BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GERRY ABOUD,
Petitioner,

vs.

CITY OF STAYTON,
Respondent.

LUBA No. 2017-131

FINAL OPINION
AND ORDER

Appeal from City of Stayton.

Gerry Aboud, Stayton, filed a petition for review and argued on his own behalf.

No appearance by City of Stayton.

BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN Board Member, participated in the decision.

AFFIRMED 04/18/2018

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city council decision that approves a modification to a previously approved site plan for a commercial use in a commercial zone.

FACTS

The subject property is a vacant 10,000-square-foot lot that is zoned Commercial Retail (CR). In 2013, the county approved a site plan for a seasonal produce stand. The 2013 approved site plan called for a 20-foot x 40-foot covered sales area to be located on an area of concrete pavers approximately 30 feet x 50 feet in area, along with a paved driveway, sidewalks, gravel-surfaced parking area and a stormwater management system or "rain garden." The 2013 site plan approval also required landscaping in the form of a lawn, although the area to be landscaped is not reflected on the approved site plan. The 2013 site plan was later modified to include a small structure used as a walk-in refrigerator. The subject property and adjacent lots are subject to a reciprocal access and parking easement, sharing use of a driveway and access point along the property's southern border.

The property was subsequently improved to include the paved driveway, concrete pavers, stormwater system and gravel-surfaced parking area (the 2013 improvements), as well as the covered area and refrigerator structure associated with the seasonal produce stand. The seasonal produce sales operated for only one year. After it closed, the covered area and refrigerator structure were

removed, leaving behind the 2013 improvements required by the 2013 site plan approval.

In November 2017, a new lessee for the property filed an application with the city to modify the 2013 site plan to allow a drive-through coffee kiosk located in an 8-foot x 20-foot trailer. The site plan submitted with the application was a copy of the 2013 site plan, with the covered sales area and refrigerator building whited out, and the proposed location of the coffee kiosk drawn by hand. No other changes to the 2013 site plan or conditions were proposed. In response to comments, the site plan was further revised with hand-drawn arrows to show the proposed on-site circulation pattern for drive-through customers.

Stayton Municipal Code (SMC) distinguishes between major and minor modifications to approved land use plans. SMC 17.04.100 defines "minor modification" as any modification that does not meet the definition of "major modification." *See* n 1, below. SMC 17.12.070.1.a.3 provides that planning staff are the review authority for an application for a minor modification of an approved land use decision, including a site plan. The planning director determined that the proposed site plan modification did not meet the definition of "major modification" and hence qualified for planning staff review as a minor modification. Accordingly, the planning director processed the application according to the administrative procedures at SMC 17.12.080 rather than the procedures for major modifications, which require a public hearing.

The planning director provided notice of the application to those entitled to notice, including petitioner, a neighboring property owner, who submitted comments in opposition. On October 9, 2017, the planning director issued a decision approving the modification to the 2013 site plan, with conditions.

A member of the city council, Councilor Quigley, called up the decision for review prior to the expiration of the local appeal period. The city council conducted a public hearing on the application on December 4, 2017, at which petitioner and others provided testimony. At the conclusion of the hearing, the city council deliberated and voted 3-1, with Councilor Quigley opposed, to approve the application with additional conditions.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

SMC 17.04.100 defines a "major modification" as a modification to an approved land use that meets at least one of nine "criteria."[1] A proposed

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[1] SMC 17.04.100 provides, in relevant part:

"MODIFICATION, MAJOR: A modification to an approved land use application that meets 1 or more of the following criteria:

"1. A change in the type and/or location of access-ways, drives or parking areas affecting off site traffic.

"2. An increase in the floor area proposed for non-residential use by more than 15% of the area previously specified.

"3. A reduction of more than 10% of the area reserved for common open space or landscaping.

modification that does not meet any of the nine criteria is treated as a minor modification. As noted, a minor modification is approved by staff. A major modification is subject to procedures at 17.12.150, which require planning commission review with a public hearing.

Under the first assignment of error, petitioner argues that the city council erred in processing the application as a minor modification, for two reasons. First, petitioner argues that the application did not qualify as a "modification" of any kind, because (1) the 2013 site plan is now four years old, (2) the site has been vacant for three years, (3) the current applicant is not the former

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"4. (Repealed Ord. 913, September 2, 2009)

"5. (Repealed Ord. 913, September 2, 2009)

"6. Increase in automobile parking spaces by more than 10%.

"7. Proposals to add or increase lot coverage within an environmentally sensitive area or areas subject to a potential hazard.

"8. Changes that exceed 10 feet in the location of buildings, proposed streets, parking configuration, utility easements, landscaping or other site improvements.

"9. Change to a condition of approval, or change similar to subsections 1 through 9 that could have a detrimental impact on adjoining properties. The City Planner shall have discretion in determining detrimental impacts warranting a major modification.

"MODIFICATION, MINOR: A modification to an approved land use application that meets none of the criteria for a major modification."

applicant, and (4) the 2013 approval was for a seasonal produce stand, whereas the current proposal is for a year round, higher impact commercial use. According to petitioner, the proposed site plan can only be approved as a new site plan application, not as a major or minor modification.

The city council rejected that argument in its findings.[2] Petitioner does not acknowledge or challenge those findings, and makes no attempt to demonstrate that the findings are inadequate, or that the interpretations of the relevant SMC code provisions therein are reversible under the deferential standard of review we must apply to a governing body's interpretation of local

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[2] The city council findings state, in relevant part:

> "Testimony was offered that the application should not be considered the modification of a previous approval because of the age of the previous approval, the applicant is different than the previous applicant, owners of the property are listed differently than the original application and the site will be used for a different use, and the impact of the proposed use will be different than the original. The Council concludes that the application is a modification of the previous approval because the basic elements of the site plan are not changed: the driveway location and entrance to the street is the same; the area and location of landscaping is the same; the stormwater management facility is not modified; and the location and area of the paving was not proposed to be changed by the application. [SMC] 17.12.120.7 provides that a land use approval granted is effective if the right granted therein is commenced within one year of the effective date of that decision. The site improvements were implemented within one year of the 2013 approvals and therefore those approvals remain in place currently. The subsequent closure of the business and the propert[y's] vacant status does not cause the site plan approval to expire. * * *" Record 21-22.

land use legislation, under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). Accordingly, we reject petitioner's first argument that the proposed site plan is not a modification of any kind that must be processed as a new site plan application.

Second, petitioner argues that the city erred in processing the application as a minor, rather than major, modification. According to petitioner, three of the criteria that distinguish a minor from a major modification are met in the present case: criteria one, eight and nine. *See* n 1. Consequently, petitioner argues, the "application should have been treated as a Major Modification and denied." Petition for Review 8.

The city council found that as originally submitted the site plan did not meet any of the criteria for a major modification at SMC 17.04.100. Record 19-20. Petitioner apparently disagrees with that conclusion as it regards criteria one, eight and nine.[3] We assume, without deciding, that petitioner is correct that at least one of the criteria 1, 8 and 9 are met in the present case, and therefore the application should have been processed as a major modification.

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[3] Petitioner's disagreement regarding criteria one, eight and nine appears to be based not on the modified site plan as originally submitted, which is what the planning director and city council evaluated to determine whether the application was a major or minor modification, but rather on the revisions to the site plan required by the city council under several conditions of approval. For example, the city council imposed conditions requiring that the parking area and drive-through lane be paved, which arguably could trigger criteria one, eight or nine if the applicant had proposed those modifications.

However, even with that assumption, petitioner has not established that any error the city committed in processing the application requires reversal or remand.

In an alternative finding, the city council found that:

> "The difference between a minor modification and major modification is the review authority and whether a public hearing is required; in either case the same standards for development would apply. With the City Council's assumption of authority over the application and Council's holding a public hearing, the distinction between minor modification and major modification becomes irrelevant." Record 22.

Petitioner does not acknowledge or challenge the foregoing finding. The city council concluded that the only differences between a major and minor modification are procedural, differing only by the initial review authority and the initial procedures, but that the approval standards (at SMC 17.12.220) are identical. Under this unchallenged finding, petitioner can obtain reversal or remand only if he demonstrates that the presumed error in processing the application as a minor modification prejudiced petitioner's substantial rights. *See* ORS 197.835(9)(a)(B) (LUBA shall reverse or remand a local government decision where the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"). Petitioner was provided a *de novo* public hearing on the application before the city council, the city's highest review authority. If the procedures the city actually followed prejudiced petitioner's substantial rights in some way, petitioner has not identified what that prejudice might be

and as far as we can tell, petitioner's substantial rights were not prejudiced by the procedure the city followed.

The closest petitioner comes to alleging that his substantial rights were prejudiced is to note that SMC 17.12.150.2.b states that a major modification "shall constitute a new land use application" and is "not a continuation of the original approved land use application."[4] Petitioner argues that an application is for a major modification and, as such, would "require an entirely new application and site plan." Petition for Review 7. It is not clear to us that SMC 17.12.150.2.b literally requires the applicant to submit an entirely new application for approval. That would not be an application for a *modification*, but an application for an entirely new use, which would seem to nullify the SMC provisions for major modifications.

In any case, even if SMC 17.12.150.2.b is understood to require the applicant for a major modification to submit an entirely new application and, in

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[4] SMC 17.12.150.2 provides, in relevant part:

> "METHOD OF ADOPTION. Major modifications shall be adopted pursuant to the requirements of Sections 17.12.070 through 17.12.100. The decision shall be made in accordance with this title.
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> "a. This Section applies to all site plan reviews, subdivisions (but not partitions), and Master Planned Developments.
>
> "b. Major modifications shall constitute a new land use application and not a continuation of the original approved land use application."

this case, a new site plan, petitioner does not attempt to demonstrate that any error the city made in accepting the application to modify the 2013 site plan and the modified site plan in this case prejudiced petitioner's substantial rights. Petitioner has also not demonstrated that the city council misconstrued the SMC procedural provisions, or that any misconstruction of law resulted in more than harmless error. Accordingly, petitioner's arguments do not provide a basis for LUBA to reverse or remand the decision. ORS 197.835(9)(a)(B).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

SMC 17.12.220 sets out the submittal and approval standards for site plans. SMC 17.12.220.4.b requires that the proposed site plan shall show, or be accompanied by, specified information or documents. SMC 17.12.220.4.b.12 requires that the applicant submit a "landscaping plan prepared in accordance with [SMC] 17.20.090.3."

Petitioner argues that the modified site plan submitted as part of the present application was incomplete, in that it did not indicate the location of required landscaping, or have a landscape plan attached to it. Petitioner argues that the site plan approved in 2013 also did not indicate the location of required landscaping or have a landscape plan attached to it.

The city council responded to this issue, when raised below, by adopting the following finding:

> "Lack of landscaping on the plan and lack of landscaping plan. The 2013 site plan approval indicated that the landscaping would

> be lawn, except the rain garden. No change in landscaping is proposed by this application." Record 6.

Relatedly, in addressing issues petitioner raised regarding irrigation for landscaping, the city council found that its "jurisdiction in this application is limited to the elements that are proposed for modification." Record 6-7. Read together, it is reasonably clear that because no modification to the landscaping was proposed, and the city council concluded that its review is limited to the proposed modifications, and the city council determined that it lacked authority to require the current plan to correct any deficiencies in the 2013 application; that is, to require the applicant to submit a landscaping plan or indicate landscaped areas (*i.e.*, lawn areas) on the site plan.[5]

Petitioner does not acknowledge or challenge the foregoing findings. The standard of review petitioner invokes under this assignment of error is ORS 197.835(9)(a)(D), which authorizes LUBA to reverse or remand a local government decision where the local government "[i]mproperly construed the applicable law[.]" However, petitioner does not identify any improper construction of law in the city's decision. Specifically, petitioner does not identify any SMC provision that requires an applicant for a minor (or major)

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[5] We note that the city council re-imposed all conditions from the 2013 approval, including the requirement to landscape the site. Further, the city council noted the existence of 1,800 square feet of landscaping based on a 2014 aerial photograph, which exceeds the 1,500 square feet of landscaping required by SMC 17.20.090.2. Record 10.

modification to a site plan to include information that was omitted from the original application, regarding features of the site plan where no modification is proposed. The city council found that its authority is limited to the proposed modifications. Absent some challenge to that conclusion, petitioner's arguments provide no basis for reversal or remand. ORS 197.835(9)(a)(D)

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that one of the four city council members, Councilor Kronquist, stated approximately 51 minutes into the December 4, 2017 public hearing that he had "made up his mind" prior to receiving all the testimony at the hearing. Petition for Review 9-10. Petitioner argues that, based on this declared predisposition, Councilor Kronquist should not have participated in the hearing or in the city council's deliberations, which resulted in a 3-1 vote in favor of approving the application.

Petitioner attached to his petition for review a recording of the December 4, 2017 hearing, and a self-prepared partial transcript of relevant portions of that audiotape, starting at approximately 51 minutes into the hearing, during a portion of petitioner's testimony in opposition. Petitioner's self-prepared transcript is reasonably accurate, but includes some inaccuracies and omissions

of what appear to be relevant statements. Accordingly, we include a more complete partial transcript in the margin.[6]

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[6] Below is a partial transcript of the audiotape of the December 4, 2017 public hearing before the city council, from approximately 52:07 to 54:00.

Aboud: May I ask you a question?

Kronquist: Certainly, sir.

Aboud: Have you made up your mind on how you would vote on this?

Kronquist: Well, I appreciate your letters and I appreciate the input, but no not until today did I make up my mind.

Aboud: I'm sorry?

Kronquist: Not until today did I make up my mind.

Aboud: Okay, because it sounds like you've made up your mind.

Kronquist: I made up my mind when I downloaded 105 pages and read them.

City Attorney: Hold on, Mr. Mayor, we have a problem.

Mayor: Okay, Mr. Lien.

City Attorney: The rules require that you can't develop a predisposition until the hearing is closed.

Kronquist: I am not saying I'm not willing to listen to other views. I, whether I—perhaps I misspoke Mr. Aboud in terms of making up my mind.

[Back and forth between petitioner and Kronquist omitted]

City Attorney: I think it's appropriate, councilor, to state for the record that you are willing to listen to the rest of the testimony with an open mind.

As the transcript indicates, Councilor Kronquist initially stated that he had "made up" his mind before the hearing on how he would vote, based on reading the written testimony in the record. He subsequently stated that he "misspoke" about making up his mind, and that he did not mean that he would not consider the oral and written testimony submitted at the hearing.

We disagree with petitioner that the pertinent portions of the audiotape demonstrate that Councilor Kronquist was predisposed to judgment prior to the hearing and was unable to consider with an open mind the testimony submitted at the hearing. The standard for disqualifying bias is that the decision maker "has so prejudged the particular matter as to be incapable of determining its merits on the evidence and arguments presented." *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 602, 341 P3d 790 (2014), *citing Beck v. City of Tillamook*, 113 Or App 660, 662-63, 833 P2d 1327 (1992). The test articulated in *Columbia Riverkeeper* represents a "high bar for disqualification," and requires that prejudgment must be demonstrated by

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Kronquist: I look forward to anything that any proponent or opponent brings to the table, and will judge it with a very open mind.

City Attorney: And you feel you can go ahead with this hearing and vote—

Kronquist: Very much so.

City Attorney: —in a fair and just manner?

Kronquist: Absolutely. * * *

"explicit statements, pledges, or commitments that the elected local official has prejudged the specific matter before the tribunal." 267 Or App at 610.

Here, Councilor Kronquist's initial statement that he had "made up" his mind based on the written testimony submitted prior to the hearing could allow one to infer that he is incapable of making a decision based on all the evidence in the record, including testimony submitted until the close of the evidentiary proceeding. However, he subsequently clarified that he "misspoke" regarding whether his mind was made up, and that he was willing to consider all the evidence in the record, including oral testimony submitted at the hearing, and to base his vote on consideration of the entire record. Petitioner focuses on the initial statement in isolation, and ignores the subsequent clarification. However, all the relevant statements must be viewed together. Taken together, Councilor Kronquist's statements do not constitute sufficient evidence to demonstrate improper prejudgment or an inability to consider all of the evidence in the record. It would appear to be more accurate to say that Councilor Kronquist was tentatively persuaded to approve the application by the material he downloaded, but that he remained willing to consider all of the testimony and other evidence presented at the hearing before rendering a final decision.

The third assignment of error is denied.

The city's decision is affirmed.