

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

VICTOR SEGER,)	
)	
Petitioner,)	
)	LUBA No. 92-056
vs.)	
)	FINAL OPINION
CITY OF PORTLAND,)	AND ORDER
)	
Respondent.)	

Appeal from City of Portland.

Victor Seger, Portland, filed the petition for review and argued on his own behalf.

Adrienne Brockman, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED

06/10/92

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a city design commission decision denying design review approval.

FACTS

The subject property is is zoned Industrial and is within a Design Review Overlay district (EXd). Petitioner proposes to construct a 100 ft. x 100 ft. tilt up concrete warehouse, without windows, on the property.

In Seger v. City of Portland, ___ Or LUBA ____ (LUBA No. 91-087, October 11, 1991), we remanded a previous design review commission decision concerning the subject warehouse because the city failed to adopt findings sufficient for review. On remand, the design commission conducted a hearing, adopted findings and again denied the proposal.

FIRST ASSIGNMENT OF ERROR

In this assignment of error petitioner contends the city erroneously required that second story windows be included in the design of the proposed warehouse, and refused to consider artwork as a substitute for the second story window requirement. Petitioner acknowledges that second story windows are required under Portland City Code (PCC) 33.140.230,¹ but points out that art work may be

¹Actually, the applicable city code standards identify a ground floor window requirement. However, the parties agree that ground floor windows would be subject to unacceptable levels of vandalism, and thus discuss the window requirement in terms of a "second story" window requirement. We

substituted for the second story window requirement under PCC 33.140.230(C) or PCC 33.510.220(C).

The city agrees that art work may be substituted for the second story window requirement.

We disagree with petitioner's interpretation of the challenged decision. As we read it, the challenged decision recognizes that, as a general matter, wall art may be substituted for the second story window requirement. However, the decision concludes that petitioner's proposed wall art is an inadequate substitute. The city did not determine that petitioner's application must be denied simply because the proposed warehouse fails to include second story windows and did not refuse to consider petitioner's proposed substitute for the required second story windows. Accordingly, this assignment of error provides no basis for reversal or remand of the challenged decision.

The first assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner argues the design commission incorrectly determined the proposal fails to satisfy PCC 33.510.225(C), which provides:

"Buildings must be designed and constructed to accommodate retail uses along at least 50 percent

also refer to the window requirement as a "second story" window requirement.

of the walls which front onto a sidewalk, plaza, or other open space."²

Petitioner contends the proposal complies with PCC 33.510.225(C) because the warehouse could, in the future, be modified to accommodate retail uses by using a concrete saw to cut out window openings.

The design commission determined, in part:

"The applicant has proposed a concrete tilt-up building with two doors and two garage doors on the elevation facing N. Borthwick Street, and a door and garage door on the N. Russell Street elevation. The open interior plan of the structure could be converted for retail use in the future. However, more wall openings are needed, which could be utilized for pedestrian entries and shop windows, in order to allow this building to be practicably converted for future retail use. Staff suggests that such openings could be walled in with temporary wood construction for the time being. Because no such wall openings are proposed, and the applicant has not demonstrated that this proposal will in some other way satisfy the purpose of the Required Retail Opportunity regulation [PCC 33.510.225(C)] this proposal does not conform to the Required Retail Opportunity regulation." Record 33.

We agree with the city that PCC 33.510.225(C) requires buildings to be "designed and constructed" to accommodate retail uses. There is no real dispute that the warehouse, as proposed, is not "designed and constructed" to accommodate retail uses. That a concrete saw could be used, in the future, to cut out window openings for retail uses is

²The proposed warehouse fronts a public sidewalk on two sides.

not the equivalent of designing and constructing a building to accommodate retail uses.

One further point merits comment. Petitioner argues PCC 33.510.225(C) does not apply to the proposed warehouse because it will accommodate industrial, not retail uses. Petitioner contends the subject property is zoned for industrial use and the "Design Review" overlay district is necessarily of secondary importance. Specifically, petitioner contends that because the proposed warehouse is permitted "outright" in the industrial zone, the design review overlay provisions may not either prohibit or significantly increase the cost of this permitted industrial use.

PCC 33.700.070(E) establishes the "Hierarchy of Regulations," and states the following:

"Different levels of regulations. In general, an area with base zoning [and] overlay zoning * * * is subject to all of the regulations of each. When the regulations conflict, unless specifically indicated otherwise, the regulations in * * * an overlay zone supersede regulations in base zones. * * *" (Emphasis supplied.)

PCC 33.700.070(E) makes it clear that in the event of a conflict between the requirements of the base zone and an overlay zone, the overlay zone regulations take precedence. The base industrial zone in this case provides that industrial uses are permitted uses. However, the design review overlay zone imposes further requirements which limits proposed industrial uses.

Further, the EXd zoning map designation for the subject property establishes the city decided some time ago that the property should be subject to both the city's industrial and design overlay regulations. PCC 33.510.225(C) is a part of those design review regulations. Accordingly, permitted industrial uses are subject to PCC 33.510.225(C). Thus, particular industrial uses that would otherwise be permissible may be denied based on design review requirements.³

The fourth assignment of error is denied.

SIXTH AND SEVENTH ASSIGNMENTS OF ERROR

In these assignments of error, petitioner outlines frustrations he has experienced in dealing with a particular city planner, and with the city's processes generally. However, none of those frustrations establish any city decision maker is biased against petitioner. Petitioner's frustrations simply do not form a basis upon which we may reverse or remand the challenged decision.

Petitioner also argues the notice he received from the city erroneously stated his hearing would begin at 4:00 p.m., when the hearing actually began at 3:30 p.m. Petitioner apparently arrived at the hearing while the planning staff was presenting the staff report. However, as

³PCC 33.825.070 provides a procedure for "Modifications Which Will Better Meet Design Review Requirements" which allows the city, upon application, to adjust applicable design review standards. However, petitioner did not request an adjustment to PCC 33.510.225(C).

far as we can tell, petitioner had a full opportunity to present his case and to rebut the written staff report.

The errors petitioner alleges are at most procedural errors. This Board may only reverse or remand a land use decision on the basis of procedural error if the error causes prejudice to the petitioner's substantial rights. ORS 197.835(7)(a)(C). We do not believe petitioner has established that the alleged errors caused prejudice to his substantial rights and, consequently, they provide no basis for reversal or remand of the challenged decision.

Petitioner's sixth and seventh assignments of error are denied.

OTHER ASSIGNMENTS OF ERROR

The petition for review includes several other assignments of error. However, the challenged decision is one to deny proposed development. It is well established that it is the applicant's burden to establish compliance with each applicable approval standard. Further, a local government may not approve a proposal unless each approval standard is met. Accordingly, this Board must sustain a denial decision if the decision demonstrates that one or more standards are not met. Garre v. Clackamas County, 18 Or LUBA 877, aff'd 102 Or App 123 (1990). Because the city determined petitioner's proposal did not comply with PCC 33.510.225(C), and we affirm that determination, the proposal fails to meet an applicable standard. Therefore,

the city's decision in this case must be sustained. No purpose is served in reviewing petitioner's other assignments of error.

The city's decision is affirmed.