs. 1) Signs constructed or placed in a public right-of-way by or with the approval of a government agency having legal control or ownership over the right-of-way; 2) Signs owned or constructed under the direction or authorization of the city, including, but not limited to, signs installed within parks and at natural resource areas within the NR Natural Resource Zone and PRO Parks, Recreation and Open Space Zone to account for entrances, trail signs, and markers; and 3) Signs placed by a public utility for the purpose of providing information concerning a pole, line, pipe or other facility belonging to a public utility."

Section 8 are evaluated using the framework established in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982). As the court explained in *Outdoor Media*, the *Robertson* framework distinguishes between laws that focus on the content of speech, which generally violate Article I, Section 8 unless such laws fit within a well-established historical exception, and laws that focus on the forbidden results of speech. Within that second category are two subcategories: laws that prohibit expression used to achieve the prohibited effects, and laws that focus on the forbidden effects, without referring to expression at all. *Outdoor Media*, 340 Or at 288 (discussing *Robertson* categories). Content neutral time, place and manner restrictions fall within the first subcategory under the second *Robertson* category, laws that focus on forbidden effects, but regulate speech.

Thus, the threshold issue for us to determine under *Robertson* is whether EC 9.6440(9) is focused on the content of speech. If it is, the city does not argue that EC 9.6440(9) falls within a "well-established historical exception," and it therefore violates Article I, Section 8. If the answer to that question is no, then the question becomes whether the regulation is a reasonable time, place and manner restriction on speech.

EC 9.6440(9) includes two distinct elements for purposes of analysis under Article I, Section 8. The first is a *prohibition* on electronic message centers that are "larger than 3 square feet in area, display a message containing more than 5 characters, or change the displayed message at intervals of less than once every 3 seconds." Petitioner does not argue that that prohibition is itself a content based restriction on speech.

The second pertinent element of EC 9.6440(9) is an *exemption* from that prohibition, for "electronic message centers operated as public signs by governmental agencies." Petitioner contends that a sign regulation scheme that exempts certain speakers from applicable sign prohibitions, but does not exempt others, violates Article I, Section 8, because the scheme selectively favors some speakers, and hence their speech, over other speakers, whose speech is thereby disfavored. According to petitioner, selectively favoring

or restricting signs based on the speaker or owner of that sign is an indirect but equally impermissible means of favoring or restricting the content of speech.

The city disagrees, arguing that the content or subject of the proposed EMC is not relevant in the city's determination whether to grant a sign permit. The city points out that an applicant for a sign permit for an EMC is not asked for information concerning the content of the applicant's sign, and argues that, therefore, the regulation is content neutral.

We are not aware of any Oregon case that has directly addressed the issue of whether a regulation allowing certain *speakers* greater rights to speak, without regard to the content of the speaker's message, is a content based regulation under Article I, section 8, but several cases have analyzed speaker based distinctions under the First Amendment. In reviewing cases analyzing laws that are subject to First Amendment challenges, we are mindful of the Oregon Supreme Court's recent statement regarding reliance on cases concerning First Amendment challenges in analyzing claims under Article I, Section 8:

> "We also find unpersuasive the state's arguments that are based on cases from other jurisdictions. * * * Whatever the merits of those conclusions as matters of appropriate policy towards expression or as interpretations of the First Amendment, however, they offer little guidance in interpreting the Oregon Constitution. The words of Article I, Section 8, and this court's consistent interpretation of those words expressly forbid the enactment of laws that restrict otherwise permissible speech because of its subject." *Outdoor Media*, 340 Or at 297-98 (citing *Bank of Oregon v. Independent News*, 298 Or 434, 439, 693 P2d 35, *cert den* 474 US 826 (1985)).

However, because Article I, Section 8 has generally been interpreted to be more protective of certain speech than the First Amendment, we think it is appropriate to consider cases interpreting the First Amendment for guidance in determining whether a law may violate Article I, Section 8 under the Oregon Supreme Court's *Robertson* analysis. If the city's scheme exempting Public EMCs from regulations that apply to Private EMCs would not pass muster under the First Amendment, it is likely that the scheme would fail to satisfy Article I, Section 8.

1 In *Turner Broadcasting Systems, Inc. v. FCC*, 512 US 622, 114 S Ct 2445, 129 L Ed
2 2d 497 (1994), the court rejected the contention that all speaker based laws should be
3 presumed to violate the First Amendment. The court found that speaker based laws should
4 be strictly scrutinized when:

5 "* * * they reflect the [g]overnment's preference for the substance of what the
6 favored speakers have to say (or aversion to what the disfavored speakers
7 have to say) * * *. Laws favoring some speakers over others demand strict
8 scrutiny when the legislature's speaker preference reflects a content
9 preference." *Id* at 658.

10 Thus, if a speaker based law also reflects a content preference, it must be strictly scrutinized
11 under the First Amendment. *See also Ward v. Rock Against Racism*, 491 US 781, 791, 109 S
12 Ct 2746, 105 L Ed 661 (1989) ("a regulation that serves purposes unrelated to the content of
13 expression is deemed content neutral, even if it has an incidental effect on some speakers or
14 messages but not others.")

15 The city relies on *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F3d 1064 (9th Cir
16 2006) in support of its assertion that the exemption for Public EMCs is content neutral. *G.K.*
17 *Ltd. Travel* also involved a challenge under the First Amendment. In *G.K. Ltd. Travel*, the
18 Ninth Circuit upheld a provision in the City of Lake Oswego's sign code exempting certain
19 signs from the requirement of obtaining a sign permit prior to constructing a sign.[7] In
20 rejecting a challenge to that exemption under the First Amendment, the court found that such
21 a provision was not content based. The court relied on *Turner* in finding that the ordinance
22 did not violate the First Amendment:

23 "The exemptions are purely speaker based * * * and say nothing of the City's
24 preference for the content of these speakers' messages, nor do they allow the
25 city to discriminate against disfavored speech." *Id*. at 1077.

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[7] The ordinance exempted "public signs, signs for hospital or emergency services, legal notices, railroad signs and danger signs," as well as temporary signs, from the permitting process. *GK Ltd.Travel*, 436 F3d at 1069 (citing Lake Oswego Code Sections 47.06.205(4) and 47.03.015). The district court found that exempting "danger signs" and "legal notices" was unconstitutional because those exemptions were not limited to a "speaker" and ordered those provisions stricken, and the city did not appeal that ruling. *Id*. at 1077.

1 Petitioner disputes that *G.K.Ltd.Travel* supports the city's position in the present case.
2 Petitioner notes that, in finding that the city's exemptions from the permit requirements did
3 not violate the First Amendment, the court specifically noted that the exempted signs
4 remained subject to the same sign standards applicable to all signs. While the ordinance at
5 issue in *G.K. Ltd. Travel* differs from the ordinance at issue in the present case in that
6 particular, petitioner does not explain why that difference affects the holding quoted above,
7 that the exemption was not content based because it did not reflect a content preference,
8 under *Turner*.
9 Petitioner relies on *Solantic, LLC v. City of Neptune Beach*, 410 F3d 1250 (11th Cir
10 2005), in support of its assertion that the EC 9.6440(9) exemption for Public EMCs is
11 inherently content based. *Solantic* involved a First Amendment challenge to a city's sign
12 code that prohibited certain types of moving signs, but exempted several categories of signs
13 from the prohibition, including signs erected by or on behalf of a government entity. The
14 court found that such a speaker based provision was no less content based than a provision
15 that selects among subjects or messages and therefore that it violated the First Amendment.
16 *Id*. at 1265. However, *Solantic* did not distinguish *Turner* or explain why the ordinance at
17 issue in *Solantic* warranted broad treatment of all speaker based distinctions under strict
18 scrutiny.
19 On balance, we think that *G.K. Ltd. Travel* is more persuasive than *Solantic*. First,
20 *G.K. Ltd. Travel* cited the holding in *Turner*, that not all speaker based prohibitions are
21 treated as content based. Under *Turner*, speaker based exemptions are only viewed as
22 content based if they are concerned with the content of the speaker's message, and
23 effectively allow the government to either favor certain speech or to discriminate against
24 disfavored speech. In the present case, the provision at issue simply exempts EMCs operated
25 as public signs by governmental agencies from the size restrictions that otherwise apply to all
26 EMCs. That exemption is focused purely on the speaker, not the content of speech, and does

not exhibit any identifiable preference for or disfavor against any particular speech content. To the extent the above First Amendment cases are any guidance in determining whether the speaker based distinction in EC 9.6640(9) runs afoul of Article I, Section 8, the answer they suggest is that EC 9.6640(9) does not focus on the content of speech, and therefore is not analyzed under the first *Robertson* category.

2. "Government Speech"

In its petition for review, petitioner responds to arguments that city staff made before the hearings officer, asserting that the exemption for "electronic message centers operated as public signs by governmental agencies" qualifies as so-called "government speech," and that regulations allowing "government speech" in circumstances where other speech or speakers are prohibited is not inconsistent with Article I, Section 8. According to petitioner, EC 9.6440(9) permits, and the city has in practice allowed, non-governmental speakers to use Public EMCs to express non-governmental, commercial speech, and this preference violates Article I, Section 8. In support of its argument, petitioner principally relies on evidence in the record showing: (i) pictures of a Public EMC located at the Lane County Fairgrounds showing the messages "baking/canning photos," "Pepsi Day," "WAMU Day," and "Sacred Heart Medical Day" (with dates following each phrase), and the message "Textiles, Wine, Beer" with a date and time following the message; (ii) pictures of a Public EMC located on the Lane County Annex building, showing the message "Fruits and Veggies;" (iii) pictures of an EMC larger than 3 square feet located near a Dairy Queen, with an unreadable message; and (iv) pictures of an EMC located at the Hult Center for the Performing Arts advertising what appear to be future performances at the center, and displaying a message saying "Jacobs Gallery." Record RE-C. Petitioner's apparent point is that the city cannot rely on any general exemption for "government speech" under Article I, Section 8, because some of the speech the city allows on some public EMCs is the speech of private parties, not any government entity.

1 We do not think that evidence demonstrates what petitioner alleges: that the city is
2 allowing private parties to display commercial speech on Public EMCs. The signs appear to
3 display the names of either private entities that are sponsors of public events taking place at
4 the location of the Public EMC, or names of entities or performers that are actually appearing
5 at the public venue, rather than the speech of private entities unrelated to the public venue at
6 which the sign appears. It is not clear to us that "government speech" that refers to private
7 parties is no longer "government speech."
8 In its response brief, the city does not explicitly rely on any exemption for
9 "government speech" to justify its differing treatment of Public EMCs, but principally
10 contends that EC 9.6440(9) does not focus on the content of speech and is a permissible time,
11 place and manner restriction under the *Robertson* second category. While the scope of
12 "government speech" and how regulations that favor governmental speech or speakers are
13 evaluated under Article I, Section 8 is not entirely clear to us, we think that petitioner's
14 arguments regarding "government speech" are essentially challenges to what it alleges is the
15 city's practice of treating one class of citizens differently than others in violation of Article I,
16 Section 20. We discuss petitioner's challenges under Article I, Section 20 below.
17 **3. Analysis**
18 In *Outdoor Media*, the Oregon Supreme Court concluded that the Oregon Motorist
19 Information Act's (OMIA's) differing treatment of on-premises and off-premises signs was
20 an impermissible content based restriction on speech because it required determination of
21 whether permits were required for signs on the basis of the sign's message. The court found
22 the section of the OMIA that exempted "on-premises signs" (as defined in the OMIA) from
23 the permit requirement violated Article I, Section 8.[8] The court described the "broad sweep"

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[8] The court's conclusion resulted from the definition of "on premises sign," which was defined to mean: "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." ORS 377.710(22).

of Article I, Section 8 and concluded that it prohibits "* * * laws that distinguish among messages because of what they say, even if some may view the basis for the distinction as benign." 340 Or at 298.

In determining under *Robertson* whether the provision was content based or content neutral, the court explained the meaning of a content neutral restriction as:

> "* * * a particular restriction on expression [that] applies to all expression, regardless of its subject or content." *Outdoor Media*, 340 Or at 287, n8.

Noting that the court has not often considered the validity of content neutral regulations, the court gave an example of the difference between a content neutral law and a law that is not content neutral:

> "For example, a law or other government action that prohibits all signs that interfere with drivers' lines of sight near an intersection is 'content neutral,' while a law that permits noncommercial (for example, political) signs but prohibits commercial signs is not content neutral." *Id.*

The court upheld certain provisions of the OMIA that regulate the location and size of outdoor advertising signs, and impose fees and permit requirements for those signs as reasonable content neutral restrictions on speech. *Id.* at 292; *see generally* ORS 377.725. The court found that because the OMIA allows as many outdoor advertising signs as existed on June 12, 1975, plus potentially thousands more on-premises signs, the statute does not * * * restrict the right to speak, write, or print freely on any subject whatsoever." *Id*. at 292.

We think that the EC provision at issue is most accurately described as content neutral, based on *Outdoor Media's* explanation of the meaning of content neutral, and examples of content neutral restrictions. The EC's prohibition is not concerned with the message being displayed on the sign. The relevant question when a party applies for a sign permit is whether or not the applicant is a government agency that will operate a public sign. This involves no analysis of what the sign's message might be.

Under the *Robertson* framework, a content neutral restraint on speech that focuses on forbidden results falls within the second *Robertson* category. Such a law is constitutional if

it is a reasonable time, place, and manner restriction that is unrelated to the substance of a particular message. *Outdoor Media*, 340 Or at 290.

Petitioner does not argue that the size and other restrictions on EMCs are in themselves unreasonable, and we think such restrictions are within the category of content neutral restrictions on speech that are permitted under the second *Robertson* test. Instead, petitioner's main problem is with the city's exemption of Public EMCs from the sign standards, and it is this exemption that petitioner asserts results in an unreasonable restriction on speech. Petitioner maintains that because the city's justifications for such restrictions are based on traffic safety concerns and aesthetics, allowing government agencies to install EMCs that are potentially unlimited in size, number, number of characters and frequency of change in message creates the same safety risk and impacts on aesthetic values as EMCs operated by private entities.

However, petitioner does not argue and cites to no evidence that the city has in fact allowed governmental agencies to install so many EMCs, or EMCs that are so large that the exemption for EMCs operated by governmental units fatally undermines the safety and aesthetics purpose of the EMC restrictions. Absent such argument and evidence, the argument that the city might *hypothetically* approve too many EMCs or EMCs that are too large is not a sufficient basis to conclude that the content neutral restrictions on Private EMCs are unreasonable time, place and manner restrictions under the second *Robertson* category.

This subpart of the second assignment of error is denied.

C. Third Subpart - Article I, Section 20

In the third subpart under its second assignment of error, petitioner argues that EC Section 9.6440(9) violates Article I, Section 20 of the Oregon Constitution because it is an

1 unlawful classification under that section.[9] Petitioner argues that the city has allowed private
2 parties to display their commercial messages on Public EMCs, while other private parties
3 seeking their own EMCs are denied the same privilege, and that this effectively allows
4 government agencies to choose the speakers entitled to preferential treatment. The city
5 responds that cities are not "citizens" for purposes of Articles I, Section 20, and that the
6 Public EMC exemption does not create distinctions between "citizens" under that provision.

7 Article I, Section 20 provides:

8 "No law shall be passed granting to any citizen or class of citizens privileges,
9 or immunities, which, upon the same terms, shall not equally belong to all
10 citizens."

11 As the Oregon Supreme Court has explained, "cities and instrumentalities of the state are not
12 'citizens' for the purposes of * * * Article I, Section 20" *Hale v. Port of Portland*, 308 Or
13 508, 524, 783 P2d 506 (1989).

14 Petitioner's argument that the EC violates Article I, Section 20 is premised on
15 petitioner's contention that the city has allowed private individuals and entities to use Public
16 EMCs to display their messages, resulting in discrimination against private speakers that do
17 not use Public EMCs. Under the second subassignment of error, we found that the evidence
18 in the record does not support petitioner's claim that the city or government agencies are
19 allowing private parties to display commercial messages. Therefore, we reject petitioner's
20 argument under this subassignment of error.

21 This subpart of the second assignment of error is denied.

22 The city's decision is affirmed.[10]

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[9] Petitioner notes that its argument is a corollary of its argument under Article I, Section 8, discussed above.

[10] Although we sustained a portion of petitioner's second assignment of error and found that petitioner had not waived its constitutional arguments, nevertheless we affirm the city's decision because we have considered those arguments and found that EC Section 9.6440(9) does not violate Article I, Section 8 or Article I, Section 20 of the Oregon Constitution.