

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

Nov 30 3 39 PM '84

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

ACKERLEY COMMUNICATIONS, INC., )  
a Washington corporation, )  
Petitioner, )  
vs. )  
MULTNOMAH COUNTY, a Home Rule )  
Political Subdivision of the )  
State of Oregon, )  
Respondent. )

LUBA Nos. 83-028  
83-034  
83-051

FINAL OPINION  
AND ORDER

Appeal from Multnomah County.

Donald Joe Willis, Portland, filed the Petition for Review and argued the cause on behalf of Petitioner. With him on the brief were Schwabe, Williamson, Wyatt, Moore and Roberts.

John B. Leahy, Portland, filed the response brief and Peter Kasting, Portland, argued the cause on behalf of Respondent.

BAGG, Chief Referee; DuBAY, Referee; participated in this decision.

AFFIRMED

11/30/84

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals Multnomah County Ordinance 365, as  
4 amended by Ordinances 369 and 376. Ordinance 365 regulates  
5 outdoor advertising (billboards) in Multnomah County.  
6 Ordinances 369 and 376 are amendatory ordinances which control  
7 billboard registration, fees and exemptions for non-commercial  
8 billboards.<sup>1</sup>

9 FACTS

10 Prior to enactment of Ordinance 365, Multnomah County  
11 sought to control billboards under Ordinance 98. The ordinance  
12 was declared invalid by the United States District Court in  
13 August, 1982. On February 1, 1983, the county adopted  
14 Ordinance 365, the ordinance on review, in a further attempt to  
15 control billboards and to avoid the legal difficulties  
16 encountered with Ordinance 98. Ordinance 365 permits  
17 off-premise advertising signs in 12 commercial and industrial  
18 districts.<sup>2</sup> This permission, however, includes controls on  
19 setbacks, visibility, sign area, height and illumination.  
20 Off-premise advertising signs are disallowed in the remaining  
21 districts within Multnomah County, in any land approved for any  
22 community service use,<sup>3</sup> in an area known as the "Columbia  
23 Community" and within 500 feet of any freeway. Billboards not  
24 meeting ordinance standards must be relocated or altered to  
25 conform. Billboard owners must phase out non-conforming signs  
26 over a four year period, but extensions of this deadline are

1 possible by application to the county planning commission. The  
2 ordinance provides fees to cover administrative costs.<sup>4</sup>

3 The ordinance exempts non-commercial billboards from any  
4 regulation whatever.<sup>5</sup> The ordinance provides:

5 "Nothing in MCC .8605 through .8645 [billboard zoning  
6 provisions] or any other provision of MCC 11.15 [the  
7 county zoning code] shall restrict non-commercial  
8 outdoor advertising such as signs displaying  
9 political, educational, philosophical, social or  
public service messages. The ordinance shall be  
liberally interpreted to permit this form of  
communciation." Ordinance 365, as amended by  
Ordinance 376; MCC 11.15.8639(A).

10 FIRST ASSIGNMENT OF ERROR

11 "The Ordinance is invalid because it fails to comply  
12 with both Multnomah County's acknowledged  
13 comprehensive land use plan and Oregon's statewide  
14 planning goals."

15 Petitioner states the ordinance is not authorized by any  
16 policy or guideline in the Multnomah County Comprehensive  
17 Plan. Petitioner argues that because Ordinance 365 does not  
18 implement a plan policy, it is outside of the purview of a  
19 permissible zoning regulation.

20 We disagree. Petitioner cites us to no requirement that a  
21 zoning regulation be based on some specific policy in a  
22 comprehensive plan.<sup>6</sup>

23 Note: The following discussion about Goal 9 was issued in  
24 a proposed opinion on November 1, 1983. Because the petition  
25 for review in this case was filed on August 22, 1983, the  
26 review was conducted under the provisions of 1979 Or Laws, ch  
772, as amended by 1981 Or Laws, ch 748. Changes to ORS Ch 197

1 made in 1983 render the analysis inapplicable to any petition  
2 for review filed after October 1, 1983. See ORS 197.835.

3 Included in petitioner's first assignment of error is a  
4 claim the ordinance violates statewide planning Goal 9.  
5 Petitioner points to the Multnomah County land use plan and  
6 states the plan includes a policy requiring it to be consistent  
7 with statewide planning goals. Multnomah County Comprehensive  
8 Plan, §1A, pages 2 and 3 (July 1980). Petitioner then argues  
9 statewide planning Goal 9 requires policies in the  
10 comprehensive plan to emphasize expansion and increased  
11 productivity from existing industries and firms. Petitioner  
12 claims to be an existing industry and firm, and the effect of  
13 the ordinance is to impose a ban on construction or maintenance  
14 of one kind of structure (billboards) from an entire  
15 community. Petitioner says this ban violates the goal.

16 LCDC has acknowledged the Multnomah County Comprehensive  
17 Plan and implementing ordinances as being in compliance with  
18 statewide planning goals. The effect of this acknowledgment is  
19 to remove any allegation of violation of statewide planning  
20 goals from this Board's consideration. Appeal of an amendment  
21 to an acknowledged comprehensive plan or land use regulation,  
22 or appeal of a new land use regulation is conducted under the  
23 provisions of ORS 197.610 to 197.630. The Board has no power  
24 to review this decision for compliance with statewide planning  
25 goals. The Board therefore dismisses petitioner's claim the  
26 ordinance violates LCDC Goal 9.

1 The first assignment of error is denied.

2 SECOND ASSIGNMENT OF ERROR

3 "The Ordinance is invalid because it was adopted in  
4 contravention of the Multnomah County rules that  
govern the adoption of emergency ordinances."

5 Petitioner reminds us we are required to reverse and remand  
6 a land use decision if we find the local government failed to  
7 follow the applicable procedure in a manner which prejudices  
8 the substantial rights of the petitioner. ORS 197.835(8)(a)(B).  
9 Petitioner argues it suffered prejudice in this case as a  
10 result of the county's failure to adhere to its own rule  
11 controlling enactment of emergency ordinances. The rule  
12 provides an emergency ordinance not receiving unanimous consent  
13 of all board members may not have immediate effect but must be  
14 read a second time.<sup>7</sup> The circumstances surrounding adoption  
15 of the ordinance included a dissenting vote. According to  
16 petitioner, therefore, the ordinance could not take effect  
17 immediately. The county, nonetheless, treated the ordinance as  
18 effective and revoked outstanding building permits held by  
19 Petitioner Ackerley.<sup>8</sup>

20 While we may agree these circumstances could constitute  
21 prejudice, our review of the events in this case cause us to  
22 deny petitioner's claims. Petitioner has the obligation to  
23 point out procedural errors during the pendency of the  
24 proceeding before the local government. In this fashion, local  
25 governments have the opportunity to correct errors and save the  
26 parties the expense and delay of an appeal. Petitioner was

1 present at the hearing adopting the ordinance. Petitioner does  
2 not allege it was prevented from objecting to the adoption  
3 process. The record reveals no reason why petitioner could not  
4 have objected to the proceedings. For some reason, petitioner  
5 chose not to do so. We will not entertain the claim on appeal  
6 here. Turner v. Washington County, 70 Or App 575, \_\_\_ P2d \_\_\_  
7 (1984).

8 The second assignment of error is denied.

9 THIRD ASSIGNMENT OF ERROR

10 "Respondent's findings are not supported by  
substantial evidence in the record."

11 Petitioner claims Findings "D", "G" and "J", made to  
12 justify the ordinance, are not supported by substantial  
13 evidence in the record. Finding "D" recites the purpose of the  
14 ordinance is to achieve "improvement in community appearance  
15 and traffic safety" by regulating off-premise advertising  
16 signs. Finding "G" explains the citizen involvement process  
17 utilized in adopting this ordinance and includes, as petitioner  
18 complains, what amounts to legal arguments to justify enactment  
19 of the ordinance. Finding "J", addresses statewide planning  
20 Goal 9, the economy of the state, and states that:

21 "The regulation of off-premise advertising sign  
22 structures in new and existing commercial and  
23 industrial areas and the resulting improvement in  
24 visual quality are important to the economic health,  
revitalization and stability of those areas; and to  
the satisfaction of need for improvement as declared  
by the community in the Comprehensive Plan."

25 The findings are, in the main, a statement of reasons  
26

1 behind the adoption of this ordinance. Petitioner does not  
2 explain how the ordinance depends on the findings and why, if  
3 the charges are true, we must reverse or remand the ordinance.  
4 Therefore, we decline to find in favor of petitioner in this  
5 assignment of error. See our discussion under the seventh  
6 assignment of error, infra.

7 The third assignment of error is denied.

8 FOURTH ASSIGNMENT OF ERROR

9 "The Ordinance is invalid because it would eliminate a  
lawful prior existing use contrary to ORS 215.130."

10 FIFTH ASSIGNMENT OF ERROR

11 "The Ordinance is invalid because it is a retroactive  
12 Ordinance contrary to ORS 215.110(6)."

13 The issues in the fourth and fifth assignments of error  
14 have been adjudicated before the circuit court in Multnomah  
15 County. On January 19, 1984, the circuit court signed an order  
16 allowing partial summary judgment in favor of petitioners and  
17 against the county. In the order, the court declared the  
18 ordinances under review to be in conflict with ORS 215.130(5)  
19 and ORS 215.110(6) insofar as they require alteration or  
20 removal of pre-existing billboards.

21 Petitioner and the county agree these issues are rendered  
22 moot by the circuit court's determination. Further, the county  
23 states it considers itself bound by the court's order.  
24 Therefore, we will not address these issues.

25 SIXTH ASSIGNMENT OF ERROR<sup>9</sup>

26 "The ordinance is invalid because it results in a

1 taking of private property without compensation in  
2 contravention of the Oregon Constitution."<sup>10</sup>

3 Petitioner complains the ordinance causes certain  
4 billboards to be removed or altered. This requirement takes  
5 petitioner's property without compensation, according to  
6 petitioner.

7 The parties agree the issues raised in this assignment of  
8 error are related to those in the fourth and fifth assignments  
9 of error. The question has therefore been rendered moot by the  
10 circuit court's order discussed supra. We therefore will not  
11 discuss this issue.

12 SEVENTH ASSIGNMENT OF ERROR

13 "The Ordinance is invalid because it violates Article  
14 1, Section 8, of the Oregon Constitution."

15 Article I, §8 of the Oregon Constitution provides:

16 "Freedom of Speech and Press. No law shall be passed  
17 restraining the free expression of opinion, or  
18 restricting the right to speak, write, or print freely  
19 on any subject whatever; but every person shall be  
20 responsible for the abuse of this right."

21 Petitioner begins this assignment of error with the  
22 proposition that the Oregon Constitution provides greater  
23 protection to speech and expression than does the federal  
24 constitution.<sup>11</sup> Petitioner bases this argument on the fact  
25 that Article I, §8 of the Oregon Constitution prohibits  
26 restraint of speech "on any subject whatever." Similar  
language does not appear in the federal constitution.

This issue has been addressed by the Oregon Supreme Court  
and Oregon Court of Appeals. However, neither court has stated

1 a rule clearly applicable to this case. In State v. Robertson,  
2 293 Or 402, 649 P2d 569 (1982), Justice Linde stated that  
3 Article I, §8 of the Oregon Constitution

4 "forecloses the enactment of any law written in terms  
5 directed to the substance of any 'opinion' or any  
6 'subject' of communication, unless the scope of the  
7 restraint is wholly confined within some historical  
8 exception that was well established when the first  
9 American guarantees of freedom of expression were  
10 adopted and the guarantees then or in 1859  
11 demonstrably were not intended to reach. Examples are  
12 perjury, solicitation or verbal assistance in crime,  
13 some forms of theft, forgery and fraud and their  
14 contemporary variance." (Citation omitted).  
15 Robertson, 293 Or at 412.

16 In In Re Lasswell, 296 Or 121, 673 P2d 855 (1983), the  
17 court considered an alleged violation of a disciplinary rule,  
18 DR7-107(B), by a county district attorney. The district  
19 attorney commented on facts relating to a large scale criminal  
20 investigation. A disciplinary proceeding was instituted  
21 against the district attorney. The issue in the case was  
22 whether the Oregon Constitution provided greater protection of  
23 speech than the federal constitution. The court stated:

24 "Recent decisions have explained that this guarantee  
25 [Article I, §8 of the Oregon Constitution] forecloses  
26 the enactment of prohibitory laws, at least in the  
form of outright prohibitions backed by punitive  
sanctions, that in turn forbids speech or writing 'on  
any subject whatever,' unless it can be shown that the  
prohibition falls within an original or modern version  
of a historically established exception that was not  
meant to be ended by the liberating principles and  
purposes for which the constitutional guarantees of  
free expression were adopted." (Citations omitted).  
In Re Lasswell, 296 Or at 122.

27 The Court of Appeals in a libel case rejected the  
28 proposition that Article I, §8 of the Oregon Constitution

1 provides a greater measure of protection of speech than the  
2 First Amendment of the federal constitution. Bank of Oregon v.  
3 Independent News, 65 Or App 29, 670 P2d 16 (1983). The court  
4 distinguished State v. Robertson, 293 Or 402, 649 P2d 569  
5 (1982), a case suggesting such a distinction exists, on the  
6 ground that in Robertson, the restriction on speech arose in  
7 the context of criminal prohibitory laws, not civil law.

8 While we believe the Robertson decision may provide a basis  
9 for holding the Oregon Constitution absolutely prohibits any  
10 kind of restriction on communication, the courts have not as  
11 yet so interpreted Article I, §8 of the Oregon Constitution.  
12 There has been no case in which the court has been willing to  
13 hold that the Oregon Constitution prohibits regulation of time,  
14 place and manner of speech, and there has been no case clearly  
15 stating that communication of commercial messages may not be  
16 controlled. We decline the invitation to take such a position  
17 at this time.

18 Therefore, we believe it appropriate to review this  
19 ordinance against Article I, §8 of the Oregon Constitution  
20 using cases construing the First Amendment to the federal  
21 constitution.

22 A. The Ordinance is invalid because its applicability depends  
upon the content of the message.

23 In this subassignment of error, petitioner argues  
24 restrictions on speech may not be based on content or subject  
25 matter. Petitioner claims the ordinance restricts commercial  
26

1 speech while specifically exempting non-commercial speech.  
2 Petitioner characterizes the distinctions maintained in the  
3 ordinance as based on content of speech, and not the time,  
4 place and manner of expression of speech. Time, place and  
5 manner controls are acceptable under the Oregon and federal  
6 constitutions. Milwaukie Co. of Jehovah's Witnesses v. Mollen,  
7 214 Or 281, 330 Ped 5, app dis, 359 US 436, 79 S Ct 940, 3 L Ed  
8 2d 952 (1958); Linmark Associates, Inc. v. Willingsboro, 431 US  
9 85, 97 S Ct 1614, 52 L Ed 2d 155 (1977).

10 We agree that ordinance regulates sign structures bearing  
11 commercial messages to a different degree than it regulates  
12 signs structures regulating non-commercial messages. Indeed,  
13 the ordinance does not regulate non-commercial billboard  
14 advertising.

15 However, the fact the ordinance controls placement of sign  
16 structures based on whether or not they bear a commercial  
17 advertising message does not mean that the ordinance is  
18 objectionable. The federal constitution permits regulation of  
19 commercial speech which might not be tolerated of ideological  
20 speech. Bates v. State Bar of Arizona, 433 US 350, 97 S Ct  
21 2691, 53 L Ed 2d 810 (1977); Central Hudson Gas & Electric Corp  
22 v. Public Service Commission, 447 US 557, 100 S Ct 2343, 65 L  
23 Ed 2d 341 (1980); Metromedia, Inc. v. City of San Diego, et al,  
24 453 US 490, 101 S Ct 2882, 69 L Ed 2d 800 (1981).

25 Under the federal constitution, commercial speech is  
26 afforded

1 "a limited measure of protection, commensurate with  
2 its subordinate position in the scale of First  
3 Amendment values, while allowing modes of regulation  
4 that might be impermissible in the realm of  
5 non-commercial expression." Ohralik v. Ohio State Bar  
6 Association, 436 US 447, 456, 98 S Ct 1912, 56 L Ed 2d  
7 442 (1978).

8 We find the federal cases persuasive and believe they are  
9 applicable here. We base this view on our understanding that  
10 the Oregon Constitution does not provide commercial speech any  
11 greater protection than the federal constitution.

12 We conclude the Oregon Constitution permits regulation of  
13 commercial speech to a greater degree than non-commercial  
14 speech. We decline to find the county's regulations  
15 objectionable for the reason asserted by petitioner.

16 B. The ordinance is invalid because it constitutes a  
17 prior restraint on the exercise of speech.

18 Petitioner argues as follows:

19 "The ordinance requires that a permit be obtained  
20 before a sign structure may be placed or a message  
21 posted. MCC 11.15.8637 as amended. A permit may be  
22 issued only if the advertiser-proves that his message  
23 meets one of the exemptions. He must state his cause  
24 to community planning groups whose recommendation  
25 shall be considered...since this determination is  
26 based on content, the process works an  
27 unconstitutional prior restraint upon the right to  
28 free speech." Petition for Review at 42.

29 Petitioner's point is not clear. The ordinance does not  
30 prohibit all commercial off-site advertising signs. The  
31 ordinance regulates off-site commercial signs and restricts  
32 them to certain areas within the county. No "exemption" is  
33 required if the advertiser seeks to erect a sign and post a  
34 commercial message in an area in which such advertising

1 activities are allowed.

2 Were the issuance of a permit to depend upon the content of  
3 the commercial speech, petitioner's agreement would be more  
4 persuasive. See Southeastern Promotion, Ltd. v. Conrad, 420 US  
5 456, 95 S Ct 1239, 43 L Ed 2d 448 (1975). However, the content  
6 of commercial speech is not so regulated in the ordinances  
7 under review here. Because commercial speech is not afforded  
8 the same protection as ideological speech, we believe permit  
9 requirements are not of themselves objectionable.<sup>12</sup>

10 C. The ordinance is invalid because it is overly vague.

11 The sign regulations are administered by the planning  
12 director and the planning commission. There is an advisory  
13 function afforded to "affected community planning groups." MCC  
14 11.15.8641. Whether or not a permit for an advertising sign is  
15 granted will, of course, depend upon whether, during the permit  
16 process, the county authorities determine the proposed  
17 billboard meets ordinance requirements and is permitted in the  
18 district in which it is to be erected. If the billboard bears  
19 a non-commercial message, it is exempted from regulation.

20 Petitioner quarrels with this regulatory structure.  
21 Petitioner complains the exemptions from regulation provided in  
22 the ordinance are so vague as to constitute an unconstitutional  
23 "chilling" of free speech. Petitioner posits that whether or  
24 not a billboard will be permitted will be dependent upon the  
25 popularity of the message or the whims of the community group  
26 reviewing the proposed message. We understand petitioner to

1 argue that the ordinance does not provide the community  
2 advisory group and the planning commission with clear criteria.

3 The ordinance regulates off-premises advertising sign  
4 structures. These structures are defined, in part, as  
5 permanent structures upon which there is posted

6 "a message or display advertising, or directing  
7 attention to a product or service sold, manufactured,  
8 produced or offered elsewhere than on the premises  
9 where the sign is located." MCC 11.15.8607(A).

10 The ordinance exempts from regulation those signs which bear  
11 non-profit outdoor advertising

12 "such as signs displaying political, educational,  
13 philosophical, social or public service messages. The  
14 ordinance shall be liberally interpreted to permit  
15 this forum of communication." MCC 11.15..8639(A), as  
16 amended.

17 The ordinance further exempts from regulation public signs and  
18 "bench advertising" signs located on a public right-of-way.

19 We do not believe the ordinance is vague. We believe  
20 people of common understanding will be able to distinguish a  
21 message which encourages purchase of a product or service from  
22 a message which provides information of the kind excluded from  
23 regulation under the ordinance. Similarly, we believe those  
24 who must apply the ordinance will be able to determine whether  
25 a proposed billboard and its message are within or without the  
26 scope of regulation. Connally v. General Construction Co., 269  
US 385, 46 S Ct 126, 70 L Ed 322 (1926); Bergford v. Clackamas  
County, 15 Or App 362, 515 P2d 1345 (1973).

Also, we do not share the petitioner's view that the

26

1 community advisory groups will contribute only whim and the  
2 results of their own popularity poll. Even if these charges  
3 are accurate, the community group role is advisory only.

4 D. The ordinance is invalid because it is overly broad.

5 Petitioner says the ordinance is invalid because it  
6 purports to regulate all off-premise billboards. Petitioner  
7 includes billboards carrying commercial as well as all forms of  
8 non-commercial speech in this statement. Petitioner  
9 acknowledges the ordinance exempts non-commercial billboards  
10 from regulation, but the county's list of kinds of exempt  
11 messages results, according to petitioner, in regulation. That  
12 is, by failing to name other non-commercial kinds of messages,  
13 the ordinance treats them as commercial messages. See 2A  
14 Sands, Sutherland, Statutory Construction, §47.23 (4th ed,  
15 1973). For example, because the ordinance does not name  
16 religious messages as exempt, the ordinance regulates  
17 billboards with such messages, according to petitioner.

18 We do not agree. The ordinance states messages "such as"  
19 those displaying political, educational, and other messages are  
20 exempt. The ordinance clearly does not intend the list to be  
21 exhaustive, but only an illustration of the kind of message  
22 exempted. See 3R Anderson, American Law of Zoning, §19.18 (2d  
23 ed, 1977).

24 Included in this subassignment of error is a comment that

25 "LUBA should not readily excepts [sic] respondent's  
26 'finding' that this Ordinance will further traffic  
safety and aesthetics, neither may it accept without

1 proof respondent's base assertion that the ordinance  
2 is narrowly drawn or content neutral. There is no  
proof in this record to support the above findings."

3 This comment suggests petitioner does not believe there is an  
4 adequate factual basis for this ordinance. We discuss this  
5 claim under subassignment of error F, infra.

6 E. The ordinance reverses the presumption that free  
speech is presumed to be protected.

7 Petitioner advises an ordinance regulating free speech is  
8 presumed invalid. Petitioner then claims Ordinance 365, as  
9 amended, reverses this presumption. We understand petitioner  
10 to argue the constitution prohibits an ordinance which requires  
11 a permit to communicate a commercial message.

12 We believe the county may elect to regulate commercial  
13 speech and control the time, place and manner of commercial  
14 speech. We further believe these controls may be exercised  
15 more freely when regulating commercial speech than when  
16 attempting to regulate the time, place and manner of  
17 non-commercial or ideological speech. In this case, the permit  
18 requirements do not preclude any particular commercial message,  
19 but only control the time, place and manner of commercial  
20 message advertising generally. We do not believe these  
21 regulations violate constitutional prohibitions. We believe  
22 the county is acting within its authority to require the  
23 issuance of a permit before billboards bearing commercial  
24 messages are erected.

25 In a second part of this subassignment of error, the  
26

1 petitioner advises LUBA not to permit itself to be bound by any  
2 finding of facts supported by substantial evidence in the  
3 record. Petitioner argues we must forget the legislative  
4 mandate in 1979 Or Laws, ch 772, §4(7), as amended by 1981 Or  
5 Laws, ch 748 and conduct an independent judicial review of the  
6 matter. According to petitioner, LUBA should not search the  
7 record for evidence to support a legislative action which  
8 deprives petitioner of constitutional rights.

9 We reject petitioner's view of our role. We view the  
10 record developed before the county commission to be critical in  
11 determining whether or not the county adopted regulations which  
12 meet the standard announced in Metromedia, supra. See also,  
13 Dionne v. Multnomah County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 83-045,  
14 October 14, 1983).

15 F. The ordinance is invalid even analyzed as a time,  
16 place and manner of restriction.

17 Petitioner argues restrictions about the time, place and  
18 manner of expression are permissible only if they are justified  
19 without reference to the content of the regulated speech.<sup>13</sup>  
20 See Van v. Travel Information Council, 52 Or App 399, 628 P2d  
21 1217 (1981). Petitioner argues the regulation adopted by  
22 Multnomah County is more restrictive than reasonably necessary  
23 to serve the county's interest. Petitioner points to the  
24 banning of all non-exempt billboards in the Columbia  
25 Community. Petitioner claims the county could adopt a less  
26 restrictive ordinance to achieve public safety by imposing

1 setback requirements on billboards. Petitioner argues  
2 strenuously that the effect of this ordinance, which petitioner  
3 believes goes beyond restrictions necessary to achieve public  
4 safety will be to restrict not only commercial, but political  
5 speech. Persons will not be willing or able to erect  
6 billboards simply for ideological advertising alone. We  
7 understand petitioner to argue that to do so would be  
8 financially impractical.

9 We believe a four-part test announced in Central Hudson Gas  
10 v. Public Service Comm'n of N.Y., 447 US 557, 100 S Ct 2343, 65  
11 L Ed 2d 341 (1980) controls our review under this subassignment  
12 of error. In that case, the court set out a test to determine  
13 whether or not controls on commercial speech offend the  
14 constitution.

15 "In commercial speech cases, then, a four-part  
16 analysis has developed. At the outset, we must  
17 determine whether the expression is protected by the  
18 First Amendment. For commercial speech to come within  
19 that protection, it must at least concern lawful  
20 activity and not be misleading. Next, we ask whether  
21 the asserted governmental interest is substantial. If  
22 both inquiries yield positive answers, we must  
23 determine whether the regulation directly advances the  
24 governmental interest asserted, and whether it is not  
25 more extensive than is necessary to serve that  
26 interest." Central Hudson, 447 US at 566, 100 S Ct  
2343, 65 L Ed 341.

22 The first part of the test is not applicable to our  
23 inquiry. There has been no claim that the advertising messages  
24 may be unlawful or misleading. We believe the county meets the  
25 remaining tests.

26 The county's findings articulate the reasons for adoption

1 of the ordinance. The county stated the purpose of the  
2 ordinance is "to achieve improvement and community appearance  
3 and traffic safety...." Record, Vol. I, p. 2. The county  
4 hoped to achieve these aims by "regulation of off-premise  
5 advertising sign structures." Id. Included in the county's  
6 findings is reference to a study entitled "Final Report, Safety  
7 and Environmental Design Considerations In the Use of  
8 Commercial Electronic Variable-Message Signage, June  
9 1980."<sup>14</sup> The study, prepared by the Federal Highway  
10 Administration, includes precis of studies done on the  
11 relationship between accidents in the presence of advertising  
12 signs along highways. Accidents rates between areas including  
13 highway advertising signs and areas not including them tended  
14 to show fewer accidents in areas without highway advertising  
15 signs. See "Final Report" at pp. 23-25. Petitioner does not  
16 challenge the results of this study, and we find that it  
17 provides substantial evidence for the county's conclusion that  
18 traffic safety is enhanced by restrictions on outdoor  
19 advertising signs.

20 Testimony before the county during the pendency of the  
21 challenged ordinances gave considerable weight to the aesthetic  
22 impact of outdoor advertising signs in particular areas of the  
23 county. While this testimony may not furnish proof that the  
24 aesthetic quality of neighborhoods would be adversely affected  
25 by the presence of advertising signs (or in some cases  
26 enhanced), we believe the testimony furnishes a basis for the

1 county's conclusion that in certain areas of the county,  
2 billboards bearing commercial messages should not be  
3 permitted. See Record, Vol. 1, pp. 61-64 and minutes of  
4 numerous county billboard advertisory committee meetings. See  
5 also, the minutes of the Multnomah County Planning Commission  
6 meeting of September 27, 1982, Record, Vol. 2, pp. 260, et seq.

7 We conclude, therefore, that the county articulated a  
8 legitimate aim in the enactment of the ordinance, and the  
9 record includes substantial evidence to support the proposition  
10 that the ordinance, with its restrictive provisions, will help  
11 accomplish that aim.

12 Petitioner claims, however, that the ordinance goes beyond  
13 the point necessary to achieve the city's aims. Petitioner  
14 asks why setback requirements and existing regulations  
15 governing open space and views are not sufficient to accomplish  
16 city aims.

17 We believe the comment of the Supreme Court in Metromedia,  
18 Inc. v. City of San Diego, supra, answers this inquiry.

19 "If the city has a sufficient basis for believing that  
20 billboards are traffic hazards and are unattractive,  
21 then obviously the most direct and perhaps the only  
22 effective approach to solving the problems they create  
23 is to prohibit them. The city has gone no further  
24 than necessary in seeking to meet its ends. Indeed,  
25 it has stopped short of fulling accomplishing its  
26 ends: it has not prohibited all billboards, but  
allows on-site advertising and some other specifically  
exempted signs." Metromedia, supra, 453 US at 508.

The seventh assignment of error is denied.

1 EIGHTH ASSIGNMENT OF ERROR

2 "The Ordinance is invalid because it violates the  
3 Equality of Privileges and Immunities Clause of the  
4 Oregon Constitution."

5 Petitioner argues Article I, §20 of the Oregon Constitution  
6 is violated. The article provides:

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

11 Petitioner argues that if this Board finds the detriment to  
12 Petitioner Ackerley is greater than the justification for the  
13 ordinance, the ordinance violates the equal protection  
14 guarantee included in the Oregon Constitution. See State ex  
15 rel v. Johnson, 276 Or 9, 15-16, 544 P2d 139 (1976).

16 Petitioner argues the ordinance improperly distinguishes  
17 between on-premise and off-premise signs, between commercial  
18 and non-commercial messages and between a total ban that  
19 applies in Columbia Community as against less severe  
20 restrictions applicable elsewhere in the county. Petitioner  
21 argues these improper distinguishing features are a detriment  
22 which outweighs the claimed benefits of the ordinance. The  
23 result, according to petitioner, is a denial of equal  
24 protection of the law to Petitioner Ackerley.

25 Were commercial speech afforded the same protection as  
26 other constitutionally protected forms of speech, petitioner's  
argument would be more persuasive. However, we do not believe  
the restrictions on commercial speech imposed in Ordinance 365

1 violate the equal protection provisions of the Oregon  
2 Constitution. The provisions of the ordinance apply equally to  
3 all kinds of commercial speech. The discrimination between a  
4 sign identifying a commercial enterprise or service and a sign  
5 identifying a non-commercial service is not one which offends  
6 Article I, §20 of the Oregon Constitution. Metromedia, supra.  
7 Therefore, we find no improper discriminatory practice as  
8 alleged.

9 Similarly, we find the ban on billboard commercial  
10 advertising in specific areas of the county to be conditionally  
11 permissible. As noted in the Metromedia case, the county would  
12 be within its rights to ban such advertising altogether.  
13 Therefore, a less restrictive ban, providing it meets a  
14 legitimate county interest, is permissible under the  
15 constitution. We find the county to have demonstrated such an  
16 interest and we find no error as alleged. As noted supra, the  
17 county adopted the regulatory measures in part to promote  
18 aesthetic qualities. The record includes discussion of these  
19 qualities, particularly in the Columbia Community area of the  
20 county. Again, while individual opinion about aesthetic  
21 quality may differ, the discussion included in the record  
22 provides substantial evidence for the county's conclusion that  
23 commercial outdoor advertising should be prohibited under the  
24 ordinance.

25 The eighth assignment of error is denied.

26 The ordinances under review are affirmed except as to those

1 provisions found by the Circuit Court of the State of Oregon to  
2 be in violation of ORS 215.130 and ORS 215.110.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

FOOTNOTES

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

---

1 In this opinion, our reference to Ordinance 365 is intended to include amendatory ordinances numbers 369 and 376. Ordinances 365, 369 and 376 are codified in Multnomah County Code (MCC) 11.15.8605 to .8645.

---

2 An "off-premise" sign is "a rigidly assembled structure permanently affixed to land or attached to another permanent structure on which is posted a message or display advertising, or directing attention to a product or service sold, manufactured, produced or offered elsewhere than on the premises where the sign is located. The term includes the sign structure, display surface, and all other component parts of the sign. The term also includes an inflatable off-premise sign."

---

3 A community service use includes:  
"ELECTRICAL GENERATING FACILITIES  
"NATURAL GAS STORAGE  
"SEWAGE TREATMENT PLANTS  
"TELEPHONE, COM. STATION AND SWITCHING  
"WATER STORAGE  
"RADIO AND TELEVISION TRANSMITTERS" Multnomah County Comprehensive Framework Plan.

---

4 The ordinance does not control signs within the boundaries of the Federal Highway Beautification Act (28 USC §131).

---

5 The ordinance also allows variances to relieve hardship in particular cases, and the provision prohibiting billboards along freeways may be altered where the area is commercial in character. A further exception is provided to allow billboards, otherwise not allowed, on shallow lots abutting residential areas. Other provisions allow waiver of a tree removal provision, height limitation variances. There is a broad exemption for some billboards providing certain findings

1 are made by the county planning commission. The planning  
2 commission may not, however, allow a billboard in a prohibited  
3 district. Also, the planning commission's authority is only to  
4 extend the period within which the owner may bring the  
5 billboard into compliance or remove it. See generally MCC  
6 11.15.8609-.8631.

7

8 

---

6

9 Even if such a requirement were to exist, we note the  
10 county comprehensive plan includes as its purpose that

11 "[t]he people of Multnomah County are provided with a  
12 safe and healthy living environment." Multnomah  
13 County Comprehensive Framework Plan, Vol. 2, pp. 1-6.

14 Ordinance 365 states as its purpose the implementation of  
15 Oregon policies regarding advertising signs and improvement of  
16 "community appearance and traffic safety...." MCC 11.15.8605.  
17 Therefore, we believe an adequate foundation for Ordinance 365  
18 exists in the county framework plan.

19

20 

---

7

21 "Emergency Ordinances. An ordinance to meet an  
22 emergency may be introduced, read once \* \* \*, a  
23 hearing held thereon and adopted at a single regular  
24 or special meeting upon unanimous consent of all board  
25 members present (Charter 5.30(3)). An emergency  
26 ordinance which fails to receive the unanimous consent  
of all board members present shall be considered an  
emergency ordinance requiring two readings, and may be  
moved to a second reading in accordance with the  
procedures set forth for non-emergency ordinances \* \* \*.  
Emergency ordinances may take effect immediately upon  
being signed by the County Executive (Charter 5.50(2))  
\* \* \*." Respondent County's Rules of Procedure,  
December 28, 1982.

27

28 

---

8

29 No construction had been started prior to the permit  
30 revocations.

31

32 

---

9

33 In Assignments of Error 4 through 8 petitioner advises that  
34 it does not believe LUBA has jurisdiction over what it  
35 characterizes as "substantive" constitutional questions.  
36 Petitioner argues original jurisdiction to answer  
constitutional questions (other than issues of procedural due

1 process) is in the circuit court.

2 In response, the county argues LUBA should consider these  
3 assignments of error withdrawn. Petitioner cites Brady v.  
4 Douglas County, 7 Or LUBA 251, 263 (1983) in support of its  
5 view:

6 "On the basis of petitioner's memorandum of law  
7 asserting that LUBA has no jurisdiction over takings  
8 claims anyway, petitioner's ninth and tenth  
9 assignments of error are considered withdrawn. There  
10 being no controversy or adversary position on these  
11 assignments they are dismissed."

12 Respondent correctly notes the Board in Brady considered an  
13 argument withdrawn where the proponent of the argument  
14 announced the Board had no jurisdiction over the question.

15 We believe it appropriate to reconsider Brady. The  
16 question of the Board's jurisdiction over constitutional claims  
17 has been a matter of some controversy. Foreman v. Clatsop  
18 County, 297 Or 129, 681 P2d 786 (1984). We do not believe a  
19 petitioner should be prejudiced by an announcement that he  
20 believes a particular issue belongs in another forum if, at the  
21 same time, he asks the Board to rule on the question should the  
22 Board believe it has jurisdiction. We think to rule otherwise  
23 would be to create a trap for the candid petitioner who simply  
24 wishes to have an issue resolved by a ruling on the merits or a  
25 ruling that the Board is not empowered to answer the question.  
26 Therefore, we reject respondent's invitation to dismiss these  
27 assignments of error under Brady.

28 \_\_\_\_\_  
29 10

30 Oregon Constitution, Article I, §18 provides, in part,

31 "Private property shall not be taken for public use,  
32 nor the particular services of any man be demanded,  
33 without just compensation; ...."

34 \_\_\_\_\_  
35 11

36 The First Amendment to the United States Constitution  
37 provides:

38 "Congress shall make no law respecting an  
39 establishment of religion or prohibiting the free  
40 exercise thereof; or abridging the freedom of speech,  
41 or of the press ...."

1  
2 12

3 In 1000 Friends of Oregon v. Wasco County Court, 62 Or App  
4 75, 659 P2d 101, rev den, 295 Or 259 (1983), the court noted  
5 that land use laws do require prior approval. The court went  
6 on to note that

7 "land use laws are permissible in positions of  
8 reasonable limitations designed to protect the public  
9 welfare and serve a significant state interest. If  
10 they restrict First Amendment freedoms, they do so by  
11 time, place and manner of restrictions that are not  
12 based on content or subject matter of speech."  
13 (Citations omitted). 62 Or App at 83.

14  
15 13

16 Petitioner's argument relies in large part on petitioner's  
17 view that the distinction between commercial and non-commercial  
18 speech suggested in Metromedia is "untenable under the Oregon  
19 Constitution in which speech on any subject whatever is  
20 protected." (Emphasis in original). Petition for Review at  
21 54. As discussed herein, we reject this proposition.

22  
23 14

24 We understand electronic variable-message signs to be signs  
25 which portray a changing or moving message controlled by  
26 electronic means. Portions of the study discuss outdoor  
advertising generally and are not restricted to electronic  
signs.

