

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

3  
4                                   LAMAR OUTDOOR ADVERTISING CO.,  
5   *Petitioner,*

6  
7   vs.

8  
9                                   CITY OF TIGARD,  
10   *Respondent.*

11  
12                                   LUBA No. 2013-085/090

13                                   ORDER

14   **THE CHALLENGED DECISIONS**

15           The challenged decisions are two decisions by the city revoking two  
16 previously issued permits that authorized petitioner to replace the displays (or  
17 “faces”) of two of petitioner’s existing signs. On April 16, 2013, an associate  
18 planner for the city issued a sign permit to petitioner to replace an existing  
19 fourteen foot by forty-eight foot (672 square feet) sign face located at 10185  
20 S.W. Cascade Avenue (Cascade Sign) with a light emitting diode (LED)-faced  
21 sign. The Cascade Sign is located on property zoned Mixed Use Commercial  
22 (MUC). On April 30, 2013, the same associate planner for the city issued a  
23 sign permit to petitioner to replace another sign face located at 16358 S.W. 72<sup>nd</sup>  
24 Street (72<sup>nd</sup> Street Sign) with an identically-sized LED-faced sign. The 72<sup>nd</sup>  
25 Street Sign is located on property zoned Light Industrial (I-L).

26           On August 19, 2013, a different associate planner than the planner who  
27 issued the sign permits sent an email to petitioner’s representative stating that  
28 “the City finds it necessary to revoke” the previously issued permit for the 72<sup>nd</sup>  
29 Street Sign. Record 14. That August 19, 2013 email takes the position that the

1 city's approval of the 72<sup>nd</sup> Street Sign permit "is not consistent with the  
2 provisions of the Tigard Development Code," but does not include any detailed  
3 explanation for the city's reasons for revoking the previously issued 72<sup>nd</sup> Street  
4 Sign permit. On August 28, 2013, the city's assistant community development  
5 director sent a letter to petitioner's attorney that states that the previously-  
6 issued sign permit for the Cascade Sign is "hereby rescinded \* \* \*." Record 1.  
7 The August 28, 2013 letter takes the position that various provisions of the  
8 Tigard Development Code (TDC) do not allow the sign to be approved. On  
9 September 9, 2013, petitioner appealed the associate planner's decision to  
10 revoke the 72<sup>nd</sup> Street Sign permit and on September 18, 2013, petitioner  
11 appealed the community development director's decision to rescind the  
12 Cascade Sign permit.<sup>1</sup> Those appeals were consolidated for LUBA review.

### 13 **JURISDICTION**

14 As relevant here, LUBA's jurisdiction is limited to "land use decisions"  
15 as defined at ORS 197.015(10)(a), which includes a local government decision  
16 that concerns the application of a land use regulation. TDC's sign regulations  
17 are found at TDC 18.780, and several provisions of TDC 18.780 are at issue in

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<sup>1</sup> Petitioner also appealed the city's revocation of a sign permit, building permit and electrical permit for replacement of a third sign face (the Sandburg Sign) in LUBA No. 2013-089, and appealed the city's revocation of previously issued building and electrical permits for the Cascade Sign and the 72<sup>nd</sup> Street Sign. Petitioner later withdrew its appeal of the revocation of all of the permits related to the Sandburg Sign and its appeals of the revocation of the building and electrical permits for the Cascade Sign and the 72<sup>nd</sup> Street Sign. Accordingly, we issue this date a final opinion and order dismissing LUBA No. 2013-089. The appeals that remain are LUBA Nos. 2013-085 and 2013-090.

1 this appeal. TDC 18.780 is a “land use regulation.”<sup>2</sup> In its August 19, 2013  
2 decision revoking the previously issued 72<sup>nd</sup> Street Sign permit, the city did not  
3 cite any provisions of the TDC or provide any explanation for its decision to  
4 revoke the permit. However, as described above, in its August 28, 2013  
5 decision rescinding the previously issued Cascade Sign permit, the city applied  
6 several provisions of the TDC that are “land use regulation[s].” We assume for  
7 purposes of this order that the city applied the same TDC provisions in its  
8 earlier decision to revoke the 72<sup>nd</sup> Street Sign permit that are referred to in its  
9 decision to revoke the Cascade Sign permit.

10 In issuing the decisions, the city first concluded that the proposed LED-  
11 faced signs are not permitted in the zones in which they are proposed, citing  
12 TDC 18.780.090.D.1.a. We set out TDC 18.780.090.D.1 below.

13 The city next concluded that the proposed signs are “billboards” as  
14 defined in TDC 18.780.015.A.8, and under TDC 18.780.070.M, “[b]illboards  
15 are prohibited.”<sup>3</sup> Finally, the city concluded that TDC 18.780.110.4 prohibits  
16 the proposed signs because they are “nonconforming signs” as described in

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<sup>2</sup> ORS 197.015(11) provides that “[l]and use regulation” means “any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.”

<sup>3</sup> TDC 18.780.015.A.8 defines “[b]illboard” as “a freestanding sign in excess of the maximum size allowed, with adjustments, in the locations where it is located or proposed to be located. Billboards are prohibited by Tigard Municipal Code Section 18.780.070.M, Certain Signs Prohibited.”

“Freestanding sign” is defined in TDC 18.780.015.A.23 as “a sign erected and mounted on a freestanding frame, mast or pole and not attached to any building.”

1 TDC 18.780.110.1 through .3 that petitioner did not propose to be brought into  
2 compliance with the height and size restrictions of the sign code.

3 The city moves to dismiss the appeals. The city argues that the decisions  
4 fall within the exception at ORS 197.015(10)(b)(A), which excludes from the  
5 definition a decision of a local government that “is made under land use  
6 standards that do not require interpretation or the exercise of policy or legal  
7 judgment.” According to the city, TDC 18.780.090.d.1.a, TDC 18.780.070.M,  
8 and TDC 18.780.110.4 do not require any interpretation.

9 **1. TDC 18.780.090 “Special Condition Signs”**

10 TDC 18.780.090 provides in relevant part:

11 **“Special Condition Signs**

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

16 “ \* \* \* \* \*

17 **“D. Electronic message centers.**

18 “1. Electronic message center (variable message) sign  
19 regulations shall be as follows:

20 “a. Electronic message center signs shall be permitted  
21 only in the C-G and MU-CBD zones, and at schools  
22 that front an arterial street where the sign is not less  
23 than 200 feet from an abutting residential use and is  
24 oriented to the arterial street;

25 “b. The maximum height and area of an electronic  
26 message center sign shall be that which is stipulated  
27 in Section 18.780.130;

1           “c. An electronic message center shall be allowed to  
2           substitute for one freestanding sign or one wall sign;

3           “d. One electronic message center sign, either  
4           freestanding or wall-mounted, shall be allowed per  
5           premises;

6           “e. With regard to light patterns:

7                   “(1) Traveling light patterns (‘chaser effect’) shall  
8                   be prohibited;

9                   “(2) Messages and animation shall be displayed at  
10                  intervals of greater than two seconds in  
11                  duration.” (underlining in original).

12 The city argues that the signs are “electronic message centers” (EMCs) and  
13 TDC 18.790.090.D.1.a allows EMCs only in the General Commercial (C-G)  
14 and Mixed-Use Central Business District (MU-CBD) zones, and not in the  
15 MUC or the I-L zones, the zones where they are proposed to be located.<sup>4</sup>

16           Petitioner does not dispute that the two new signs constitute EMCs, but  
17 argues that another section of the TDC in fact authorizes the two disputed  
18 signs. Petitioner argues that the two original signs were “freestanding signs” as  
19 defined at TDC 18.780.015.A.23. *See* n 3. According to petitioner, TDC  
20 18.780.090.D.1.c allows an EMC to “substitute for” a “freestanding sign.”  
21 Petitioner argues that because different subsections of TDC 18.780.090.D.1 can

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<sup>4</sup> TDC does not include a definition of “electronic message center,” but TDC 18.780.015.A.18 defines “[e]lectronic information sign” to mean “signs, displays, devices or portions thereof with lighted messages that change at intermittent intervals, each lasting more than two seconds, by electronic process or remote control. Electronic information signs are not identified as rotating, revolving or moving signs. *Also known as an automatic changeable copy sign or electronic variable message center.*” (emphasis added.)

1 be interpreted to either prohibit or expressly authorize the proposed signs, for  
2 purposes of ORS 197.015(10)(b)(A), it is a land use standard that “requires  
3 interpretation.” *See Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d  
4 761 (2000) (addressing ORS 197.015(10)(b)(B), the similar exclusion for  
5 building permits approved or denied under clear and objective land use  
6 standards).

7 Petitioner also argues that even the specific provision that the city relied  
8 on, TDC 18.780.090.D.1.a, can plausibly be interpreted in more than one way.  
9 As petitioner explains it, the city implicitly interpreted TDC 18.780.090.D.1.a  
10 to allow the substitution of an EMC for a freestanding sign (as allowed in  
11 subsection (c)) *only* in the C-G and MU-CBD zone. Petitioner reads TDC  
12 18.780.090.D.1.a more broadly to allow an EMC to substitute for a  
13 freestanding sign in any zone. Petitioner contends that both interpretations are  
14 “plausible,” and thus the city’s decision applied standards that required  
15 interpretation, and does not fall within the exception at ORS  
16 197.015(10)(b)(A).

17 Petitioner also responds that interpretation of other parts of the TDC is  
18 required to conclude that the proposed signs are prohibited and for that reason,  
19 the decisions are not exempt under ORS 197.015(10)(b)(A). According to  
20 petitioner, the city’s decision to apply TDC 18.780.070.M’s prohibition on  
21 “billboards” to prohibit the proposed signs and not to apply TDC  
22 18.780.090.D.1.c to allow the proposed signs to “substitute” for the existing  
23 freestanding signs required the city to interpret the TDC and choose between  
24 two potentially applicable ordinances. *See St. John v. Yachats Planning*  
25 *Commission*, 138 Or App 43, 47, 906 P3d 304 (1995) (city’s determination of  
26 which ordinance applied to proposed development requires interpretation and

1 exercise of legal judgment, is not determinable under clear and objective  
2 standards and is thus a land use decision subject to LUBA's exclusive  
3 jurisdiction.)

4 We agree with petitioner's arguments set out above that any conclusion  
5 that TDC 18.780.090.D.1.a and TDC 18.780.090.M prohibit the proposed signs  
6 and that the proposed signs are not allowed under TDC 18.780.090.D.1.c, a  
7 provision not referenced in the city's decisions, requires interpretation of those  
8 provisions. The circumstances in which TDC 18.780.090.D.1.c could allow  
9 substitution of an EMC for a freestanding sign are not clear and determining  
10 whether that subsection of TDC 18.780.090.D.1, separately or in conjunction  
11 with other provisions of the TDC, allows substitution of an EMC for an  
12 existing freestanding sign requires interpretation. Therefore, the city's decision  
13 does not qualify for the exclusion at ORS 197.015(10)(b)(A).

## 14 **2. TDC 18.780.110 Nonconforming Signs**

15 TDC 18.780.110 provides that for non-conforming signs described in  
16 that section "[a]ny sign which is structurally altered, relocated or replaced shall  
17 immediately be brought into compliance with all of the provisions of this  
18 chapter[.]" The city argues that TDC 18.780.110.4 unambiguously prohibits  
19 petitioner's new signs because the original signs are nonconforming signs as  
20 described in TDC 18.780.110.1 – .3 that petitioner sought to replace without  
21 proposing to comply with the height and size restrictions for replacement signs.  
22 Petitioner argues that TDC 18.780.110.4 is ambiguous because the word  
23 "replace" is not defined in the TDC, and some of the dictionary definitions for  
24 "replace" suggest that petitioner is not seeking to "replace" its existing signs  
25 within the meaning of TDC 18.780.110.4. Petitioner's Response to Motion to  
26 Dismiss 12.

1           Because we conclude above that the city’s application of TDC  
2 18.780.090.D.1 and TDC 18.780.070.M requires interpretation, for purposes of  
3 the city’s motion to dismiss, we need not consider the parties’ arguments about  
4 TDC 18.780.110.4.

5           The city’s motion to dismiss is denied.<sup>5</sup>

6           **BRIEFING SCHEDULE**

7           The city previously transmitted the record in these appeals, and the next  
8 event in these appeals is briefing. By stipulated motion, the parties previously  
9 established a briefing schedule. The petition for review shall be due not later  
10 than March 12, 2014. The response brief shall be due not later than April 9,  
11 2014. The Board’s final opinion and order shall be due not later than May 28,  
12 2014.

13           Dated this 12<sup>th</sup> day of February, 2014.

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21           Melissa M. Ryan  
              Board Member

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<sup>5</sup> Petitioner previously filed a conditional motion to transfer the appeals to circuit court. Our denial of the city’s motion to dismiss makes it unnecessary to address petitioner’s conditional motion to transfer.