LUBA
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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

EMPWR USA INC.,
Petitioner,

vs.

CITY OF McMINNVILLE,
Respondent.

LUBA No. 2026-038

FINAL OPINION
AND ORDER

Appeal from City of McMinnville.

Matthew P. Juhren filed the petition for review and reply brief and argued on behalf of petitioner.

Melissa M. Ryan filed the respondent's brief and argued on behalf of respondent. Also on the brief was Bateman Seidel, PC.

BASSHAM, Board Member; WILSON, Board Chair; ZAMUDIO, Board Member participated in the decision.

AFFIRMED 10/30/2026

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city council decision denying its application for an exception to a sign standard to allow installation of a 300-square-foot "electronic changeable copy" sign.

MOTION TO STRIKE REPLY BRIEF

OAR 661-010-0039 allows filing a reply brief, as long as it is "confined to responses to arguments in the respondent's brief, state agency brief, or amicus brief," and does not "include new assignments of error or advance new bases for reversal or remand." The city moves to strike the entire four-page reply brief, arguing that at Reply Brief page 1, lines 10 through 12, petitioner raises a new inadequate findings challenge, and at Reply Brief page 3, lines 3 through 6, petitioner raises a new argument for reversal or remand involving one of the sign code exception criteria.

In a 10-page response to the motion to strike, petitioner argues that even if the seven disputed lines raise new assignments of error or new bases for reversal or remand, the remedy is for LUBA to ignore those seven lines of text, not strike the entire four-page reply brief. We agree with petitioner on that point. Petitioner also disputes the merits of the motion, arguing that the seven lines of text respond, in nearly the same terms, to arguments made in the city's brief, and do not expand on arguments raised in the petition for review, much less advance new assignments of error or new bases for reversal or remand.

The seven lines of text all involve issues that, as it turns out, play no role in our analysis or disposition of petitioner's four assignments of error. Accordingly, we see no point in setting out in detail the parties' dispute over whether those seven lines raise new assignments of error or new bases for reversal or remand (as the city argues), or whether they simply respond non-expansively to arguments in the respondent's brief (as petitioner argues). As movant, the city bears the burden of persuasion, and we are not persuaded that in the seven lines of text petitioner stated new assignments of error or bases for reversal or remand, or impermissibly expanded on arguments in the petition for review.

The motion to strike is denied.

FACTS

The subject property is a 7.23-acre parcel zoned General Industrial (M-2), and located between Booth Bend Road, a major collector, and State Highway 18, a regional high-speed arterial. The property is developed with petitioner's existing industrial building, which is approximately 200 feet long and 30 feet high along its south frontage facing the highway. The building is set 200 feet back from the highway. The south face of the building has an existing permanent signage identifying petitioner's business, EMPWR.

McMinnville Municipal Code (MMC) 17.62 governs signs in the city. MMC 17.62.070(C)(2) regulates "mounted signs" in the M-2 zone states that there is "no limit on the area of permanent mounted signs except as provided in

[MMC 17.62.070(D)]." In turn, MMC 17.62.070 imposes no size restriction on such signs, except that "[m]aximum square footage restrictions include changeable copy." MMC 17.62.070(D)(3). MMC 17.62.070(E) regulates "electronic changeable copy" signs. MCC 17.06.040 defines a "Changeable Copy Sign (Electronic)" as a "sign on which the copy changes electronically." Among other regulations, MMC 17.62.070(E) limits an electronic changeable copy sign to 24 square feet in area, and requires that such signs are only allowed "as part of a permanent freestanding or wall sign." MMC 17.62.070(E)(1), (3).

MMC 17.62.120 sets out standards for granting an exception to sign standards, essentially a form of variance, upon a showing that due to "special and unique circumstances related to a specific piece of property," strict application of the sign standards would cause an undue or unnecessary hardship. MMC 17.62.120(A). However, MMC 17.62.120(A) prohibits granting an exception to a sign standard for any type of signage that is prohibited by MMC 17.62.050. That code provision prohibits "video signs." MMC 17.62.050(G). MMC 17.06.040 defines "video sign" as:

> "An electronic changeable copy sign providing information in both a horizontal and vertical format (as opposed to linear), and having the capacity to create continuously changing sign copy in a wide spectrum of colors, shades, and light intensities."

A primary issue in this appeal is whether the electronic changeable copy sign proposed by petitioner is a prohibited "video sign."

Petitioner applied for an exception for a 10-foot by 30-foot, 300-square-foot electronic changeable copy sign that has both a horizontal and vertical format, and the technical ability to create continuously changing sign copy in a wide spectrum of colors, shades, and light intensities. However, petitioner argued to the city that the proposed sign was not a "video sign" as defined at MMC 17.06.040, because petitioner proposed a condition of approval that would, via programming, limit the sign's operation to a series of static displays. If operated as proposed, the sign would display a static picture or message for a short period time, 8 to 10 seconds, then automatically replace that display with another static picture or message, *ad infinitum*.

The planning commission conducted a hearing and issued a decision denying the proposed exception on several grounds, including that the proposed sign is a prohibited video sign. The planning commission also concluded that the proposed sign is prohibited as a stand-alone sign rather than part of a permanent wall sign. Finally, the planning commission concluded that petitioner failed to demonstrate that it met the exception criteria set out MMC 17.62.120 to increase its size from 24 to 300 square feet, in part because the proposed sign is a prohibited video sign.

Petitioner appealed the planning commission denial to the city council, which adopted the planning commission's decision and findings as its own, with some modifications. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city council misconstrued the applicable law in concluding that the proposed sign is a "video sign" as defined at MMC 17.06.040, notwithstanding the proposed conditions of approval that would limit its operation to a series of static displays.

The city council adopted the planning commission findings on this point, concluding that the proposed sign has the "capacity" to create continuously changing sign copy in a wide spectrum of colors, shades, and light intensities, even if petitioner proposes to program the sign to employ only a sequence of static images.[1] Record 64. The city cited the dictionary definition of "capacity"

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[1] The city council findings on this point state:

> "FINDING: The Planning Commission finds that [petitioner's] sign is a 'Changeable Copy Sign' (Electronic) per the definition in 17.06.040. And the Planning Commission finds that [petitioner's] sign is a 'Video Sign', per the definition in 17.06.040. A video sign is also an electronic changeable copy sign that provides information in both a horizontal and vertical format (as opposed to linear) and has the capacity to create continuously changing sign copy in a wide spectrum of colors, shades, and light intensities.
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> "Per the design proof provided [by petitioner] the sign is ten feet tall and thirty feet wide, and the whole of the sign has the capacity to change sign copy in a wide spectrum of colors, shades and light intensities.
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> "The proof sheet describes the sign as an EMC. According to the International Sign Association, an EMC sign is an Electronic Message Center that is a type of digital sign that can display words,

as meaning "the ability or power to do[,]" and concluded that the proposed sign retains the capacity for continuously changing copy, even if not programmed for video-like animated images. *Id.*

On appeal, petitioner argues that the city council's interpretation of "capacity" to mean something like the technical ability to display continuously changing sign copy may be affirmable, if that term were read in isolation. But petitioner contends that that interpretation, taken to its logical conclusion, would eliminate the distinction between video signs, which are prohibited, and electronic changeable copy signs, which are allowed. We understand petitioner to argue that all electronic changeable copy signs, including those previously approved by the city, have the "capacity" of continuously changing sign copy. To avoid prohibiting all electronic signs, we understand petitioner to argue, the restriction on "capacity" and the scope of "video sign" must be understood to exclude electronic changeable copy signs that, by condition of approval, will be programmed to avoid "continuous changes" and to display only a series of static images.

> symbols, figures, or images that can be electronically changed by remote or automatic means. EMCs utilize LED displays to show dynamic content.
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> "In this definition 'capacity' is used in its plain, ordinary, and common meaning. The common meaning of capacity is 'the ability or power to do.' Choosing to limit the way a sign is operated does not limit its ability to operate as a video sign." Record 64.

Petitioner acknowledges that considerable deference is due a governing body's interpretations of its land use code. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). Under *Siporen*, LUBA must affirm a governing body's code interpretation under the standards set out in ORS 197.829(1), as long as that interpretation is "plausible," that is, not inconsistent with the express language, purpose, or policy underlying the code provision interpreted.[2] We understand petitioner to argue that the city council's interpretation of the term "capacity" is implausible, viewed in context, because it would arguably sweep all electronic changeable copy signs into the category of prohibited "video signs."

The city responds, and we agree, that the city council's interpretation of the term "capacity" as meaning the technical ability "to create continuously changing sign copy in a wide spectrum of colors, shades, and light intensities[,]"

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[2] 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 [B]oard determines that the local government's interpretation:
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> "(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; [or]
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

without regard for whether that technical ability could be constrained by programming, is consistent with the text of MMC 17.06.040, in context with the rest of the city's sign regulations, and certainly plausible. The plain meaning of the term "capacity" is the ability to do something, and nothing in the text or context of MMC 17.06.040 suggests that the sign operator's constraint in how messages are displayed reduces or eliminates that capacity. To draw from an admittedly distant analogy, an automatic rifle has the *capacity* for automatic fire, even if the operator by flicking a switch can select semi-automatic fire, and promises to fire only in semi-automatic mode.

Further, petitioner has not established that the city council's interpretation would sweep all electronic changeable copy signs into the category of prohibited video signs. A "video sign" as defined at MMC 17.06.040 is a subcategory of the broader category of electronic changeable copy sign. As defined, a video sign has three definitional elements (and one exclusion) that must all be present, in order to constitute a video sign. The sign must (1) provide information in both a horizontal and vertical format (as opposed to linear), (2) have the capacity to create continuously changing sign copy, (3) in a wide spectrum of colors, shades, and light intensities. A linear sign (whatever that is) that does not provide information in both a horizontal and vertical format is not a video sign, even if it meets the other elements of the definition. Similarly, a non-linear sign that lacks the capacity to continuously change sign copy, or that lacks the capacity to provide a spectrum of colors, shades, and light intensities, falls outside the

definition of video sign. In the respondent's brief, the city includes an image of a gas station sign advertising fuel prices in a monochromatic digital format that planning staff cited as an example of an electronic changeable copy sign that is not a video sign. Respondent's Brief 3; *see also* Record 295-96 (city presentation depicting various non-video electronic changeable copy signs). Under the city council's interpretation, the category of video signs may be expansive, but petitioner has not demonstrated that it encompasses the universe of electronic changeable copy signs.

Petitioner also notes that MMC 17.62.120(A) authorizes the city, in approving an exception to the sign code, to impose conditions of approval designed to protect surrounding property and achieve the sign code's purposes.[3] Petitioner faults the city for failing to adopt findings explaining why the city could not use that authority to accept petitioner's proposed conditions of

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[3] MMC 17.61.120(A) provides:

> "Applications for an Exception shall be heard by the planning commission, which may authorize exceptions from the requirements of this chapter where it can be shown that, owing to special and unusual circumstances related to a specific piece of property, strict application of this chapter would cause an undue or unnecessary hardship as set forth in [MMC 17.62.120(B) through (C)], except that no exception shall be granted pursuant to [MMC 17.62.120(C)] to allow a sign or a type of signage which is prohibited by MMC 17.62.050 of this chapter. In granting an exception the commission may attach conditions which it finds necessary to protect the best interests of the surrounding property or neighborhood or otherwise achieve the purposes of this chapter."

approval, which petitioner argues would ensure that the proposed sign would not operate as a "video sign." However, the city correctly responds that MMC 17.62.120(A) is permissive ("may attach conditions"), and does not require the city to accept petitioner's operational constraints, or require the city to adopt findings explaining why it chooses not to do so. Moreover, while MMC 17.62.120(A) authorizes impositions of conditions as necessary to protect the best interests of the neighborhood or to achieve the purposes of the sign code, it expressly prohibits an exception that would allow a "type of signage which is prohibited by MMC 17.62.050," which include video signs. It is doubtful that MMC 17.62.120(A) can be construed to authorize conditions that would allow a prohibited video sign, subject to conditions that affect its operation, but that do not actually remove the elements (capacity) that define that type of sign as one that is prohibited.

The first assignment of error is denied.[4]

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[4] The city argues, correctly, that LUBA may affirm a decision denying a land use application as long as there is a single valid basis for denial, and need not address other alternative or independent bases for denial stated in the decision, citing *Wilson v. Washington County*, 63 Or LUBA 314, 319 (2011); *Johns v. City of Lincoln City*, 34 Or LUBA 594, 602-603, *rev'd on other grounds*, 157 Or App 7, 967 P2d 894 (1998). However, that is a prudential doctrine of judicial economy, and we may choose to address challenges to alternative or independent grounds for denial where the application could be resubmitted with modifications that resolve the problem identified in the primary basis for denial. *Wilson*, 63 Or LUBA at 319. Doing so in the present case may aid the parties in addressing such a modified application, if one is submitted. Accordingly, we shall address petitioner's challenges to the city's other bases for denial.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city council misconstrued MMC 17.62.070(E)(1), which requires in relevant part that an electronic changeable copy sign is only allowed "as part of a permanent freestanding or wall sign."

Petitioner initially proposed a stand-alone sign, located on the same south wall as the existing permanent sign, but separated from it by some distance and a loading door. Record 58. The planning commission denied the application in part for noncompliance with MMC 17.62.070(E)(1), finding:

> "[Petitioner's] sign is a standalone electronic changeable copy sign. The sign is not part of a greater wall sign. [Petitioner] did not request an exception to this provision of the sign code." Record 396.

> "Per 17.62.070[E](1), the Planning Commission finds that Electronic Changeable Copy Signs shall only be allowed as part of a permanent freestanding or wall sign. * * * The Planning Commission finds that per [petitioner's] application * * * that the electronic changeable copy sign is not part of a permanent freestanding or wall sign, and is proposed as a standalone sign. Since [petitioner] did not apply for an exception to this portion of the sign code, the Planning Commission finds that the application is not compliant with the [MMC]." Record 400.

The city council adopted those findings as its own. Record 61, 66.

Petitioner argues that on appeal to the city council, petitioner proposed a condition of approval that would require petitioner to submit "[f]inal sign-permit drawings [that] shall confirm installation as part of a permanent wall sign or framed building-mounted presentation integrated with the building façade." Record 338. Petitioner also submitted alternative designs apparently intended to

show how the proposed sign could be integrated into the existing façade. Record 341-44.

On appeal to LUBA, petitioner argues that the city council erred in simply readopting the planning commission findings without evaluating the new designs or the proposed new condition of approval that petitioner submitted into the record. Petitioner also argues that the findings do not explain the basis for concluding that a free-standing sign as originally proposed would require a new exception under MMC 17.62.120.

The city responds, and we agree, that petitioner identifies no misconstruction of law in the city's findings. The city council's conclusion that a free-standing sign would require an exception to the sign code standards is more than plausible. Nothing cited to us in the city code or elsewhere obligates the city council to adopt findings addressing the new designs for framing around the sign or integration into the building façade, or the new condition of approval, that were submitted as part of petitioner's legal brief in support of its appeal to the city council.[5] Petitioner did not submit a modified application or otherwise formally place any alternative designs before the planning commission or city council in a manner that would compel the decision makers to base their decisions on such

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[5] We note that petitioner's legal brief argued that the proposed sign need *not* be part of the existing permanent signage. Record 333. Consistent with that argument, the alternate designs submitted do not, as far as we can tell, actually depict a proposed sign that is integrated into or a part of the existing signage. Record 341-44.

designs, rather than the free-standing design submitted as part of the original application.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city council erred in concluding that petitioner failed to satisfy the criteria at MMC 17.62.120(B) or (C) for an exception to the sign code standards, to expand the sign from 24 feet to 300 feet, and to allow a prohibited video sign.[6]

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[6] MMC 17.62.120 provides, in relevant part:

"B. An exception may be granted if the property owner established that:

"1. An exception is necessary to prevent an unnecessary hardship due to factors such as topography, location, surrounding development, lot shape or lot size; and

"2. The granting of the exception will not result in material damage or prejudice to other property in the vicinity; and

"3. The request will not be detrimental to community standards and the appearance of the city.

"C. An exception may be granted if the property owner establishes that the strict enforcement of the ordinance will either:

"1. Deny the owner of all economically viable use of the property on which the sign is located; or

The city council adopted the planning commission's findings, which address the exception criteria in both MMC 17.62.120(B) and (C) and find that those criteria are not satisfied. As explained in MMC 17.62.120(A), quoted above at n 3, the criteria at MMC 17.62.120(B) or (C) apply, as the applicant chooses, to exceptions for a type of sign that is allowed under the code. However, for a type of sign that is prohibited in the code, MMC 17.62.120(C) supplies the exclusive criteria for an exception. *See* Record 60 (staff prepared chart describing how MMC 17.62.120(A), (B), and (C) are structured).

Petitioner first challenges the city council findings that the exception criteria at MMC 17.62.120(B) are not met, on the assumption that petitioner's first assignment of error is sustained. However, we have denied the first assignment of error, and affirmed the city's interpretations and findings that the proposed sign is properly categorized as a prohibited video sign. Accordingly, the exception criteria at MMC 17.62.120(B) are inapplicable, and MMC 17.62.120(C) supplies the only applicable exception criteria. Accordingly, we address here only petitioner's challenges to the findings addressing MMC 17.62.120(C). As we understand how the city applied MMC 17.62.120(C) in the present case, an exception is required both (1) to expand the sign from 24 feet to 300 feet and (2) to allow a prohibited video sign.

"2. Substantially interfere with the owner's use and enjoyment of the property on which the sign is located."

MMC 17.62.120(C) allows an exception under two alternative standards, the "economically viable use" standard (subsection (C)(1)), and the "substantial interference" standard (subsection (C)(2)). Petitioner clarified before the planning commission that it sought an exception only under subsection (C)(2), which allows an exception where strict enforcement of the ordinance would "[s]ubstantially interfere with the owner's use and enjoyment of the property on which the sign is located[.]" Nonetheless, the planning commission findings adopted by the city council address both the subsection (C)(1) and (C)(2) standards:

> "The Planning Commission finds that [petitioner] has not submitted evidence to demonstrate an 'unnecessary hardship' would result from requiring [petitioner] to install a sign that meets the city's sign standards. [Petitioner] has assumed the right to utilize an electronic changeable copy (video) sign and then claims it is a hardship that it cannot convey a 300 square foot message in that location due to its proximity to Highway 18 and the speed of the vehicles on that expressway. Why does [petitioner] need a prohibited, exceedingly large video sign on the back of their building at their manufacturing facility? [Petitioner] has the same opportunity as any other private market distributor to take advantage of other advertising available to them in the form of approved billboard locations on Highway 18. Such a hardship is a perspective of entitlement and is not owing to special and unusual circumstances related to a specific piece of property.
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> "The Planning Commission finds that the enforcement of the prohibited signs and of the limitations imposed on electronic copy signs does not deny the owner of all economically viable use of the property, or substantially interfere with the owner's use and enjoyment of the property. The property is zoned industrial, and [petitioner] is operating a manufacturing facility on the property.

> [Petitioner] previously applied for and obtained permits for multiple signs that have been installed, including wall signs on the south and west sides facing Highway 18. [Petitioner] has been able to install code-compliant signage that identifies the business and provides wayfinding opportunities for its suppliers, vendors, and employees.
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> "The sign code was in place when the owner constructed the building and when the owner installed the signage already in place. Strict enforcement of the existing sign code does not require that signage be completely removed from the property, nor does it limit the size of the signage. It only limits the type of sign. The prohibited signs and limitations on electronic copy signs also do not result in the property becoming completely economically unviable, as the existing building and use are allowed to continue to operate as they do today." Record 70-71.

On appeal, petitioner argues that the city erred in addressing the "unnecessary hardship" standard from subsection (B)(1), as well as the "economically viable use" standard in subsection (C)(1), rather than focusing exclusively on the "substantial interference" standard in subsection (C)(2). We understand petitioner to argue that the findings impermissibly conflate multiple exception standards and fail to explain the conclusion that strict enforcement of the sign code would not "[s]ubstantially interfere with the owner's use and enjoyment of the property on which the sign is located[.]" MMC 17.62.120(C)(2).

The city responds that MMC 17.62.120(A) states that the sign code allows exceptions where "strict application of this chapter would cause an undue or unnecessary hardship as set forth in" MMC 17.62.120(B) and (C). *See* 10 n 3. We agree with the city that, by virtue of MMC 17.62.120(A), "unnecessary

hardship" is also a consideration in applying the MMC 17.62.120(C) exception criteria. The city did not err in addressing "unnecessary hardship" as part of its findings under subsection (C)(2).

The findings addressing the "economically viable use" standard in subsection (C)(1) appear to be surplusage. Petitioner has not established that by addressing both subsection (C) standards the city conflated the two standards, or otherwise failed to adequately address the "substantially interfere" criterion in subsection (C)(2).

Finally, petitioner argues that the findings addressing whether strict enforcement of the sign code (*i.e.*, limiting electronic changeable copy signs to 24 square feet and continuing to prohibit video signs on the property) would substantially interfere with petitioner's use and enjoyment of the property impermissibly rely on the fact that the sign code allows other types of code-compliant signs on the subject property, without size limits, as well as opportunities for off-site billboards along Highway 18. Petitioner contends the potential for off-site billboards and code compliant signs on the property cannot mitigate the interference with petitioner's use and enjoyment of the property caused by the absence of a large video sign allowing petitioner to display electronic messages visible to persons travelling on the highway, as well as to employees and customers on its property.

However, petitioner's arguments on this point fall far short of establishing that the city misconstrued subsection (C)(2), or failed to adopt adequate findings,

supported by substantial evidence, explaining its conclusion that continuing to limit signs on the property to code-compliant signs would not substantially interfere with petitioner's use and enjoyment of the property. As explained, "unnecessary hardship" is a consideration in applying the "substantially interfere" test under subsection (C)(2). As the findings explain, petitioner has not demonstrated that the inability to display 300-square-foot video images and messages to travelers on Highway 18 is a "hardship." Nor did petitioner establish that having to rely on code-compliant signage to communicate with its customers and employees on the subject property is an "unnecessary hardship."

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues that the city council's findings are inadequate for failing to discuss and address all the evidence petitioner submitted regarding "framed wall-sign integration, static configuration, conditions of approval, scale, and the exception criteria." Petition for Review 15.

The city responds, and we agree, that petitioner cites no authority that requires the city to adopt findings discussing all the evidence petitioner submitted. Generally, a local government is not obligated to identify or discuss in its findings evidence it does not rely upon to reach its decision. *Evans v. City of Bandon*, 74 Or LUBA 418, 425 (2016); *Melton v. City of Cottage Grove*, 28 Or LUBA 1, 20, *aff'd*, 131 Or App 626, 887 P2d 359 (1994); *Angel v. City of Portland*, 22 Or LUBA 649, 656-57, *aff'd*, 113 Or App 169, 831 P2d 77 (1992).

In any case, we have rejected in the first three assignments of error petitioner's interpretative, adequacy, and evidentiary challenges to the city's findings, regarding the criteria that bear on the issues of "framed wall-sign integration, static configuration, conditions of approval, scale, and the exception criteria." Petition for Review 15. Petitioner's adequate findings challenge under this fourth assignment of error duplicate the resolved arguments under the first three assignments of error, and accordingly do not provide a basis for reversal or remand.

The fourth assignment of error is denied.

The city's decision is affirmed.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2026-038 on October 30, 2026, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 30th day of October, 2026.

Erin Pence
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