

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

A STORAGE PLACE and JERRY CARLSON,)

Petitioners,)

vs.)

CITY OF TUALATIN,)

Respondent,)

and)

LINDA PEPLINSKI and)

IRWIN DALE BLUME,)

Intervenors-Respondent.)

LUBA No. 92-227

FINAL OPINION
AND ORDER

Appeal from City of Tualatin.

Larry Derr, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Josselson, Potter & Roberts.

No appearance by respondent.

Linda Peplinski, Portland, represented herself.

Irvin Dale Blume, Honolulu, Hawaii, filed the response brief on his own behalf.

KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

REVERSED

04/20/93

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the city council
4 approving architectural review for a freestanding pole sign,
5 and determining that a sign permit could be issued under a
6 former version of a city sign ordinance.

7 **MOTIONS TO INTERVENE**

8 Linda Peplinski and Irwin Dale Blume move to intervene
9 on the side of respondent. There is no objection to the
10 motions, and they are allowed.

11 **MOTION TO DISMISS**

12 In his brief, intervenor Blume states the following:

13 "Because this matter is not a 'land use decision'
14 as defined by the statute, this appeal should be
15 dismissed for lack of jurisdiction. * * * "
16 Intervenor Blume's Brief 2.

17 However, intervenor Blume does not explain why he believes
18 this Board lacks jurisdiction over this appeal, and we do
19 not see that we do.

20 Intervenor Blume's motion to dismiss is denied.

21 **MOTION TO STRIKE**

22 Petitioner moves to strike statements in
23 intervenor-respondent's brief concerning certain
24 negotiations which are not in the record.

25 LUBA has previously determined that although it will
26 not grant a motion to strike portions of a brief, based on
27 allegations that the disputed portions are inaccurate or

1 without factual support in the record, it will disregard any
2 such inaccurate or unsupported assertions. Mannenbach v.
3 City of Dallas, ___ Or LUBA ___ (LUBA No. 92-183, March 31,
4 1993); Hammack & Assoc. v. Washington County, 16 Or LUBA 75,
5 78, aff'd 89 Or App 40 (1987). Once a party challenges the
6 accuracy or evidentiary support for allegations in another
7 party's brief, this Board expects such other party to
8 establish the accuracy of the disputed allegations or to
9 identify factual support in the record for those
10 allegations, either in a reply brief or at oral argument.
11 Id.

12 Intervenor-respondent Blume cites nothing in the record
13 to support his allegations concerning pending negotiations,
14 and we disregard those allegations.

15 Petitioner's motion to strike is denied.

16 **FACTS**

17 The subject property is zoned Light Manufacturing (ML).
18 On May 11, 1992, intervenors-respondent (intervenors)
19 submitted an application to the city for architectural
20 review of a proposed freestanding pole sign for a storage
21 business located on the subject property. The city sign
22 ordinance in effect until May 13, 1992, Tualatin Sign
23 Ordinance (TSO), requires a sign permit and architectural
24 review approval as prerequisites to city approval of a

1 sign.¹ No application for a sign permit has been submitted
2 to the city.

3 The Architectural Review Board (ARB) approved
4 intervenors' application. Petitioners appealed to the city
5 council. The city council denied petitioners' appeal and
6 affirmed the decision of the ARB. This appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 "Architectural review of a proposed sign and
9 subsequent review of a sign permit application for
10 the sign cannot occur under the repealed sign
11 ordinance."

12 As indicated above, the disputed application is for
13 architectural review. No request for a sign permit has been
14 submitted to the city as of the date of the city's adoption
15 of the challenged decision. A sign permit is required to
16 establish the disputed sign.

17 Petitioners contend that an application for a sign
18 permit begins a process which is separate from the process
19 begun by an application for architectural review for a sign.
20 Petitioners argue that when intervenors submit their
21 application for a sign permit, as they concede they must,
22 that application will be subject to the standards in the

¹ On April 13, 1992, the city amended the TSO (amended TSO), prohibiting pole signs in the ML zoning district. However, the amended TSO did not become effective until May 13, 1992. There is no dispute that the TSO applies to the subject application for architectural review. The dispute in this appeal centers on whether the TSO or the amended TSO establishes the standards applicable to intervenors' eventual application for a sign permit.

1 amended TSO, the standards in effect at the time that
2 application is submitted. ORS 227.178(3).² Petitioners
3 argue the city erred by determining that intervenors'
4 eventual sign permit application will be subject to the TSO,
5 notwithstanding that the TSO was repealed on May 13, 1992.

6 The challenged decision determines:

7 "[Petitioners] argued that the [city council] must
8 defer any action in this case until a sign permit
9 application under the * * * new Sign Ordinance
10 * * * is submitted. The thrust of [intervenors']
11 argument is that the 'old' Sign Ordinance * * *
12 under which this application was submitted,
13 involves two distinct steps, an architectural
14 review and a sign permit application. The purpose
15 of the two-step process is to review the proposed
16 sign and apply the criteria contained in the [old
17 sign ordinance]. The submittal of a sign permit
18 application as a follow-up step, is intended as a
19 fulfillment of whatever decision is reached
20 through the architectural review process. The
21 first step involves the application of significant
22 discretion while addressing the various criteria.
23 The second step is intended to simply assure that
24 whatever decision is reached through the first
25 step, is complied with in the second. In effect,
26 the second step is a non-discretionary and
27 non-land use decision made by staff to assure that
28 the sign which is ultimately constructed meets
29 with the previous discretionary approval. A
30 favorable decision under the [old] sign ordinance
31 will allow the applicant to obtain a sign permit

²ORS 227.178(3) provides:

"If the application was complete when first submitted * * * and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

1 and sign which are consistent with that approval
2 without a separate application under the new sign
3 ordinance.

4 "In this case, the architectural review
5 application for this sign was submitted prior to
6 the effective date of the 'new' sign ordinance. A
7 companion sign permit application has not been
8 submitted. Virtually all review of the proposed
9 sign has occurred through the architectural review
10 process as required under the 'old' Sign
11 Ordinance. No discretionary review remains once
12 that process is completed and a sign permit
13 application with the final design is submitted.
14 Even though the new Sign Ordinance which repealed
15 the [old] Sign Ordinance has been adopted and has
16 become effective prior to the current applicant's
17 submittal of a sign permit application,
18 nevertheless the sign review under the
19 architectural review procedures and the old Sign
20 Ordinance remain the applicable law." Record
21 54-55.

22 The TSO, the sign ordinance in effect at the time the
23 application for architectural review was submitted,
24 establishes that sign permit review is a process separate
25 from the architectural review process and that both
26 processes are necessary in order for the city to approve a
27 sign in the ML zoning district. We are aware of nothing in
28 the TSO to support the city's determination that an
29 application for architectural review begins a two-step
30 process which necessarily leads to a sign permit, or that
31 approval of a sign permit is based on nondiscretionary
32 standards the compliance with which is only a formality once
33 architectural review approval is secured.

34 TSO 8-1.3 provides:

1 "In addition to the provisions of this ordinance,
2 all signs * * * shall be subject to the
3 Architectural Review process in Chapter 73 of the
4 Tualatin Development Code [(TDC)]. * * * Through
5 the Architectural Review process, the appropriate
6 height, area, location and number of signs shall
7 be determined. * * * All sign applications shall
8 meet the objectives of the Architectural Review
9 process as listed in [TDC 73.020(2)] as well as
10 the following criteria and standards for approval.

11 "(a) The design of all signs shall be appropriate
12 for the use which they identify.

13 "(b) The design of all signs shall be compatible
14 with the architectural character of the
15 surrounding area.

16 "(c) Signs shall be kept to a minimum number in
17 order to adequately identify the development.

18 "(d) Sign size, design, shape, materials, color,
19 and construction shall be compatible with the
20 development's architectural design, colors
21 and materials in order to promote an
22 integrated design.

23 "(e) The method of illumination shall be
24 compatible with surrounding land uses.

25 "(f) Location of signs shall give consideration to
26 design of buildings, landscaping, visibility,
27 obstructions, other signs, pedestrian
28 activity, and traffic patterns.

29 "(g) Unless exempted, all signs shall comply with
30 the specific applicable provisions of this
31 ordinance."

32 TSO 8-1.3 and TDC chapter 73³ contemplate discrete sign

³TDC chapter 73 provides, in relevant part, as follows:

"73.040 Architectural Review Plan Approval Required.

1 permit and architectural review processes. TSO 8-1.3(6)
2 (Sign Permit Application) and (8) require that a separate

"* * * no sign permit shall be issued, until the architectural review plan required under Section 73.060 has been reviewed and approved * * *."

"73.050 Criteria and Standards.

"(1) The Planning Director shall, in exercising or performing his powers, duties, or functions, determine whether there is compliance with the following:

"(a) The proposed site development, including the site plan, architecture, landscaping and graphic design, is in conformance with the standards of this and other applicable City ordinances insofar as the location, height, and appearance of the proposed development are involved;

"(b) The proposed design of the development is compatible with the design of other developments in the same general vicinity; and

"(c) The location, design, size, color and materials of the exterior of all structures and signs are compatible with the proposed development and appropriate to the design character of other structures in the same vicinity.

"(2) The Planning Director shall, in making his determination of the compliance with the above requirements, be guided by the objectives and standards set forth in Section 73.020 and Sections 73.110 to 73.180.

"(3) The Planning Director shall, in making his determination of compliance with the requirements set forth, consider the effect of his action on the availability and cost of needed housing. The Planning Director shall not use the requirements of this section to exclude needed housing types. However, consideration of these factors shall not prevent the Planning Director from imposing conditions of approval necessary to meet the requirements of this section. The costs of such conditions shall not unduly increase the cost of housing beyond the minimum necessary to achieve the purposes of this Code. As part of the Architectural Review process, the Planning Director shall have no authority to reduce dwelling unit densities."

1 application and fee be submitted for a sign permit, in
2 addition to the application and fee required for
3 architectural review. While TDC 73.050 contains standards
4 that are somewhat similar to those provided in TSO 8-1.3,
5 each includes discrete standards which are clearly intended
6 to be applied in addition to the requirements of the other.
7 Consequently, we believe the city's interpretation of
8 TDC 73.050 and TSO 8-1.3, that they envision a two-step
9 process that can be initiated by filing an application for
10 architectural review, is clearly wrong. West v. Clackamas
11 County, 116 Or App 89, 94, ____ P2d ____ (1992).

12 In addition, the city's conclusion that the proposed
13 freestanding pole sign is approvable under the TSO is
14 erroneous as a matter of law. If intervenors submit an
15 application for a sign permit, as required by TSO 8-1.3(6),
16 then under ORS 227.178(3) that application will be subject
17 to the standards in effect at the time that application is
18 submitted -- the amended TSO. Further, there is no dispute
19 that under the amended TSO, freestanding pole signs are not
20 allowed. Therefore, we must reverse the city's decision
21 approving architectural review of the proposed sign.⁴

22 The first assignment of error is sustained.

23 The city's decision is reversed.

⁴Because we sustain the first assignment of error, and the challenged decision must therefore be reversed in any event, there is no need to address other assignments of error. Accordingly, we do not address petitioners' second through fifth assignments of error.