

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WEST COAST MEDIA, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF GLADSTONE,
10 *Respondent.*

11
12 LUBA No. 2002-098

13
14 ORDER ON MOTION TO TAKE EVIDENCE

15 The challenged decision is the city’s denial of four applications to construct four
16 billboards along Interstate 205 in areas within city limits zoned either commercial or
17 industrial. Each billboard totals approximately 672 square feet in size. The city denied each
18 application on the grounds that such billboards are not allowed anywhere within the city
19 under the city’s current sign ordinance. Gladstone Municipal Code (GMC) 17.52.

20 In the petition for review, filed December 4, 2002, petitioner argues that the city’s
21 denials violate petitioner’s constitutional rights under the Equal Protection Clause of the
22 United States Constitution and the Privileges and Immunities Clause of Article I, section 20,
23 of the Oregon Constitution. Petition for Review 32-34. The petition for review also argues
24 that the city’s denials violate the First Amendment to the United States Constitution, because
25 GMC 17.52 allows the city to subject First Amendment rights to the “unbridled discretion”
26 of government officials. Petition for Review 30-31.

27 On the same date the petition for review was filed, petitioner filed a motion to take
28 evidence not in the record, pursuant to OAR 661-010-0045.¹ The evidence petitioner seeks

¹ OAR 661-010-0045 provides, in relevant part:

“(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision * * *.

1 to submit consists of seven Oregon State Highway Division sign permit applications, seven
2 City of Gladstone sign permit applications, seven affidavits signed by the City of Gladstone
3 building inspector, and seven billboard leases, all relating to seven billboards, of sizes
4 between 12 by 25 feet and 14 by 48 feet, that were permitted and constructed within the City
5 of Gladstone between the years 1962 and 1978.²

6 In the motion to take evidence, petitioner argues that the proffered evidence regarding
7 the seven billboards permitted by the city between the years 1962 and 1978 supports
8 petitioner's contention that, under GMC 17.52 and its predecessor provisions, the city has
9 exercised unbridled discretion in approving and denying similar sign applications.³
10 According to petitioner, the evidence regarding the seven approved billboards also
11 demonstrates that the city has applied GMC 17.52 and its predecessor provisions in
12 inconsistent ways, in a manner that grants certain sign applicants privileges that other sign

“(2) Motions to Take Evidence:

“(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.

“(b) A motion to take evidence shall be accompanied by:

“(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or

“(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule.”

² Petitioner also requests a telephone conference to address the motion to take evidence. We do not believe a telephone conference is necessary to resolve the motion and, therefore, that request is denied.

³ Similarly, in the petition for review, petitioner states:

“[T]he City has claimed that all billboards are banned under the GMC. Petitioner has filed a motion to allow evidence which will demonstrate that billboards have been permitted and allowed in the City of Gladstone under prior codes with substantially similar language as the present Code. If the evidence is allowed, it will prove that the Code language allows officials to exercise ‘unbridled discretion’ in a manner that denies signs to some applicants, but grants signs to others[, b]oth as a matter of law and fact. This is an unconstitutional prior restraint on First Amendment protected speech.” Petition for Review 31.

1 applicants do not enjoy, thus violating petitioner’s rights under the Equal Protection and
2 Privileges and Immunities Clauses of the federal and state constitutions.

3 In support of these arguments, petitioner asserts in its motion that the seven billboards
4 were approved between 1962 and 1978 pursuant to ordinances that were “substantively the
5 same” as GMC 17.52. Motion to Take Evidence Not in the Record 3; *see also* Petition for
6 Review 31. Attached to the petition for review are several superseded city zoning
7 ordinances. We understand petitioner to argue that the seven billboards at issue in this
8 motion were approved under those superseded zoning ordinances, that the superseded
9 ordinances are “substantively the same” as GMC 17.52 with respect to regulation of signs
10 and, therefore, evidence that the city approved billboards under the superseded ordinances
11 between 1962 and 1978 supports petitioner’s constitutional assignments of error.

12 The city makes a number of responses, but we need address only one. The city points
13 out that GMC 17.52 was adopted in its current form in 1990, and revised only in immaterial
14 ways since then. The city argues that there is no evidence or allegation that the city has ever
15 approved a billboard under the existing sign code. According to the city, GMC 17.52 bears
16 little resemblance to the sign regulations in effect during the period 1962 through 1978.⁴ The
17 city argues that petitioner makes no attempt to demonstrate that there is any similarity
18 between GMC 17.52 and the ordinances in effect between 1962 and 1978 with respect to
19 signs in general or billboards in particular.

20 Reduced to essentials, petitioner’s argument for our considering evidence of the seven
21 billboards approved between 1962 and 1978 is that approval of those billboards and denial of

⁴ We described the basic structure of GMC 17.52 in an earlier order denying the city’s motion to dismiss. *West Coast Media, LLC v. City of Gladstone*, ___ Or LUBA ___ (LUBA No. 2002-098, Order, October 11, 2002), slip op 2-3. We do not repeat that description here, except to note that GMC 17.52 is a complex and extensive regulatory scheme for signs of various specified types. The sign regulations in the superseded ordinances attached to the petition for review appear to consist of a few sentences tucked into the miscellaneous section of the city’s zoning ordinance. *See, e.g.*, Petition for Review App D-30 (1975 zoning ordinance, which in relevant part allows “signs” in all nonresidential zones, with prohibitions on moving, animated or flashing signs and limitations on the location of other signs near residential zones).

1 petitioner's identical billboards were pursuant to a common or at least similar regulatory
2 scheme, which, if true, might lend support to petitioner's arguments that the city has acted
3 inconsistently and arbitrarily in denying petitioner's billboards. However, the premise to that
4 argument is not well-founded, as far as we can tell. GMC 17.52 is significantly different
5 from the previous city sign regulations attached to the petition for review. Petitioner has not
6 demonstrated any similarity between GMC 17.52 and relevant portions of the superseded
7 ordinances with respect to the regulation of signs, and we see none. Absent such a
8 demonstration, the fact that more than 20 years ago the city approved billboards under very
9 different regulatory schemes has little bearing on whether GMC 17.52 allows the city to
10 exercise "unbridled discretion" in approving or denying sign applications, or whether the city
11 has extended privileges to others that were denied to petitioners. Accordingly, we conclude
12 that petitioner's motion fails to explain with the requisite particularity how the proffered
13 evidence pertains to the alleged unconstitutionality of the decision, and how that evidence
14 will affect the outcome of this review proceeding. OAR 661-010-0045(2)(a).

15 The motion to take evidence not in the record is denied.

16 By stipulation of the parties, the response brief is due January 30, 2003. The next
17 event to be scheduled is oral argument. Oral argument in this case is hereby scheduled for
18 February 13, 2003, at 10:00 a.m., at the Board's offices in Salem.

19 Dated this 8th day of January, 2003.

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Tod A. Bassham
Board Member