

LAND USE
BOARD OF APPEALS
APR 1 4 30 PM '86

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

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2
3 WILMA MCNULTY and)
LINDA SIMPSON,)
4)
5 Petitioners,)

LUBA No. 85-101

6 vs.)

FINAL OPINION
AND ORDER

7 CITY OF LAKE OSWEGO and)
8 CHURCH OF JESUS CHRIST OF)
LATTER-DAY SAINTS,)

9 Respondents.)

10 Appeal from City of Lake Oswego.

11 Barbara Gay Canaday, Lake Oswego, filed the petition for
12 review and argued on behalf of petitioners.

13 James M. Coleman, Lake Oswego, filed a response brief and
14 argued on behalf of Respondent City.

15 James H. Bean, Portland, filed a response brief and argued
16 on behalf of Respondent Church of Jesus Christ of Latter-Day
17 Saints. With him on the brief were Lindsay, Hart, Neil &
Weigler.

18 KRESSEL, Chief Referee; BAGG, Referee; DUBAY, Referee;
19 participated in the decision.

20 REMANDED

04/01/86

21 You are entitled to judicial review of this Order.
22 Judicial review is governed by the provisions of ORS 197.850.
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24
25
26

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 This is an appeal of the city's approval of the design of a
4 temple. The temple is proposed by Respondent Church of Jesus
5 Christ of Latter-Day Saints.

6 FACTS

7 The temple is to be built on a 7.29 acre parcel. The
8 parcel contains stands of douglas fir, alder and ash trees.
9 Interstate 5 freeway is to the west, Southwood Park, a
10 residential neighborhood, is north of the site. To the south
11 is land proposed for residential development, as well as the 35
12 acre Centerpointe Corporate Office Park. East of the site is
13 Lot 9 of the Centerpointe Plat, which is scheduled for single
14 family residential development.

15 A conditional use permit allowing the temple was approved
16 by the city in 1984. The city's Development Review Board
17 conditionally approved the design of the temple in September,
18 1985.¹ Petitioners appealed the approval to the city
19 council. The council denied the appeal in December, 1985.

20 FIRST AND SECOND ASSIGNMENTS OF ERROR

21 The city is required by its development code to review the
22 temple design for conformance with certain building design
23 standards. See Sections 2.005-2.040, Lake Oswego Development
24 Standards Ordinance and Standards Document. Among the
25 pertinent design standards are the following:

26 "2.020 Standards for Approval.

1
2 "1. Buildings shall be designed and located to
3 complement and preserve existing buildings,
4 streets and paths, bridges and other elements of
5 the built environment.

6 "a. Design buildings to be complementary in
7 appearance to adjacent structures of good
8 design with regard to:

- 9 "i. Materials
10 "ii. Setbacks (for retail/commercial part
11 specifically)
12 "iii. Roof lines
13 "iv. Height
14 "v. Overall Proportions

15 * * *

16 "f. Use trees and other natural elements to help
17 define building proportion relationships and
18 to provide scale to the structure as a whole."

19 In these assignments of error, Petitioners claim the city's
20 findings are inadequate to demonstrate conformance with the
21 quoted standards. They also allege the findings are not
22 supported by substantial evidence in the record.

23 As a threshold matter, both Respondents urge us to dismiss
24 these assignments of error on grounds Petitioners did not claim
25 the building design standards were violated when they appealed
26 the Development Review Board's decision to the city council.
The city's brief states that the assignments of error should
not be heard here because Petitioners failed to exhaust an
available remedy at the local level, i.e., the remedy of asking
the council to review the proposal for conformance with the
building design standards. Respondent Church makes a similar
argument, but expresses it as an objection to Petitioners'

1 standing. The Church contends Petitioners are not "aggrieved"
2 by the alleged errors because they did not object on the
3 specific grounds (building design standards) they wish to raise
4 here.

5 We reject Respondents' threshold arguments for several
6 reasons. First, we do not believe Petitioners are asking us to
7 consider issues not first presented to the city council.

8 Concededly, their appeal to the council did not cite specific
9 design standards or frame objections by using the same words as
10 the standards. However, the appeal raised concerns that the
11 standards were violated by complaining that the approved temple
12 design is out of character with its surroundings. For example,
13 one portion of the appeal to the council states:

14 "Essentially, opponents arguments can be broken down
15 into two categories. The first deals with the conflict
16 of the architectural design of the temple and the
17 surrounding neighborhoods. The second argument is
18 concerned with the approval of the proposal by the De-
19 velopment Review Board subject to certain conditions.
...The architectural design of the proposed Portland
Temple is incompatible to the Kruse Way Corridor and
the City of Lake Oswego and as designed, is destructive
to the peace, tranquility and enjoyment of the
surrounding real property." Record at 38.

20 Another portion of the appeal to the Council alleges that "the
21 temple design plan is not compatible with the area or the City
22 of Lake Oswego as a whole and will be disruptive to the natural
23 beauty." Record at 37.

24 Based on these and other statements in the appeal, the
25 staff report to the city council advised:

26 "The language listed in the Notice of Appeal states

1 that the architectural design is 'incompatible,' that
2 it will 'predominate the Kruse Way Corridor and
3 adjoining neighborhoods,' that 'the architectural mood
4 of the Kruse Way Corridor remains low key in both
5 commercial and residential buildings,' and that it
6 'intrudes upon the visual enjoyment of the City.' The
7 appeal does specifically address the Building Design
8 Standard which is properly the criteria (sic) for the
9 Board's review." Record at 29 (citations to exhibits
10 omitted).

11 We agree with this assessment of the scope of the appeal.
12 Accordingly, we cannot accept Respondents' contentions that
13 Petitioners are here seeking to raise concerns not first
14 presented to the city council.

15 There are other reasons why Petitioners' claims under the
16 Building Design Standards are properly raised in this appeal.
17 Contrary to Respondents' contentions, we do not believe the
18 statutes governing exhaustion of local remedies, or standing to
19 appeal to LUBA, bar our consideration of claims of error not
20 presented at the local level. Thus, as explained below, even
21 if the appeal to the city council failed to direct the
22 Council's attention to specific Building Design Standards,
23 Petitioners could claim the city's decision violates those
24 standards in this forum.

25 1. Exhaustion of Local Remedies

26 ORS 197.825(2)(a) limits the jurisdiction of this Board to
"...those cases in which the petitioner has exhausted all
remedies available by right before petitioning the board for
review." The statute clearly required Petitioners to appeal
the Development Review Board's decision to the city council

1 before invoking our jurisdiction. Portland Audubon Society v.
2 Board of Commissioners of Clackamas County, 77 Or App 277,
3 280 ___ P2d ___ (1986). They did so.

4 The city contends ORS 197.830(2)(a) also should be
5 construed to bar LUBA's consideration of an issue (as
6 contrasted with an appeal) not presented at the local level.
7 This interpretation is desirable, according to the city,
8 because it would give the local government the opportunity to
9 address claims of error before they are presented to the state
10 (LUBA) for review. The interpretation would also give effect
11 to a city code provision authorizing the city council to
12 consider only those issues specifically identified in the
13 notice of appeal. See Lake Oswego Code section 49.625(7).

14 We do not believe ORS 197.830(2)(a) should be given the
15 interpretation advocated by the city. Our previous opinions
16 have reflected a more open approach to the scope of issues
17 assignable at LUBA. See, e.g., Twin Rocks Water District v.
18 City of Rockaway, 2 Or LUBA 36, 40-42 (1980); Zusman v.
19 Clackamas County Board of Commissioners, 13 Or LUBA 39, 42
20 (1985). More importantly, state law is at odds with the city's
21 position. For example, ORS 197.830(3) states:

22 "The provisions of [the exhaustion requirement] do not
23 affect the authority of the board [LUBA] to decide
24 issues not raised in the local governmental
25 proceedings." (Emphasis added.)

26 Clearly, the legislature did not intend the exhaustion rule to
prevent our consideration of issues not raised at the local

1 level. Indeed, as we read the law, ORS 197.830(3) takes
2 precisely the opposite approach from the one advocated by the
3 city. That is, by expressly authorizing LUBA to address all
4 issues despite the exhaustion rule, the statute seems to
5 encourage that approach.²

6 We continue to believe that the course most consistent with
7 the overall statutory scheme is to allow presentation at LUBA
8 of all claims of error arising out of the local proceedings.
9 In addition to ORS 197.830(3), support for this approach can be
10 found in ORS 197.835(10), which states:

11 "Whenever the findings, order and record are sufficient
12 to allow review, and to the extent possible consistent
13 with the time requirements of ORS 197.830(12), the
14 board shall decide all issues presented to it when
15 reversing or remanding a land use decision described
16 in subsections (2) to (8) of this section."

17 Accordingly, although we are cognizant of the policy arguments
18 made by the city, we cannot accept its restrictive
19 interpretation of ORS 197.830(2)(a).

20 2. Standing

21 We also reject the contention by Respondent Church that
22 Petitioners have standing in this forum to raise only those
23 issues they presented at the local level. The standing
24 statutes are concerned with who may petition LUBA for review
25 of a land use decision. Benton County v. Friends of Benton
26 County, 294 Or 79, 90, 653 P2d 1249 (1982). The question of
what issues may be presented by one with standing to appeal to
LUBA is distinct from standing. See Lane County v. City of

1 Eugene, 54 Or App 26, 33, 633 P2d 1306 (1981) ("...it is not
2 necessary for the party seeking LUBA review to have raised
3 below the issue on which review is sought...so long as the
4 party has standing."). Respondent's contention that this
5 distinction was blurred or obliterated by the Supreme Court's
6 analysis of the standing statute (ORS 197.830(3)(c)(B)) in
7 Jefferson Landfill Committee v. Marion County, 297 Or 280, 686
8 P2d 310 (1984) is unpersuasive.³

9 Petitioners have standing in this forum to challenge the
10 city's decision. They objected to the design of the temple
11 before the Development Review Board and the city council. The
12 council's decision resulted in approval of the temple design.
13 Petitioners are aggrieved by the approval. ORS 197.830(3);
14 Jefferson Landfill Committee v. Marion County, supra.

15 We conclude that Petitioners' attacks under the Building
16 Design Standards are properly before us. As noted previously,
17 the claims are that (1) certain standards were not adequately
18 addressed in the findings and (2) that there is insufficient
19 evidence in the record to support the findings that were made
20 by the City. For the following reasons, we agree that the
21 findings are inadequate. A remand is thus in order.

22 The relationship of the proposal to the Building Design
23 Standards is discussed in the city council's order as follows:

24 "When read as a whole, the appellants' opposition is
25 based upon their opinion that the approved building
26 and site design is unattractive, intrudes upon the
visual enjoyment of the City and on visually impacted
neighborhoods. They did not allege nor raise

1 violations of the Building Design Standard, which is
2 the standard which governs aesthetic issues nor the
Landscaping, Screening and Buffering Standard.

3 "Two of the Development Review Board members that
4 reviewed the project are architects by training, as is
5 the City staff member who prepared the staff report.
6 The overriding criteria of the Building Design
7 Standard is that the structure and site design be
8 complementary. That standard was thoroughly discussed
9 and considered by the Development Review Board. The
appellants did not like the height or lighting of the
building. The Council finds that the appellants have
presented no reasons which lead the Council to
substitute its judgment on design issues for that of
the Development Review Board." Record at 12 (emphasis
added).

10 We construe the emphasized portion of the order to reflect
11 the Council's concurrence in the findings adopted by the
12 Development Review Board. As Petitioners point out, however,
13 the Review Board's findings in connection with Building Design
14 Standards, like the city council's findings, are highly
15 general. The pertinent findings state:

16
17 "13. The applicant testified that sound level
18 measurements were made on the Temple site and that a
19 berm and wall along Interstate Highway No. 5 were
20 recommended to reduce highway noise impacts to the
21 site. The Board believed these measures to be more
22 effective than a vegetative buffer which does not
23 screen noise effectively. The board believed that
24 there would be no increase in the amount of noise
25 reaching residential areas, and that the building
26 design standard had been met with respect to noise.

27 "17. The Board agreed with the staff report and
28 presentation regarding the design of the building.
29 The Board found the evidence in the record sufficient
30 to demonstrate compliance with the building design
31 standard as well as LOC 48.515(2) which exempts the
32 Temple's spires from the height limitations of the
33 zoning code.

1 "18. The applicant submitted an additional material
2 sample (Exhibit HH) which illustrated the slate
3 roofing material. The Board found that adequate
4 material samples had been submitted by the applicant.

5 "20. The applicant submitted a site and vicinity
6 section (Exhibit JJ) which showed the relationship of
7 the Southwood Park residential area to the Temple.
8 The Board found that proposed landscaping, existing
9 vegetation, a solid fence, and distance would
10 adequately buffer the residential area." Record at
11 119-20.

12 These findings, read in conjunction with those adopted by
13 the city council, are not adequate to demonstrate the
14 proposal's compliance with the Building Design Standards quoted
15 at the beginning of this assignment of error. They are
16 conclusional. They do not describe the design and location of
17 existing buildings and other elements of the "built
18 environment." See Section 2.020(1), Building Design
19 Standards. They do not relate the design and location of the
20 proposed temple to these considerations. They do not identify
21 adjacent structures of good design, as Section 2.020(1)(a) of
22 the ordinance requires, or explain why the proposed temple will
23 "complement" those structures. Finally, the findings do not
24 provide detail about the natural setting in which the temple
25 will be built. Such detail must be provided if the city is to
26 demonstrate, as the standard requires, that the structure will
"use trees and other natural elements to help define building
proportion relationships and to provide scale to the structure
as a whole." Section 2.020 (1)(f), Building Design Standards.

Although we would give considerable weight to the city's

1 ultimate determination on the question of the temple's
2 compliance with the design standards, that determination must
3 be supported by an explanation (in the final order) of the
4 pertinent facts and the rationale for the result. In the
5 absence of the necessary explanation why the temple design
6 satisfies the standards, we must remand the decision. South of
7 Sunnyside Neighborhood League v. Board of Commissioners of
8 Clackamas County, 280 Or 320-23, 569 P2d 1063 (1977); McPherson
9 v. Metropolitan Service District 12 Or LUBA 107, 112-14 (1984).

10 The findings concerning the Building Design Standards are
11 inadequate as a matter of law. We therefore sustain
12 Petitioners' second assignment of error.

13 The first assignment of error alleges that the city's
14 findings are not supported by substantial evidence in the
15 record. However, since we conclude that those findings are
16 legally inadequate, we see no purpose in discussing the
17 substantial evidence question.

18 THIRD ASSIGNMENT OF ERROR

19 The city council concluded that a number of the issues
20 before the council were conclusively determined in 1984, when
21 the city approved a conditional use permit for the project. In
22 particular, the council held that Petitioners' attempt to
23 question the project's compatibility with the surrounding area
24 was foreclosed by the previous approval of the permit. Record
25 at 7-8. In this assignment of error, Petitioners claim the
26 city's characterization of their appeal is incorrect. They

1 insist their appeal focused on whether the design of the
2 temple, as approved by the Development Review Board, satisfied
3 the Building Design Standards--in particular the portion of the
4 standards requiring buildings:

5 "to complement and preserve existing buildings,
6 streets and paths, bridges and other elements of the
7 built environment." Section 2.020(1), Building Design
8 Standards Document.

9 We sustain this assignment of error. As previously noted,
10 the city council did not correctly construe the scope of the
11 appeal from the Development Review Board. That appeal, in
12 substance, called on the council to review the Board's con-
13 clusion that the proposed design satisfied the Building Design
14 Standards. The council should have taken up the issue and
15 expressed its rationale and ultimate determination in the final
16 order. A remand is appropriate for that purpose.

17 The third assignment of error is sustained. The city's
18 decision is remanded.

FOOTNOTES

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The Review Board also approved a major partition and a variance in conjunction with the project. Those approvals are not contested.

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In Lane County v. City of Eugene, 54 Or App 26, 633 P2d 1306 (1981), the Court of Appeals held that under Oregon Laws 1979, Chapter 772 (the statute creating LUBA) "...it is not necessary for the party seeking LUBA review to have raised below the issue on which review is sought, regardless of whether the local proceeding was quasi-judicial, so long as the party has standing." 54 Or App at 33. The exhaustion rule was added to the statute in 1983, long after publication of the decision in Lane County v. City of Eugene. Oregon Laws 1983, Chapter 827, Section 30. Given these circumstances, we have considerable difficulty accepting the city's position. Had the 1983 legislature wished to reverse the permissive appeal rule enunciated in Lane County v. City of Eugene, supra, it could easily have done so.

3

The pertinent standing statute requires an allegation that petitioner "is aggrieved or has interests adversely affected by the decision." ORS 197.830(3)(c)(B). In Jefferson Landfill Committee v. Marion County, 297 Or 280, 686 P2d 310 (1984), the Supreme Court articulated a three part test of aggrievement: (1) the person's interest in the decision was recognized by the local body, (2) the person asserted a position on the merits and (3) the local body reached a decision contrary to the position asserted by the person. Both the statute and the court's analysis of "aggrievement" focus attention on petitioner's interest in the decision. Respondent Church, by contrast, converts the inquiry into whether a petitioner has a sufficient interest in particular issues. We find no statutory or other basis for this approach to the standing issue.

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 85-101, on April 1, 1986 by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 1st day of April, 1986.


Patti J. Kadaja
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