

IN THE CIRCUIT COURT OF THE STATE OF OREGON
IN AND FOR THE COUNTY OF MULTNOMAH

CLEAR CHANNEL OUTDOOR, INC., a
Delaware corporation, formerly known as
ACKERLEY MEDIA GROUP, INC., a
Washington corporation, dba CLEAR
CHANNEL OUTDOOR,,

Plaintiff

vs.

CITY OF PORTLAND,

Defendant,

and

JOSEPH COTTER,

Intervener.

Case No. 9801-00125

OPINION AND ORDER

1 This case involves the attempts of the plaintiff, Clear Channel Outdoor, Inc., [“Clear
2 Channel”] to compel the City of Portland to issue permits for construction of new billboards, and
3 to recover damages for failure to issue those permits. As of the trial in this court in 1999, the
4 controversy already had a lengthy history, as described in my Opinion and Order of June 3, 1999.
5 In that opinion, I purported to resolve federal constitutional issues regarding damages and injunctive
6 relief. I held that by reason of an appeal from a 1998 purported ORCP 67B judgment disposing of
7 portions of plaintiff’s state constitutional claims by Circuit Judge *pro tempore* Thomas W. Brown,
8 I was without jurisdiction to address unresolved state constitutional issues. Considering that appeal

1 along with cross appeals from my judgment of 1999, the Court of Appeals held that it was without
2 jurisdiction to review either judgment,¹ and remanded this case for entry of a final judgment
3 disposing of all claims. *AK Media Group, Inc. v. City of Portland*, 192 Or App 204 (2004).

4 My task on remand, however, could not consist merely of articulating a judgment that
5 resolved, in the context of the full range of issues that had previously been fragmented by the ORCP
6 67B judgment, all of the contentions of the parties. It was necessary to afford a further opportunity
7 for argument, and appropriate to afford an opportunity for the presentation of additional evidence.

8 After the case returned from the Court of Appeals, I heard and decided a variety of motions
9 addressing the scope of issues that remained to be tried. I allowed Joseph Cotter to intervene on
10 behalf of mural art, which he alleged was drastically and unnecessarily burdened by this court's 1999
11 opinion or the City's response to that opinion, or both.

12 Before trial on remand, and in the context of further motions to define the scope of issues,
13 it became apparent that the plaintiff's litigation strategy was to stand on its purported right to
14 injunctive relief based on the remaining² permit applications it filed to perfect its rights on the eve
15 of the 1999 trial. The plaintiff did not suggest that its requested relief was impeded by any
16 subsequent local legislation or decisions, but alleged subsequent facts only in support of its
17 contention that the City was acting in bad faith and evading the order I issued in 1999.³ I concluded

¹ The Court of Appeals reasoned that the purported ORCP 67B judgment "is not appealable because it reserves judgment as to portions of those claims rather than disposing of whole claims," and that my judgment was not appealable as it also did not address all remaining issues. I had expressed doubts whether an ORCP 67B judgment was available under the circumstances existing after the partial summary judgment of 1998 [1999 Opinion at note 23], and the Court of Appeals did not address my conclusion that I was without jurisdiction to address the reserved portions of the state law claims.

² Plaintiff withdrew several of the original 83 applications before the 1999 trial, and an additional 8 before the trial on remand, so 65 remained. Presumably, the locations for the withdrawn applications became unavailable to the plaintiff.

³ Plaintiff sought an order compelling the City to issue the permits for which it had applied, but did not seek any other relief based on any of the City's alleged subsequent behaviors or subsequent legislation.

1 that the plaintiff's theories of relief left me unable to adjudicate the lawfulness (including
2 constitutionality) of any intervening legislation or behaviors of the City upon which the plaintiff's
3 right to relief did not depend. I agreed with the City that injunctive relief could not properly be
4 employed merely to penalize the City for alleged bad faith occurring after my Opinion of 1999.⁴ I
5 also concluded that the Intervener's participation could not expand the scope of litigation beyond that
6 joined by the plaintiff and defendant – and that I could not adjudicate in this context any party's
7 allegations concerning Portland's more recent Public Art Mural Program.⁵ I did, however, welcome
8 the intervener's further participation, and it proved quite helpful.

9 At the trial on remand, as before, plaintiff was represented by counsel, Donald Joe Willis and
10 Jill Gelineau. Defendant was represented by counsel, Tracy Pool Reeve and Mary Danford. Joseph
11 Cotter, intervener, appeared *in propria persona*. The context was provided by a combination of the
12 original issues raised by the plaintiff's complaint, the remand from the Court of Appeals, the parties'
13 stipulation that almost all findings of fact from the 1999 trial would remain, the parties' contentions
14 on remand, and the evidence and argument adduced at the trial of 1999 and at the trial on remand.

15 Plaintiff's complaint sought relief by contesting as unconstitutional the inclusion in the then-

⁴ In fairness to the plaintiff, I will not speculate on the merits of its contention that the City has exhibited "bad faith" or attempted to evade the spirit of this court's 1999 Opinion – for the simple reason that I have not allowed either side to present or dispute evidence on this point. I suspect, however, that the best perspective on this contention will be that of hindsight – based on the final appellate word on the disagreements that separate the parties as to the reach of legitimate regulation of billboards and the countervailing limitations upon regulation afforded by constitutional law. Bad faith would not thereby be determined, however, as the issue will be whether the loser *contended* in good faith.

There was evidence from which the plaintiff can argue that the Mayor appeared to condone a nonprofit's wall mural that may have been created in violation of the sign code. Yes, the City may prefer nonprofit murals outside "Outside Inn" and may even have noticed – had a complaint been made to someone concerned with such regulations – that the mural was created in violation of the sign code. But well before discriminatory enforcement might itself provide a basis for relief of the sort sought by plaintiff, I would need to find something well beyond an example or two that understandably evoke the plaintiff's chagrin – something approaching a pattern and practice. The evidence was strongly to the contrary – that (apart from the more recent Public Art Mural Program, which is beyond the scope of this litigation) the City has done a far more effective job of banning murals in Portland than of eliminating billboards.

⁵ See <http://www.portlandonline.com/planning/index.cfm?c=dgbbb>.

1 existing “sign code”⁶ of a definition that captures as a “sign” subject to regulation “[m]aterials placed
2 or constructed primarily to convey a message and which can be viewed from a right-of-way or
3 another property. Signs contain text, numbers, registered trademarks, or registered logos.” PCC
4 33.910.030. The City adopted this “fine tuning” to the “Zoning Code Rewrite Project” effective in
5 1991 with the objective of creating a clear and easily enforceable distinction by which to spare
6 “painted wall decorations” the regulations imposed on “wall signs.” Any sign would have to contain
7 text, numbers, registered trademarks, or registered logos to be subject to regulation under the sign
8 code (including design review if within a design zone).

9 Plaintiff’s first claim for relief purported to combine a writ of review with an additional claim
10 to challenge on state and federal constitutional grounds a City ordinance proclaiming a moratorium
11 on painted wall signs. Before the first trial, I concluded that the writ of review portion of that claim
12 “was moot because the City had repealed the moratorium ordinance in question and because the
13 plaintiff sought no relief that was available by way of writ of review.” 1999 Opinion at 15.
14 Although I agreed with the plaintiff that the repeal of the moratorium ordinance did not render the
15 remainder of the first claim moot, I awarded plaintiff nothing on the first claim as the plaintiff did
16 not produce any evidence in the first trial that the moratorium had any continuing impact on its rights
17 that was not fully and more directly addressed by other claims. On appeal, neither party challenged
18 the original disposition of plaintiff’s first claim for relief, and judgment in this matter will be for the
19 defendant on the first claim for relief.

20 Plaintiff’s second and third claims sought declaratory and injunctive relief on grounds that
21 the City’s sign code and related regulations violated the Oregon Constitution. Plaintiff’s fourth

⁶ The “sign code” consisted of sign regulations in PCC Chapter 33.286 and the relevant definitions of PCC 33.910.030. Also implicated were the City’s design review regulations and design guidelines to the extent that they become applicable because the plaintiff applied for a “sign” requiring design review in a design zone.

1 claim sought damages, attorney fees, and injunctive relief (compelling issuance of recently pending
2 sign permit applications) on federal constitutional grounds.⁷

3 On October 27, 1998, Circuit Judge *pro tempore* Thomas W. Brown granted in part
4 plaintiff's motion for summary judgment, holding that the City's sign code definitions were
5 "content-based" and prohibited by Article I, section 8, of the Oregon Constitution. Plaintiff
6 submitted and obtained a judgment purportedly pursuant to ORCP 67B in its favor on its second and
7 third claims for relief, and the City filed a notice of appeal.

8 At the 1999 trial, I concluded that the City's appeal deprived me of jurisdiction of the second
9 and third claims (even though the ORCP 67B judgment did not resolve all issues cognizable under
10 those claims), and I proceeded to find that the distinction based on "text, numbers, registered
11 trademarks, or registered logos" constituted an invalid content-based distinction under the First
12 Amendment to the United States Constitution (Judge Brown had reached the same conclusion under
13 Article I, section 8, of the Oregon Constitution), that the challenged design review regulations should
14 and could be construed to avoid inconsistency with the First Amendment, that the plaintiff was
15 entitled to damages for revenue lost until the City made the "political choice" to subject signs and
16 "mural art" to the same regulatory scheme, but that the plaintiff was not entitled to injunctive relief
17 compelling the City to issue the permits.⁸

18 After concluding that it had no jurisdiction to consider either appeal, the Court of Appeals
19 rejected the plaintiff's request for a remand to this court under ORS 19.270(4) for entry of an

⁷ In addition to some differences in the force of Oregon's protections of speech (Or. Const. Art. I, §8) and that of the First Amendment to the United States Constitution, damages are unavailable for violations of the Oregon Constitution (*Hunter v. City of Eugene*, 309 Or 298, 303 (1990)), and attorney fees may be more difficult to recover than under federal remedies for federal constitutional violations under 42 USC § 1983.

⁸ As will appear below, I reached the federal constitutional issues because they were critical to the plaintiff's claim to damages, and because they might as well support injunctive relief.

1 appealable judgment. The Court of Appeals reasoned that

3 allowing the trial court leave to amend the second judgment under ORS
5 19.270(4) would not serve a useful purpose. Reviewing the second judgment
7 apart from the first judgment on the record before us would require us to
9 determine which of several mixed assignments of error are properly before
 us, and certain issues clearly are not reviewable because of our “first things
 first” methodology. Moreover, review of the second judgment might be
 impossible in any event, depending on resolution of the substantive issue of
 whether AK Media’s claims can be fully resolved under state constitutional
 analysis.

11 [192 Or App at 211]

13 As noted by the Court of Appeals, “first things first” methodology directs the court

15 to analyze the state’s law, including its constitutional law, before reaching a
17 federal constitutional claim. This is required, not for the sake either of
19 parochialism or of style, but because the state does not deny any right claimed
 under the federal Constitution when the claim before the court in fact is fully
 met by state law.

21 [*Sterling v. Cupp*, 290 Or. 611, 614 (1981)]

22 Upon further trial on remand, the plaintiff adduced evidence that the inevitable attrition
23 mentioned in my 1999 Opinion⁹ had progressed to the point that it was reduced to 499 billboards
24 (692 “faces”) from the 566 boards existing in 1999; that the diversification of media through cable,
25 internet, and vastly expanded television and radio choices for consumers, left billboards uniquely
26 able to reach targeted mass audiences; that the plaintiff could easily sell far more showings than it
27 can accommodate with its remaining boards; and that attrition would eventually render the available
28 opportunities sufficiently unattractive to plaintiff’s buyers that they would seek other markets or
29 channels of communication and require plaintiff as well to abandon Portland as a billboard market.

30 The City adduced evidence of an inventory of thousands of commercial signs in use in

⁹ “Although it is clear that by some time in the future, the City’s sign code and related ordinances would require plaintiff to remove all nonconforming signs absent some change in the law or other intervention, it is not at all clear from this record how quickly plaintiff would in fact lose how many of its 566 existing billboards. All that the record shows is that nonconforming uses are legal, that when the existing use ceases or is so modified as to be subject to new regulation, the nonconforming use must cease, that there are some occasions that permit relocation when the use is lost by government action, and that the regulations governing nonconforming uses are ‘complicated.’” 1999 Opinion at 8.

1 Portland that are smaller than billboards, evidence that many alternatives to billboards (both smaller
2 signs and other media) exist that serve the needs of wide ranges of advertisers, and that wall and site
3 signage opportunities are widely used and adequate for some advertisers.

4 The intervener adduced evidence that but for the existing sign code, wall murals would be
5 practical for some nonprofits when billboards or other advertising would be unavailable or
6 impractical; that murals are created and produced in a manner that is quite different from that by
7 which billboards are created, produced and distributed; that murals are expected to last for years as
8 compared with the typical monthly changes of billboard “messages”; that the regulatory process
9 applicable to murals is prohibitively expensive for some; that there is a desire and a capacity to
10 produce murals but that (with the possible, unexplored exception of the Portland Public Art Mural
11 Program) the existing sign code prohibits the production of new murals; that muralists have had to
12 seek sites outside Portland for their art; that murals are preferable to billboards to some who wish
13 to use large, outdoor graphics for conveying political or social messages; that the mural art process
14 and product have unique and important social value which has been lost to Portland under the current
15 regulatory scheme; and that wall paintings are traceable to prehistory as a necessary and valuable
16 avenue of human expression.

17 Both parties attempt to benefit from the circumstance that I now have jurisdiction over state
18 law issues including state constitutional issues. The plaintiff contends that an injunction should issue
19 under state law, including both the Oregon Constitution and (independently) the statutory (ORS
20 227.178(3)) and regulatory (PCC 33.700.080(A)) protection for “vested rights,” “[n]ow that the
21 Court has been freed from the narrow confines of the federal First Amendment analysis,” and given
22 the repeated decisions in this case that the invalid definition could not be severed from the remainder
23 of the sign code. Further, the plaintiff contends that my previous narrowing construction of design

1 review provisions (relevant to permit requests in design review zones) in the context of the First
2 Amendment is unavailable under a state law analysis. Plaintiff asks that I revisit my First
3 Amendment analysis only by recognizing that the “burden” to show adequate channels of speech as
4 alternative to billboards properly lay with the City, not plaintiff, and that I should rule in plaintiff’s
5 favor because the City’s persisting regulation of billboards cannot be sustained as a time, place and
6 manner regulation in view of the inadequacy of alternative channels and the unavailability of new
7 billboards under the sign code. Plaintiff argues that the combination of the Oregon Constitution’s
8 “remedies clause” (Or. Const. Art. I, §10) and the unavailability of damages under Oregon law for
9 a violation of Oregon’s free speech provision (Or. Const. Art. I, §8)¹⁰ lends further support to
10 plaintiff’s claim for injunctive relief. Finally, plaintiff contends that I correctly awarded damages
11 under the First Amendment.

12 The City, understandably, asks that I employ the “first things first” methodology in an
13 entirely different manner. Initially, the City has now abandoned its dispute with the conclusion that
14 the distinction based on “text, numbers, registered trademarks, or registered logos” constituted an
15 invalid content-based distinction. The City concedes that the Oregon Supreme Court’s decision in
16 *Outdoor Media Dimensions, Inc. v. Department of Transp.*, 340 Or 275 (2006), forecloses
17 successful opposition to that conclusion.¹¹ The City contends that the “first things first”
18 methodology dictates that plaintiff’s claims are fully resolved by a declaratory judgment on state
19 constitutional grounds that the sign code definition was invalid, and that this court has no reason
20 to reach federal constitutional issues. The City asks that I adhere to my 1999 analysis rejecting

¹⁰ *Hunter v. City of Eugene*, 309 Or 298, 303 (1990), *supra* note 5.

¹¹ *Outdoor Media* rejected many of the assertions plaintiff advances here, but ruled that provisions of the Oregon Motorist Information Act (OMIA) requiring permits for off-premises highway advertising signs, but not for on-premises signs, prohibited speech based on content, and thus violated Or. Const. Art. I, §8.

1 plaintiff's "vested right" contentions under statutory and local law, and to my decision to deny
2 injunctive relief. The City asks that I revisit my conclusion (shared with Judge Brown) that the
3 invalid definition could not be severed from the remainder of the sign code, and that I now
4 determine that the 1999 award of damages was erroneous and should be vacated.

5 The City also asks that I revisit what it terms my conclusion that the First Amendment
6 forbids it to prefer art over commercial signs. The intervener agrees, and further asks that I
7 recognize that applying the sign code to murals abolishes murals as such in Portland and is
8 therefore unconstitutional.

9 **"Vested Rights" and "Void" Ordinances**

10 Plaintiff argues that because it resubmitted the permit applications in question after Judge
11 Brown declared the sign code void (rejecting the City's arguments for severance of the
12 unconstitutional definition), it was entitled to the issuance of the permits under these
13 codifications of "vested rights" law:

15 If the application was complete when first submitted or the applicant
16 submits the requested additional information within 180 days of the date
17 the application was first submitted and the city has a comprehensive plan
18 and land use regulations acknowledged under ORS 197.251, approval or
19 denial of the application shall be based upon the standards and criteria that
20 were applicable at the time the application was first submitted.

21 [ORS 227.178(3)]

22 **33.700.080 Regulations That Apply at the Time of an Application**

23 When new zoning code amendments or changes to the zoning map are
24 adopted but not yet implemented, the regulations of this section apply.

- 25 **A. Applications.** Applications for building or development
26 permits or land use reviews will be processed based on the
27 regulations in effect at the time a complete application is
28 submitted to the City.

29 * * * *

[PCC 33.700.080 (7/1/97)]

31 The argument is that because an unconstitutional ordinance is void and of no effect, there

1 was no ordinance “in effect” or “applicable” as of the time plaintiff refiled its applications for
2 sign permits, there was and remains no basis upon which to deny the permits. As plaintiff
3 contends, the City never followed up on my invitation to show any lawful basis for denying the
4 permits other than the sign code (and, for those in design review zones, the applicable design
5 review regulations). The plaintiff argues, and I assume, that the common law requirement of
6 *detrimental* “reliance”¹² does not apply to its vested rights contentions under the statute and
7 ordinance.

8 It is perhaps to avoid this set of contentions that the City urges me to reverse my
9 conclusion that the invalidity of the distinction based on text, numbers, registered trademarks, or
10 registered logos could not be severed and the remainder of the sign code sustained. I continue to
11 be persuaded, however, that invalidating the distinction did not leave me (or Judge Brown) the
12 option of simply upholding the remainder of the sign code. As plaintiff noted, only by adding “or
13 image” or the equivalent to what was left of the definition (or by rewriting it completely) could
14 the result cure the unconstitutionality of the sign code. And, as plaintiff further argues, without
15 hindsight, I could not with any confidence determine how the City would resolve its strongly
16 conflicting interests in regulating billboards on the one hand and promoting mural art on the
17 other. It was to be expected that the City would seek some way to reconcile those interests, but I
18 was in no position to predict from legislative history or otherwise how it would attempt to do so.
19 I could not conclude that the City would necessarily make the choice that it did – to subject wall

¹² See, e.g., *Foress Sign Co. v. City of Woodburn*, 37 Or App 343, (1978). There is apparently no requirement under the statute or ordinance that a party change position to its detriment to retain its ability to rely on law in effect at the time of its initial application; the provisions, however, otherwise obviously exist to protect “reliance.”

1 murals to the same regulations that it applied to billboards.¹³ I could not determine the
2 “overriding concern” sufficiently to determine which outcome would do “the least damage” to
3 that concern. *Advocates for Effective Regulation v. City of Eugene*, 176 Or App 370 (2001). I
4 could not determine which intent was “dominant.” *City University v. State*, 320 Or 422, 426
5 (1994). I could not rewrite the sign code’s definitions because I did not know “what boundaries
6 the [City] would have considered had it recognized the constitutional infirmities” of the sign
7 code. *City of Eugene v. Powlowski*, 116 Or App 186, 190 (1992); *State v. Robertson*, 293 Or.
8 402, 436-37 (1982). Moreover, the real constitutional flaw was the City’s failure to make the
9 political choice it needed to make; I could not remove that flaw by usurping the City’s role to
10 make that political choice.

11 These circumstances all distinguish this case from *Outdoor Media Dimensions, Inc. v.*
12 *Department of Transp., supra*, 340 Or at 299-302. The *Outdoor Media* court could determine
13 with some confidence that the legislature would prefer foregoing permit fees altogether to
14 imposing them on to owners of on-premises signs as well as other signs. I had no confidence
15 which choice the City would make - whether to regulate murals along with billboards, to separate
16 wall signs and murals from billboard regulations, or to attempt on some basis other than content
17 to exempt wall murals from sign regulations. Moreover, the definition at stake was a far more
18 constitutionally sensitive, political determination than how to deal with the invalidity of a fee
19 exemption.

20 The City also invokes the severance statute, ORS 174.040, and the savings clause of the

¹³ Even plaintiff concedes that the City could choose to subject wall signs and murals to an entirely different set of regulations than those applicable to billboards. That choice was presumably unattractive because the City had no more affection for commercial wall signs than it has for commercial billboards. As discussed later in this opinion, the City probably had a number of other choices, of which the much more recent Public Art Mural Program may be one.

1 Portland City Code itself. The problem with both bases for seeking severance is that merely
2 eliminating the words “[s]igns contain text, numbers, registered trademarks or registered logos”
3 would not have cured the constitutional defect, as the remaining definition was limited to
4 “materials placed or constructed primarily to convey a message,” and that limitation suffered
5 from the same unconstitutionality as a regulatory scheme that reaches “messages” but not
6 “images.” Severance could not cure the problem; the remaining provision would itself be
7 unconstitutional. The necessary redrafting required a political choice as to which speech to
8 regulate and how. The choice could not with any confidence be predicted. That redrafting was
9 not for the court to presume.

10 I adhere, therefore, to my conclusion that I could not merely strike the offending
11 language, and that I could not redraft the sign code. In this sense, only, the code was “void.” It
12 does not follow, however, that the plaintiff is entitled to injunctive relief compelling the City to
13 issue the permits as if no restrictions existed when the plaintiff seized the opportunity to refile
14 applications for permits between Judge Brown’s ORCP 67B judgment and the City’s prompt
15 response.

16 In my 1999 Opinion, I noted that the essence of the statutory provision regarding
17 “standards and criteria” was “to assure both proponents and opponents of an application that the
18 substantive factors that are actually applied and that have a meaningful impact on the decision
19 permitting or denying an application will remain constant throughout the proceedings.”

20 *Davenport v. City of Tigard*, 121 Or App 135, 141 (1993), and *authorities cited*. I reasoned:

21 Had the City exercised the required political choice and come up
22 with a new ordinance that imposed more onerous size, placement,
23 adjustment criteria, design review guidelines or other restrictions on signs
24 than those in effect at the time of plaintiff’s initial (or resubmitted)
25 applications, the plaintiff would presumably be entitled under the statutory

1 and ordinance “vested rights” provisions to insist that the original
2 “standards and criteria” apply. In fact, the City has preserved precisely the
3 same “standards and criteria,” but has changed the applicable code only by
4 removing precisely the provision which has alone been found
5 unconstitutional in light of plaintiff’s attack. It is not just ironic that
6 plaintiff is seeking to avoid same “standards and criteria” that existed at
7 the time of plaintiff’s applications — it is fatal to plaintiff’s vested right
8 contentions. There is nothing in the language or the purpose of the statute
9 or ordinance that suggests that the plaintiff has anything approaching a
10 vested interest or its statutory equivalent in the entire *absence* of
11 “standards and criteria.” The vested rights language invoked by the
12 plaintiff may entitle it to avoid more onerous regulation as the cost of
13 successfully challenging a regulatory scheme, but it does not entitle the
14 plaintiff to avoid resurrected “standards and criteria” which are not
15 themselves inherently invalid simply because they were part of a scheme
16 which had to be revised in light of the plaintiff’s successful challenge.
17 The statute and ordinance protect reliance without a change of position,
18 but they do not entitle the plaintiff to “rely” on the circumstance that
19 otherwise valid “standards and criteria” are unenforceable because of their
20 connection to an unconstitutionally underinclusive definition of “sign.”

21 Nor does it assist plaintiff to label the pre-amendment sign code
22 “void.” . . . [T]he mission of judicial relief is to cure the constitutional
23 violation. While the City’s sign code was unconstitutionally disfavoring
24 categories of noncommercial speech the plaintiff had reason and standing
25 to contend that the scheme under which its permits were denied was
26 invalid. Because the permits were not denied on any basis that was
27 constitutionally proscribed *except* for the underinclusiveness of the sign
28 code definition, the plaintiff is not entitled to an order freeing it from any
29 regulation simply because it chose to file many applications as part of its
30 preparation for its challenge.

31 [1999 Opinion at 58-59]

32
33 Taking another run at this contention under state law, the plaintiff invokes *PGE v. Bureau*
34 *of Labor and Industries*, 317 Or 606 (1993),¹⁴ to argue that I must first look at the text and
35 context of the vested right provisions and go no further than the plain meaning of “in effect” and
36 “applicable” in these provisions because the meaning is clear from that text and context. Again,
37

¹⁴ Plaintiff correctly notes that the legislation which responded to *PGE v. BOLI* by amending ORS 174.020 to promote a more vigorous respect for legislative intent has no application to this litigation because it was filed before that amendment. 2001 Or Laws Ch 438, §2. It is astonishing, however, how pervasively this legislative adjustment has been ignored in cases to which it should apply.

1 a “void” ordinance is neither “in effect” or “applicable” according to the plaintiff, so no
2 regulation existed by which to restrict plaintiff’s right to the permits for which it applied.¹⁵

3 Initially, there is irony in the notion that the “plain meaning” of “in effect” or
4 “applicable” is subject to the time-shifting interpretation as to the initial applications – *i.e.*, that
5 because Judge Brown concluded (as I did later) that the distinction based on text, numbers,
6 registered trademarks, or registered logos, was unconstitutional and the sign code could not saved
7 by severance, the sign code was not “in effect” or “applicable” when those applications were
8 initially submitted *before* that determination. This is no “plain meaning,” but instead the
9 counterintuitive notion that an unconstitutional ordinance did not “exist” even though it was on
10 the books and purportedly adopted by a lawfully constituted legislative body through the usual
11 legislative process. Indeed, the cases cited to support the legal fiction of retroactive nonexistence
12 include one that declared a county’s adoption of a comprehensive plan without effect for want of
13 published notice required by statute (*Ramsey v. Multnomah County*, 44 LUBA 722 (2003)),¹⁶ and
14 others that held of no effect bonds issued by an entity whose very existence and therefore
15 authority to issue bonds was in violation of constitutional provisions regarding the creation of
16 such entities (*Rodgers v. Mabelvale Extension Road Imp. Dist. No. 5 of Saline County*, 103 F2d
17 844, 844 (8th Cir 1939), *and authorities cited*). Those kinds of cases do not support the legal
18 fiction, however, but amount to a determination that *at the time of* purported action by an entity,
19 the entity could not lawfully act.

¹⁵ I discuss plaintiff’s contentions regarding the design review regulations, applicable to a small subset of the permit applications, below. For present purposes I assume without deciding that those regulations did not afford an independent basis for denying the applications.

¹⁶ It was not the plan that the court found ineffective by reason of inadequate notice, but the county’s action in adopting the plan; the cited decision upholds the adoption of the plan by subsequent county action accomplished with notice satisfactory to LUBA.

1 I am not persuaded that the notion that the sign code was void because unsalvageable
2 without redrafting renders “plain” the meaning plaintiff would attach to ORS 227.178(3) and
3 PCC 33.700.080 (7/1/97) – at least with respect to the impact of these provisions on the
4 applications originally submitted. Moreover, the plain meaning of the introductory language in
5 PCC 33.700.080, appears to be that its provisions *only* apply “[w]hen new zoning code
6 amendments or changes to the zoning map are adopted but not yet implemented” at the time of
7 the application – hardly this situation.

8 Plaintiff contends, however, that once Judge Brown declared the sign code void, there
9 was no sign code. Because plaintiff resubmitted the applications, plaintiff insists at least during
10 this time period¹⁷ no sign code was “in effect” or “applicable,” and therefore that there was no
11 lawful basis upon which to deny those applications.¹⁸ I find this contention unpersuasive for
12 three reasons. First, the statute by its plain meaning directs that the “standards and criteria that
13 were applicable at the time the application was *first* submitted.” Resubmitting the applications
14 after Judge Brown’s decision should have no impact on the outcome. Second, the statute and the
15 ordinance (assuming its relevance when even were, as here, no adopted ordinances were yet to be
16 implemented) contemplate and protect – by their plain meaning – an applicant’s reliance (even
17 without “detriment”) upon pre-existing standards, not the strategy of employing litigation to push
18 aside existing regulations for the purpose of evading them before new regulations can be
19 adopted. Third, the ORCP 67B judgment was not yet final and the time in which to appeal and

¹⁷ Judge Brown “issued” his order October 27, 1998; plaintiff resubmitted its applications on November 2, 1998, and the City adopted the new sign code provisions regulating murals and signs together on November 18, 1998 - the day after Judge Brown’s order was *entered*.

¹⁸ Although reapplying was an understandable tactic to avoid my reading of “in effect” or “applicable,” it is arguably inconsistent the notion that these vested right provisions protect both proponents and opponents of an application. As Plaintiff notes, *Davenport v. City of Tigard, supra*, 121 Or App 135, held that an applicant could not invoke the provisions of changes in the law after its initial application application.

1 in which to seek a stay pending appeal had not run, by the time the ordinance was replaced by the
2 superseding ordinance. The City effectively superseded the challenged sign code before any
3 judgment declaring it unconstitutional was final. And, as it turns out, the Court of Appeals
4 concluded that the ORCP 67B judgment was itself improperly entered.¹⁹ I am confident that
5 under these circumstances, the plaintiff may not successfully rely on ORS 227.178(3) or PCC
6 33.700.080 to entitle it to permits as if no sign regulation existed when those permits were
7 resubmitted – at least where, as here, the centrally fatal and constitutional size limitations pre-
8 existed the plaintiff’s applications for permits and were at least resurrected in the sign code in
9 question.

10 **Alternative Channels of Communication and Disappearing Billboards**

11 *Outdoor Media Dimensions, Inc. v. Department of Transp., supra*, 340 Or 275 (2006),
12 dashed the City’s hopes of upholding a distinction between art and billboards based on “text,
13 numbers, registered trademarks, or registered logos,” but that opinion did far wider damage to
14 attempts to avoid regulation of billboards through free speech challenges. *Outdoor Media*
15 *Dimensions* rejected arguments that in regulating billboards as highway signs, OMIA²⁰ violated
16 the state and federal constitutions as a forbidden prior restraint on speech, or by deterring speech
17 through the impact of a permit fee. As germane to the plaintiff’s arguments here, *Outdoor Media*
18 *Dimensions*, except for the different content-based treatment of on-premises and off-premises
19 signs, upheld OMIA’s regulation of billboards visible from highways as “content-neutral time,

¹⁹ As noted, the Court of Appeals found the purported ORCP 67B judgment ineffective because it “reserves judgment as to portions of . . . claims rather than disposing of whole claims.” 192 Or App at 208. “No part of ORCP 67 B or any other statute or rule authorizes entry of a judgment in such circumstances.” *Lesch v. DeWitt*, 317 Or 585, 590 (1993).

²⁰ Oregon Motorist Information Act, ORS 377.700-840, 377.920.

1 place, and manner restrictions” *even though OMIA capped off-premises signs at the number that*
2 *existed on June 12, 1975:*

3 In this case, it is apparent that, by limiting the number of outdoor
4 advertising sign permits to the number of signs that existed in commercial
5 and industrial zones in 1975, the OMIA was intended to, and does, cap the
6 number of those signs that are visible from public highways. Petitioner
7 appears to assert that the fact that it must obtain a permit lawfully to
8 display its signs and that the number of permits is limited means that the
9 OMIA necessarily violates Article I, section 8.

11 We disagree. Outdoor advertising signs, like other forms of expression,
12 may have characteristics that make them uniquely suited to conveying
13 certain messages to certain audiences. If the state were to prohibit
14 billboards – or some other form of expression – entirely, then perhaps
15 there would be reason to consider whether the effect of such a ban
16 “restrain[ed] the free expression of opinion” or “restrict[ed] the right to
17 speak, write, or print freely” under Article I, section 8. *Cf. Miller*, 318 Or
18 at 487 (complete ban on sale and distribution of all expressive material,
19 although content neutral, likely would violate Article I, section 8, “because
20 it would restrict too greatly ‘the free expression of opinion’ and ‘the right
21 to speak, write, or print freely on any subject whatever’”). But the OMIA
22 differs fundamentally from the complete ban on door-to-door solicitation
23 in *Purcell* and the blanket exclusion of sellers of books and magazines
24 from the sidewalk marketplace in *Miller*. The OMIA allows as many
25 outdoor advertising signs (off-premises signs) as existed on June 12, 1975,
26 as well as potentially thousands of on-premises signs. Petitioner has ample
27 avenues to communicate its messages, both on highway signs and by other
28 means. On this record, the permit and fee requirements do not
29 unconstitutionally restrain the free expression of opinion or restrict the
30 right to speak, write, or print freely on any subject whatsoever.

31 [340 Or at 291-92]

33 Plaintiff reasonably argues that the City’s regulatory scheme is critically distinguishable
34 from OMIA in that rather than a cap it is a death-knell, that the prohibition of signs over 200
35 square feet means that plaintiff’s inventory will shrink – ultimately to zero – and that there are or
36 will be no adequate alternative channels of communication at least as to those buyers or nonprofit
37 beneficiaries who depend upon the standardized posters and bulletins to “communicate [their]
38

1 messages.” The plaintiff asserts that I should treat the sign code as a ban on a entire medium of
2 communication, and stresses that the technological evolution and diversification of media has
3 increasingly elevated the importance of its billboards for reaching the intended targets of the
4 messages it charges its customers to convey.²¹

5 Plaintiff argues that I erred in the 1999 Opinion by implying that it was plaintiff’s burden
6 to show that no adequate alternatives existed, and that the City properly has the burden of
7 persuasion and proof as to the existence of adequate alternatives. Clear Channel’s regional
8 General Manager, Chris Artman, testified that if attrition continued for another seven years at the
9 rate it has occurred since 1999, the loss of signs would be a mortal blow to plaintiff’s business.
10 Plaintiff argues that the injunction is appropriate to “counter the effects of the City’s
11 unconstitutional action.”

12 The City responds that plaintiff’s cases for assigning burden of proof and defining the
13 adequacy of alternative channels are from other areas of free speech litigation – such as “adult”
14 book stores – and should have little or no weight here. In any event, the City argues, it has
15 demonstrated (*i.e.*, that it has met its burdens of persuasion and of proof) that many of the
16 plaintiff’s buyers not only have but regularly exploit entirely different modes of communication,
17 and that many thousands of signs exist in Portland to serve the communication needs of all who
18 might use plaintiff’s product. To plaintiff’s suggestions that all or almost all smaller sign
19 locations are already taken, that billboards are more economically feasible for many advertisers,
20 and that nonstandardized sizes are economically infeasible, the City essentially responds that
21 these contentions are irrelevant.

²¹ For present purposes, I assume drivers on a public road have no “right to be left alone” that would compete with plaintiff’s rights to engage in speech some might find offensive. *See, e.g., Hill v. Colorado*, 530 U.S. 703 (2000).

1 Assigning the burdens of proof and persuasion will not affect the outcome on this record.
2 I assume that the burdens of proof and persuasion as to the adequacy of alternative channels rest
3 on the City. This means that if there were no evidence of alternative channels, the City would
4 lose on this issue, and that if the persuasiveness of evidence and argument were evenly balanced,
5 the City would lose as well. But the City has surely satisfied the burden of presenting evidence,
6 and both sides are entitled to rely on evidence produced by others (including evidence produced
7 by the intervener). The evidence is that for many who might use billboards, there are available
8 alternative channels of communication, such as radio, television, smaller signs, and even bus
9 bench and bus advertising. It is clear from the testimony exhibits that in terms of sheer numbers
10 of messages, there is no such shortage of alternatives that would raise constitutional infirmities in
11 a content-neutral time, place and manner regulation of signs. But it is also clear from the record
12 that for some who would rent message space from the plaintiff, and for some who would, if
13 allowed, place messages for nonprofit purposes, billboards are uniquely efficient, affordable,
14 targeted, and effective. On the one hand, it is not analytically correct to assess the adequacy of
15 channels of communication alternative to billboards by the assumption that all who would use
16 them can realistically only use billboards for their purpose. On the other hand, it is also incorrect
17 to argue that smaller signs are an adequate alternative for all who would use billboards. And
18 several of the interests invoked by the plaintiff are at least fragmented in their relationship to the
19 value of billboards in general and plaintiff's particular business plan – particularly including
20 standardized posters and bulletins. National retailers with national “campaigns” and “showings”
21 may require standardized sign sizes, but the local political campaign probably does not and the
22 unique directional signs “eat here” or “next left for gas” surely do not. Major retailers and many
23 nonprofits who use billboards also use smaller signs, radio, newspapers, flyers, and even TV,

1 while some few retailers would apparently address this market only through billboards because of
2 economics or their own market strategy; some nonprofits apparently are heavily reliant on
3 billboards; some election strategies (for candidates and for issues) rely heavily on billboards; and
4 some nonprofit users cannot afford newspaper, radio, or television alternatives.

5 I agree with the plaintiff that cost and other practical considerations cannot be discarded
6 when assessing the adequacy of alternative channels of communication if the protection of
7 speech is to be effective. *See, e.g., Linmark Associates, Inc. v. Willingboro*, 431 US 85, 93
8 (1977); *Van v. Travel Information Council*, 52 Or App 399, 414-15 (1981). On the other hand,
9 the requirement of adequate alternative channels applies to *regulation* of time, place and manner,
10 and regulation implies limitation. It is not plaintiff's business plan, or plaintiff's interest in
11 maximizing profits or in fulfilling all requests to purchase sign faces that determines adequacy.
12 *See Outdoor Media Dimensions, supra*, 340 Or at 291-92. That plaintiff might choose to leave
13 the market because of its calculations of profitability is not the test of whether there is a
14 constitutionally adequate supply of poster and bulletin locations to serve the needs of users
15 without a practical or economically viable alternative in other signs or other media

16 Nor are the "total ban" cases invoked by plaintiff persuasively applicable here. Although
17 the evidence is that the plaintiff has lost 67 structures since the 1999 Opinion, the remaining 499
18 structures account for 692 "faces," which are typically changed monthly, for a total of 8304
19 messages per year. Although if nothing changes, the combination of the sign code and attrition
20 would presumably amount to a total ban, I cannot now grant plaintiff the remedy of injunctive
21 relief because in a decade or two the reservoir of sign faces would eventually become inadequate
22 with respect to those billboard uses that have no adequate alternatives.

23 Moreover, the rapid evolution of advertising technology that plaintiff evokes to

1 emphasize the unique value of “reaching” viewers (many of whom, if able, would presumably
2 skip them as they now can skip commercials with TIVO and similar technologies for television)
3 also presents the very real likelihood of undermining the plaintiff’s contention that no
4 alternatives exist. For many present users of billboards, though fragmentation through
5 technology may challenge advertising strategies, the emergence of new avenues and devices of
6 communication and publication may present new avenues that are preferable to billboards. And
7 the value of standardization into poster and bulletin sized signs may well fade as technology
8 affects the modes of sign printing and distribution, and perhaps replaces printing with electronic
9 displays (which all acknowledge has begun in other markets). For example, by the time the
10 plaintiff may be able to provide only two thousand “messages” per year on billboards in Portland,
11 it may be that another ten thousand are available by way of smaller, animated electronic displays
12 authorized by a new electronic sign code, and it may be that plaintiff’s present potential
13 customers will by then prefer the flexibility, economies, or effectiveness of that new medium.²²

14 What amounts to a “total ban” is itself not an immutable query. By the time plaintiff’s
15 available structures, faces, and monthly messages in the City of Portland decline to the point that
16 they approach constitutional inadequacy, changes in technology, the market, and even in the
17 City’s regulations may leave the plaintiff with far fewer claims to unique communication value
18 than it now has. It may even be that by then, advertising will reach all drivers through the
19 medium of ubiquitous GPS and road hazard dashboard screens. It makes no sense to predict
20 those variables now to determine whether plaintiff’s requested relief might by then be essential to
21 avoid an unconstitutional outcome which is neither imminent nor inevitable.

²² I do not mean to suggest that this is or is not a preferable path for regulation, but merely provide the scenario in support of my conclusion that it makes no sense to contemplate injunction now to solve a problem that may not exist or whose contours may be enormously different later.

1 I agree with the plaintiff that the intervener has made a strong case that *murals* have been
2 effectively banned already. But the plaintiff isn't asking for permits to paint murals, and the City
3 has initiated a Public Art Mural Program whose contours and constitutional adequacy I cannot
4 assess in the context of this litigation. That the City may need murals is not an adequate basis
5 upon which to compel the city to issue plaintiff permits for billboards.

6 Imminence of irreparable injury is a touchstone of injunctive relief. That speech is
7 involved addresses what may be irreparable, but I find nothing approaching an imminent
8 constitutional injury because the City's sign code is a reasonable time, place, and manner
9 regulation of signs, and any inadequacy of alternatives in a constitutional sense is many years
10 away and would occur if at all in a far different mix of practical considerations than that which
11 now exists.

12 **Damages and Injunctive Relief**

13 Plaintiff argues that the unavailability of damages for free speech violations under state
14 law is a basis for injunctive relief and a sufficient reason to reach federal claims under the First
15 Amendment. The City argues that because the plaintiff has obtained declaratory relief under the
16 state constitution, and because that relief is complete, under the "first things first" methodology
17 this court cannot properly reach any of the plaintiff's federal claims.

18 I conclude that even if plaintiff is properly entitled to damages for federal violations, their
19 unavailability under state law is not itself a sufficient basis for injunctive relief, but that I must
20 reach plaintiff's federal claims to explore whether the plaintiff is entitled to injunctive or
21 monetary relief under federal law.

22 The short answer to the plaintiff's argument based on the remedies clause, Article I,
23 section 10 of the Oregon Constitution, is that that clause protects rights that existed as a matter of

1 Oregon common law when the state constitution was adopted. *Smothers v. Gresham Transfer,*
2 *Inc.*, 332 Or 83, 124 (2001). Our Supreme Court has held that the right to damages for violation
3 of constitutional protections is not among the rights that existed as a matter of Oregon common
4 law. 332 Or at 124 (2001). It follows that the unavailability of damages in state law does not
5 trigger any right to a remedy under Article I, section 10. Moreover, even assuming that damages
6 are available to the plaintiff for violation of its federal constitutional rights, and even if Article I,
7 section 10 applied to federal constitutional rights, declaratory relief and, where appropriate under
8 applicable circumstances, injunctive relief are adequate substitute remedies within the meaning
9 of Article I, section 10 at least where, as here, plaintiff's claim for First Amendment damages
10 cannot be based on the notion that but for the constitutional violation, plaintiff would have had
11 its signs.²³ See, e.g., *Davidson v. Rogers*, 281 Or 219, 222 (1978) [retraction adequate substitute
12 for general damages for defamation].

13 It does not follow, however, that I can simply ignore the plaintiff's federal claims. If the
14 First Amendment affords a remedy by way of injunctive relief or damages that is unavailable
15 under state law, the plaintiff is entitled to pursue federal claims in state courts. *Barcik v.*
16 *Kubiaczyk*, 321 Or 174, (1995).

17 On the merits of plaintiff's First Amendment claim to injunctive relief, however, I
18 conclude that the plaintiff is not entitled to injunctive relief for the reasons stated in my 1999
19 Opinion. To the extent that the plaintiff has offered new evidence and argument on remand, the
20 analysis above under Article I, section 8, of the Oregon Constitution also requires that I find that

²³ My theory of First Amendment damages in the 1999 Opinion was not that the plaintiff would have had it signs but for the sign code distinction that unconstitutionally discriminated between regulation or not based on content, but that until Portland made its constitutionally required political choice, "damages are appropriately measured by the pecuniary loss suffered while the City deprived the plaintiff of a stream of income during and by authority of the unconstitutional regulatory scheme." 1999 Opinion at 62.

1 the plaintiff is not entitled to injunctive relief under the First Amendment – that the City properly
2 relied on size limitations, as content-neutral, time place and manner regulations, to deny
3 plaintiff’s applications for billboard permits notwithstanding “vested rights” provisions and the
4 eventual but remote disappearance of billboards through attrition under the existing sign code.

5 On the merits of plaintiff’s claim to damages, the City asks that I review and vacate my
6 prior award of damages. That award was based upon my analysis that although the plaintiff had
7 not established that but for the unconstitutional distinction between signs with and without “text,
8 numbers, registered trademarks, or registered logos,” it would have had its signs, the plaintiff
9 was deprived of a stream of income *on the authority of* an unconstitutional code until the City
10 amended its code.²⁴ The City correctly cites intervening First Amendment caselaw, as the
11 availability of damages for First Amendment violations is itself a federal question. On such
12 questions, only decisions of Oregon appellate courts and of the United States Supreme Court are
13 binding authority, but the reasoning of the lower federal courts may well be instructive. The City
14 also argues that its moratoria on all wall signs removed the basis upon which plaintiff’s
15 constitutional challenge rested (preference for murals based on content) before the plaintiff filed
16 any applications, so that the plaintiff is entitled to no damages even under my theory.

17 *Valley Outdoor, Inc. v. County of Riverside*, 337 F3d 1111, 1115 (9th Cir 2003),
18 understandably denied damages to a billboard company that successfully challenged a sign
19 ordinance’s “grandfather clause” but whose signs remained ,”independently’ illegal” under
20 *severable* and valid remaining “content-neutral zoning, size and height provisions.” *Prime*
21 *Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 824 (6th Cir 2005), denied damages to a

²⁴ 1999 Opinion at 60-63.

1 billboard plaintiff whose signs were rejected for both unconstitutional (on-premises versus off-
2 premises distinctions) and constitutional (height and size) bases. Brentwood had amended its
3 code to remove the off-premises restriction. Finding the size and height restrictions lawful and
4 sufficient to bar the plaintiff's signs, *Prime Media* agreed with the city that the plaintiff could not
5 establish that it had suffered any damages as a result of the off-premises restriction. And
6 *Boulder Sign Co., L.L.C. v. City of Boulder City, Nev.* (2006 WL 2088412) (D. Nev. 2006)
7 followed *Valley Outdoor* in reasoning that because valid and prohibitory size and height
8 limitations remained after Boulder City repealed a challenged proscription of off-premises
9 messages, the billboard plaintiff was entitled to neither actual or nominal damages.

10 Plaintiff naturally would distinguish the City's authorities on the basis that all involved
11 severable ordinances, and I continue to agree with the plaintiff that no court could appropriately
12 rewrite this sign code to make it constitutional. Plaintiff invokes my reasoning that at the time
13 the permits were denied, "the City had not yet made the political choice to regulate billboards
14 and murals alike, as opposed to sparing billboards to promote murals." From this, the plaintiff
15 argues:

17 The City surely cannot rely on changes made in the ordinance either by the
18 City Council or by a court applying its powers of severance *after* the
19 permits were, in fact, denied. The City's position ignores the unassailable
20 fact that, but for the unconstitutional code, Clear Channel's permits would
21 have been issued, and its income stream from the signs would have
22 continued beyond the date the ordinance was amended up until the point
23 that the permits were granted.

[Plaintiff's Trial Brief at 34-35]

25 My damages analysis in the 1999 Opinion was that because the sign code was "invalid"
26 due to its unconstitutional content-based definitions, and because it could not be saved by
27 severance, plaintiff was deprived of income *on the authority of* an unconstitutional sign code
28

1 from the time of the initial applications for permits until November 18, 1998, when the new code
2 was adopted, or, as to some wall signs, as to the date the City adopted a second moratorium²⁵ (not
3 “until the point that the permits were granted”).

4 In retrospect, and at least in light of intervening caselaw cited by the City and my renewed
5 and extended analysis of plaintiff’s “vested rights” arguments,²⁶ I am now convinced that my
6 previous theory of damages was erroneous. Although the unconstitutional sign code was the
7 City’s basis for denying the permits, and although that code could not be cured without
8 legislative response to the plaintiff’s constitutional challenge, the size limitations which existed
9 at the time of the initial and renewed applications were not themselves prohibited by free speech
10 provisions of any constitution. What was unconstitutional about the previous code was not its
11 application to plaintiff’s billboards but the method by which it exempted murals. Had the
12 question been prospective at the time, I would not have found it more likely than not that the City
13 would deregulate billboards to cure the constitutional defect; the only unknown was *how* the City
14 would manage to continue to regulate billboards and repair the constitutional defect the City now
15 concedes. And the issue was not prospective at the time, as the City had cured the defect without
16 deregulating billboards.

17 In this context, it is as much a fiction to reason that but for the unconstitutionality of the
18 City’s sign code plaintiff would have had its billboards as it is to reason that the sign code was
19 “void,” did not “exist,” and was not “applicable” when the plaintiff resubmitted its applications.

20 I cannot award damages based on the notion that but for the unconstitutionality of the
21 sign code, plaintiff *would have had its signs*. In that sense, then, the unconstitutionality of the

²⁵ 1999 Opinion at 62-65.

²⁶ *Supra*, pages 9-16.

1 sign code was not a proximate cause of damages to the plaintiff, and actual damages are
2 unavailable. “No compensatory damages may be awarded in a § 1983 suit absent proof of actual
3 injury.” *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). “Substantial damages should be awarded
4 only to compensate actual injury.” *Carey v. Piphus*, 435 US 247, 266 (1978). The actionable
5 injury was the unconstitutional distinction based on “text, numbers, registered trademarks, or
6 registered logos,” not the loss of billboards that exceeded the City’s sign size limitations. The
7 actionable injury was redressed by the City’s amendment of the code, and the plaintiff is not
8 entitled to monetary relief.

9 Nominal damages are available in Oregon courts when appropriate for First Amendment
10 violations. *See Barcik v. Kubiacyk, supra*, 321 Or at 196-97. It appears from the cases that
11 most courts considering the issue have rejected nominal damages where, as here, the
12 constitutional flaw identified was not in the provision which resulted in rejecting permits for
13 billboards. *See, e.g., Boulder Sign Co., L.L.C. v. City of Boulder City, Nev., supra*, 2006 WL
14 2088412 at 7; *Valley Outdoor, Inc. v. County of Riverside*, 337 F3d 1111, 1114-15 (9th Cir
15 2003); *Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F3d 814, 824 (6th Cir 2005); *Granite*
16 *State Outdoor Advert., Inc. v. City of St. Petersburg, Fla.*, 348 F3d 1278, 1283 (11th Cir 2003).
17 The closest case to plaintiff’s which awarded nominal damages is *KH Outdoor, LLC v. City of*
18 *Trussville*, 465 F3d 1256, 1258 (11th Cir 2006). That case involved a sign ordinance which
19 unconstitutionally preferred commercial over noncommercial speech. The plaintiff did not
20 recover actual damages because it did not establish which of the permits it sought were for
21 noncommercial speech; the court awarded nominal damages, distinguishing *Granite State*
22 *Outdoor* as a case in which the provisions found invalid were not those use to deny the plaintiff’s
23 applications, while, presumably, signs were directly precluded here under a provision disfavoring

1 noncommercial speech.

2 These cases are, again, distinguishable on grounds that the court found the
3 unconstitutional provisions severable from the constitutional provisions which independently
4 supported rejection of the permits in question. For the same reasons upon which I reject
5 plaintiff’s vested rights and actual damages arguments here, however, I cannot say that the
6 plaintiff was denied any sign by reason of an unconstitutional provision. The signs were properly
7 rejected because they were larger than permitted. The only flaw was excepting murals through a
8 content-based definition. Nominal damages are appropriate where a plaintiff has suffered a
9 constitutional deprivation to its detriment but cannot or does not prove actual damages. They are
10 not available where, as here, the constitutional flaw was not itself an impediment to the
11 plaintiff’s signs, but at best provided an opportunity to exploit that flaw to force the City to issue
12 permits the City could and did constitutionally refuse to issue.

13 In any event, the plaintiff did not seek nominal damages, but expressly sought actual
14 damages which it alleged were “in an amount in excess of the minimum required for jurisdiction
15 and not to be subject to arbitration.” (Petitioner for Review/Amended Complaint ¶18).

16 I recognize that there are serious issues involved in this case as to which reasonable
17 minds can differ. If an appellate court disagrees about either the unavailability of injunctive
18 relief or damages, perhaps my damage calculations of 1999 will spare the parties some of the
19 burden of further litigation. For what it is worth, I would reject the City’s argument that the
20 moratoria covering all wall signs and murals cured the unconstitutional content-based distinction
21 challenged by the plaintiff. Even during the moratoria, it was the sign code that prevented
22 plaintiff from erecting new billboards.

23 I agree with the City that my determination that plaintiff is not entitled to damages also

1 means that plaintiff is not entitled to attorney fees under 42 USC §1988. *Oregon State Police*
2 *Officers Ass’n, Inc. v. State*, 308 Or 531, 537-39 (1989), and authorities cited.

3 **Design Review and Narrowing Construction**

4 The plaintiff reasonably argues that my narrowing construction of design review
5 guidelines²⁷ applicable to sign permit applications in design review zones did not fully address
6 constitutional flaws in the design review regulations, and that at least as a matter of state
7 constitutional law, the narrowing construction was unavailable because it undertook an
8 unwarranted recasting of expressed legislative intent. However, under a “first things first”
9 methodology, and under the “avoidance principle” discouraging adjudication of constitutional
10 issues not required for resolution of the parties’ dispute,²⁸ it is inappropriate to address any
11 remaining constitutional issues surrounding design review standards. First, I adhere to my
12 findings that the City denied all of the plaintiff’s applications, including those for billboards in
13 design review zones, because all “sought vastly (in the case of bulletins and many posters) or
14 substantially (some posters) to exceed the permitted size,” and that none would have been
15 permitted regardless of design review.²⁹ The design review process and its criteria presented an
16 additional hurdle which the plaintiff would have to overcome to obtain its permits; any invalidity
17 of the criteria could not provide the basis of an affirmative *right* to those permits. Second, the
18 City modified its code in apparent response to my 1999 Opinion to provide:

19 Notwithstanding any other provision of this Title or of related standards

²⁷ My 1999 Opinion awarded plaintiff, on federal constitutional grounds, “declaratory relief that the sign adjustment criteria and design review guidelines variously applicable to signs are to be interpreted and enforced in relevant part as referring only to sign structure or placement, and as permitting reference to copy only to the extent of color or typeface and excluding any reference to message, category, subject, topic, or viewpoint.”

²⁸ *E.g., Ainsworth v. SAIF Corp.*, 202 Or App 708, 711-13 (2005), and authorities cited..

²⁹ 1999 Opinion at 43

1 referenced in this Title, applications for adjustments, design review, and
3 historic design review for signs will be reviewed only with respect to sign
5 structure or placement, or with reference to copy only to the extent of color
topic, or viewpoint.

[PCC 32.38.010 C]³⁰

7
8 The plaintiff contends that color and typeface *are* elements of content and message that
9 cannot form a constitutional basis for regulation of a sign. The issue may be framed by *Outdoor*
10 *Media*'s analysis that "[o]n-premises signs, which do not require a permit, and off-premises
11 signs, which do require a permit, can pose the same risk to safety and have the same adverse
12 effect on scenic beauty." 340 Or at 297. Whether the distinction that design review criteria
13 purport to further content-neutral aesthetic interests is sufficient to deflect a challenge that
14 typeface and color are forbidden content-based distinctions is a substantial question³¹ that I have
15 no business addressing in the context of permit applications that were properly denied based
16 upon size limitations alone and design review guidelines whose relevant restriction is now
17 established by a subsequent code provision.

18 **Free Speech and Preferring Art to Advertisement**

19 The City asks that I revisit or at least clarify my prior Opinion "[g]iven the devastating

³⁰ I sustained plaintiff's objection to the City's offer of this ordinance on evidentiary grounds – that it was irrelevant to the issues before me concerning plaintiff's entitlement to the permits for which it applied most recently in 1998. The plaintiff was attempting to exploit an acknowledgment that managers had ignored my narrowing construction of design review criteria, and the City offered this ordinance to demonstrate the contrary. I take judicial notice of this ordinance for a different purpose here – to explain why it is inappropriate for me to determine the validity of the criteria before they were revised by this provision, when I am persuaded that the permits were precluded by size limitations regardless of those criteria.

³¹ Compare, e.g., *Outdoor Media Dimensions, supra*, 340 Or at 288, 296 ["the state's reliance on the legitimate safety and aesthetic goals of the OMIA does not justify a prohibition of speech based on its content" – perhaps because such laws "violate Article I, section 8, unless the prohibition comes within a well-established historical exception"], with John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw U L Rev 1099, 1107 (2002) ["Although aesthetic regulation of urban land use is regarded as a relatively recent development in America, many examples of it exist in the laws and ordinances of the early republic" (*footnote omitted*)].

1 impact this Court’s last decision had on the mural arts community.” Defendant’s Post-October 2,
2 2006 Trial Memorandum at 47. And the Intervener powerfully argued that at least the sequel of
3 that decision has been disastrous to that community. I cannot properly prejudge any issues that
4 may exist outside the context of the dispute squarely before me. Perhaps this much is appropriate
5 and useful:

6 First, as the City now concedes, its attempt to favor murals over billboards *by means of a*
7 *content-based regulation* was prohibited by the Oregon Constitution. My Opinion was correct in
8 recognizing that reality; it did not create Oregon constitutional law or even provide the definitive
9 interpretation of that law – a function ultimately reserved to our Supreme Court. The City
10 chose, when faced with the invalidity of its distinction based on content, was to restrict murals in
11 the same manner as it restricts billboards. It was that choice, and perhaps the underlying
12 constitutional law which my Opinion merely recognized, which is chargeable with having had a
13 “devastating impact.” I surely did not direct the City to prohibit murals over 200 square feet,
14 although I understand the City’s choice if it understood its only alternative was to deregulate
15 billboards.

16 Second, the prohibition against favoring art exists in the context of content-based
17 regulation. My Opinion focused on the First Amendment analysis in which whether a content-
18 based distinction is “content-neutral.”

19 In any event, the Oregon courts have upheld (at least for the time
20 being) the distinction between on- and off-premises signs as content-
21 neutral even though a “message” must be evaluated to determine whether
22 its placement is lawful. *Outdoor Media Dimensions, Inc. v. State of*
23 *Oregon*, 150 Or App 106 (1997), *review allowed* 326 Or 627 (1998);
24 *accord, Media Art Company v. City of Gates*, 158 Or App 336 (1999). I
25 agree with these cases that a distinction in treatment of signs does not
26 become “content-based” for First Amendment purposes so as to escape the
27 domain of “time, place and manner” regulations merely because the

1 distinction depends on an examination of sign copy.

3 Nonetheless, the distinction based on text, numbers, registered
5 trademarks, or registered logos cannot be simply categorized as a
7 distinction based on the “mode” of expression, such as between broadcast
9 and cable media, sound trucks and parades, live music and television
11 performances, or magazines and newspapers. Even when a distinction
13 related to content appears to be neutral, it will lose the status of “content-
15 neutrality” if its manifest *purpose* carries a bias as to message, topic, or
17 issue, even where the state takes no sides. *Compare, e.g., Turner*
19 *Broadcasting Inc. v. FCC*, 512 US 622, 645-46, 114 SCt 2445, 2461
21 (1994), and authorities cited, *with Police Department of City of Chicago v.*
23 *Mosley*, 408 US 92, 96, 92 SCt 2286, 2290 (1972) [government may not
25 select which issues are worth discussing], *Burson v. Freeman*, 504 US
27 191, 197, 112 SCt 1846, 1850 (1992), and authorities cited [content-based
29 regulation extends beyond viewpoint to prohibition of entire topic]. It is
31 unavoidable on this record that the primary *purpose* of the text, numbers,
33 registered trademarks, or registered logos distinction was to exempt murals
35 — a protected form of noncommercial speech — from regulations
37 applicable to both commercial and noncommercial speech. *See, e.g.,*
39 Exhibits 1053 (SIGN CODE REWRITE PROJECT at 9), 1095, 1096, 1096A,
41 105 at p.1 [City policies “encourage murals, such as those murals used to
43 foster a sense of community and those used to discourage graffiti”].
45 Whatever can be said of the *method* the City choose to pursue this interest,
the City cannot claim that the differences in treatment “are only
adventitiously connected with content” (*City of Ladue v. Gilleo, supra*,
512 US at 53, 114 SCt 15 2044). The City’s challenged distinction is
content-based because it seeks to favor one form of protected speech (“art”
in the form of “wall murals”) over many others, including commercial and
noncommercial speech, including much at the core of the values protected
by the First Amendment. In this sense, the distinction here challenged is
alike in kind with distinctions aimed at religious expression (*Widmar v.*
Vincent, 454 US 263, 102 SCt 269 (1981)); collective bargaining topics
(*City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment*
Relations Commission, 429 US 167, 97 SCt 421 (1976)); or political
speech (*Lehman v. City of Shaker Heights*, 418 US 298, 94 SCt 2714
(1974) (NO. 73-328)).

In short, the City’s challenged distinction based on text, numbers,
registered trademarks, or registered logos cannot be deemed content-
neutral because its purpose was never content-neutral. That the City chose
to render the distinction as objective and viewpoint-neutral as possible for
a variety of reasons does not change the result: the distinction is not
content-neutral and time, place and manner arguments are simply
unavailing.

[1999 Opinion at 22-24, *footnotes omitted*]

1 Of course, the final opinion in *Outdoor Media Dimensions, Inc. v. Department of*
2 *Transp.*, 340 Or 275 (2006), seems quite unavoidably to say that even a “neutral” content-based
3 distinction cannot comport with Article I, section 8 of the Oregon Constitution – so that it
4 doesn’t matter for state constitutional purposes (absent an applicable historical exception)
5 whether the City’s purpose was to prefer art. That purpose was critical only for First Amendment
6 analysis, and only to assess the validity of a content-based distinction in the regulation of “signs”
7 including murals.³²

8 Nowhere in the opinion or in state or federal caselaw that I know of, however, is there a
9 proscription (outside the area of discrimination against protected classes) against “preferring”
10 one activity or expression over another *outside the context of content-based regulation*, and
11 nothing that I am aware of prevents the City from “preferring” art over commercial speech, any
12 more than it may choose to prefer other forms of commerce to “adult” book stores, quiet forms of
13 recreation to automobile races, backpacking to ATVs, public transportation to individual
14 automobiles, vibrant commercial occupancies to abandoned buildings – or even television ads to
15 newspaper ads when, for example, it chooses to buy advertising. Even in the context of
16 regulation, the City may surely regulate distinct channels of communication based on what
17 makes them distinct – for example, the City may choose to regulate newspaper stands differently
18 than it regulates sound trucks differently than it regulates wall signs differently than it regulates
19 on premises signs differently than it regulates free standing signs – and so on – as long as the
20 basis for the distinction is not based on the content of any of these forms of expression. *Outdoor*

³² The City urged me to “clarify” that it may “prefer” art without violating the First Amendment. I still cannot foresee any relevant situation in which the First Amendment would *compel* a result that is inconsistent with the state constitution, and I see no benefit to anyone in reciting how the First Amendment may be less protective of speech than Article I, section 8, of the Oregon Constitution. Neither constitutional provision prohibits regulation that varies with distinctions among channels or modes of communication without regard to content; whether a given regulation conflicts with either is a very different question than whether the City can prefer murals to billboards.

1 *Media*, for example, did not forbid regulating on-premises signs differently than off-premises
2 signs, but only distinguishing between them for purposes of regulation based on the content of
3 the message displayed.³³ Free speech concerns limit how a city might regulate door to door
4 solicitation (*City of Hillsboro v. Purcell*, 306 Or 547 (1988)) or sidewalk vending (*City of*
5 *Eugene v. Miller*, 318 Or 480 (1994)), but it hardly follows that a city must regulate both alike.

6 The intervener’s evidence demonstrated a number of ways in which the channel of
7 communication that is characterized by mural art is vastly distinct from the channel of
8 communication that is characterized by standardized billboard posters and bulletins. There are
9 substantial differences in the manner of production and distribution, the expected duration and
10 permanency, and, at least potentially, in the relationship between the owner of the surface and the
11 persons and entity who apply media to that surface. It is easy to predict how attempts to
12 articulate regulatory definitions might stray into prohibited distinctions based on content. There
13 may be challenges in avoiding content-based regulations with respect to wall murals whose
14 proponents wish to employ them for commercial purposes. But nothing in this court’s Opinions
15 say that the City cannot attempt to free wall murals from sign regulations in ways that do not
16 depend on the content of the message displayed.

17 Moreover, once the City strays from the context of prohibition and regulation to that of
18 promotion and enhancement, there are abundant examples of public support for preferred “art”
19 which have not been challenged because they somehow disfavor some other version of
20 expression. Public art is evident on our bus mall [at least it was before the commencement of the

³³ Critical to the *Outdoor Media* analysis was the circumstance that OMIA’s definition “allows a sign owner without a permit to display one narrowly defined category of message – a message related to activity conducted on the premises where the sign is located – but not to display any message respecting any other subject. The OMIA thus treats signs differently on the basis of the content of their message.” *Outdoor Media Dimensions, Inc. v. Department of Transp, supra*, 340 Or at 296.

1 current remodeling project to accommodate light rail] and in public buildings throughout
2 Portland. There are many ways in which the City promotes art and other activities which could
3 presumably include mural art. And, at least for purpose of the federal Constitution, the law of
4 “limited public forum” permits a governmental entity to discriminate reasonably in the purposes
5 for which a forum of the entity’s creation can be used – including prohibiting altogether whole
6 categories of “speech” – as long as the process retains *viewpoint* neutrality and does not run
7 afoul of some other forbidden basis of discrimination such as religion. *E.g., Good News Club v.*
8 *Milford Central School*, 533 US. 98 (2001), *and authorities cited*. As a matter of First
9 Amendment law, a public transit authority may, for example, prohibit political advertising while
10 permitting commercial advertising on its vehicles. *Lehman v. City of Shaker Heights*, 418 US
11 298 (1974). And, to the extent that the City may be merely supporting the efforts of wall owners
12 to promote mural art, it may be that the result is not even a “limited public forum” (or
13 “designated public forum”) but a “nonpublic forum:”

15 Implicit in the concept of the nonpublic forum is the right to make
16 distinctions in access on the basis of subject matter and speaker identity.
17 These distinctions may be impermissible in a public forum but are inherent
18 and inescapable in the process of limiting a nonpublic forum to activities
19 compatible with the intended purpose of the property. The touchstone for
20 evaluating these distinctions is whether they are reasonable in light of the
21 purpose which the forum at issue serves.

22 [Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460
23 US 37, 49 (1983)]

25 The notion of nonpublic fora has been recognized in Oregon cases. *E.g., Higgins v.*
26 *Driver and Motor Vehicle Services Branch*, 335 Or. 481, 72 P.3d 628 (Or.,2003). Our appellate
27 courts have also engaged in “limited public forum” analyses. *Service Employees Intern. Union*
28 *Local 503 v. State, Judicial Dept.*, 209 Or App 497 (2006); *Powell v. Bunn*, 198 Or App 21,

1 136-39 (2005), *reversed on other grounds* 341 Or. 306 (2006). It may be that a government-
2 endorsed or supported nonpublic forum is not as free to discriminate in the content of supported
3 messages or displays as is the plaintiff, but these federal and state authorities appear to bear no
4 hostility whatever to a publically supported mural or art or music or theater or sculpture or dance
5 or – for that matter – recycling activity.

6 These notions may be the theoretical basis of the Portland Public Art Mural Program –
7 about whose validity I express no opinion. I cannot prejudge – or even reliably foresee – whether
8 any interest might challenge some preference for wall murals over commercial advertising
9 expressed in these or any other ways that do not employ discrimination based on the content of
10 the messages displayed. But I can say with confidence that my conclusions in this litigation that
11 the City cannot prefer murals over billboards (or other commercial advertising) were limited to
12 the context of regulatory distinction based on the content of expression and were in no way
13 intended to convey any suggestion that the City cannot prefer art through some other mechanism.

14 **Conclusion**

15 I resolve all claims of the plaintiff, state and federal, as follows:

- 16 1. Plaintiff is awarded a declaration that the Portland sign code definitions in existence prior
17 to November 18, 1998, based on the presence of text, numbers, registered trademarks, or
18 registered logos, imposed regulation based on the content of speech and was therefore a
19 violation of Article I, section 8, of the Oregon Constitution;
- 20 2. The purported ORCP 67B judgment entered in this matter on November 17, 1998, is
21 VACATED;
- 22 3. The award of damages contained in my 1999 Opinion and Order, the judgment entered
23 thereon, and the supplemental judgment for attorney fees and costs, are VACATED;

1 plaintiff may pursue any request for fees (other than any dependent upon 42 USC §1988)
2 and costs as provided by ORCP 68;
3 4. Plaintiff's request for injunctive relief compelling the City of Portland to issue billboard
4 permits is DENIED;
5 5. Plaintiff shall take nothing further by its complaint in this matter;
6 6. Judgment shall be for the plaintiff awarding declaratory relief as set forth in paragraph 1,
7 and judgment on all other claims shall be for the defendant.

8

9 May 8, 2007

/s/ Michael H. Marcus
Michael H. Marcus, Judge