

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

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

ALLAN T.J. McINNIS, GENERAL)
LEASING, INC., HAROLD JEANS,)
JERALD R. HUMBERT, ALBIN M.)
HAMLIN, JR., DOROTHY F. HAMLIN,)
and JEROME C. GORDON,)
Petitioners,)
vs.)
CITY OF PORTLAND,)
Respondent.)

LUBA No. 92-218
FINAL OPINION
AND ORDER

Appeal from City of Portland.

Jack L. Orchard, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Ball, Janik & Novack.

Kathryn Beaumont Imperati, Senior Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 05/27/93

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 city decision denying an
4 application for a comprehensive plan and zone map amendment.

5 **FACTS**

6 The subject property consists of eight acres and is
7 zoned and planned General Industrial (IG2). The proposal is
8 to change the property's plan designation and zone to
9 General Commercial (CG).

10 The hearings officer recommended approval of the
11 proposal. The matter was placed on the city council's
12 consent agenda for approval. However, the city council
13 removed the proposal from the consent agenda and on its own
14 motion set the matter for a public hearing. After a public
15 hearing, the city council adopted the challenged decision,
16 denying the proposal. This appeal followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 "The city council erroneously removed the
19 unappealed hearings officer's decision from the
20 consent agenda and subjected petitioners'
21 application to a de novo process."

22 **FOURTH ASSIGNMENT OF ERROR**

23 "The proceeding before the Portland City Council
24 was, in effect, an invalid, unauthorized planning
25 bureau-initiated appeal."

26 Petitioners argue that the city council conducting a
27 public hearing to review a hearings officer's decision
28 recommending approval of a plan amendment and zone change,

1 is unprecedented. Petitioners assert the city council had
2 always before simply approved a hearings officer's
3 recommendation to approve a plan amendment and zone change,
4 on its consent calendar. Petitioners argue they should have
5 been afforded an opportunity to participate in the city
6 council's decision to change its procedures for the review
7 of the hearings officer's recommendation before that change
8 was made. Petitioners also argue the change of the process
9 from that previously used for city council review of a
10 hearings officer recommendation violates ORS 227.178(3).¹
11 Petitioners argue that the city council's review of the
12 hearings officer's recommendation through a public hearing
13 amounts to an unauthorized city planning staff appeal of the
14 hearings officer's decision.

15 Portland Community Code (PCC) 33.730.040 provides:

16 "In the case of certain quasi-judicial land use
17 reviews, such as comprehensive plan amendments * *
18 *, final City Council action is required in
19 addition to the normal Type III procedure. In
20 these cases, the initial processing of the land
21 use review is the same except the decision of the
22 initial review body becomes a recommendation to
23 the Council. The post-acknowledgment procedures
24 required by ORS 197.610 through 197.650 are
25 followed, and the case is scheduled for a public

¹ORS 227.178(3) provides in relevant part:

"If the application [for a permit, limited land use decision or zone change] was complete when first submitted * * * 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 hearing before the City Council." (Emphasis
2 supplied.)

3 PCC 33.730.040 was in effect at the time the disputed
4 application for a plan amendment was submitted. The city
5 council followed the requirement in PCC 33.730.040 that it
6 conduct a public hearing on the hearings officer's
7 recommendation. The city staff did not initiate an unlawful
8 appeal to obtain city council review of the hearings
9 officer's recommendation by public hearing as opposed to
10 action as an item on the city council's consent calendar.

11 That the city council may have, in the past, acted on a
12 hearings officer's recommendation on a plan amendment and
13 zone change by approving the consent calendar, does not
14 preclude the city from conducting a public hearing under
15 PCC 33.730.040. Further, by following the existing
16 requirements of PCC 33.730.040, the city did not change the
17 standards applicable to the zone change application in
18 violation of ORS 227.178(3). Even if the city failed to
19 follow the requirements of PCC 33.730.040 regarding city
20 council review of a hearings officer's recommendation on a
21 plan amendment and zone change in the past, that does not
22 preclude the city from following those requirements in this
23 case. Okeson v. Union County, 10 Or LUBA 1, 4-5 (1983).

24 Finally, even if the city erred by conducting a hearing
25 on the hearings officer's recommendation, that error is at
26 most procedural in nature. We may only reverse or remand a
27 challenged decision on the basis of procedural error where

1 the alleged error causes prejudice to petitioners'
2 substantial rights. ORS 197.835(7)(a)(B). Petitioners were
3 given notice of the public hearing on the hearings officer's
4 recommendation and participated in the hearing.

5 The "substantial rights" referred to in
6 ORS 197.835(7)(a)(B) are "the rights to an adequate
7 opportunity to prepare and submit [a] case and a full and
8 fair hearing," not a right to a particular result. Murray
9 v. City of Beaverton, 17 Or LUBA 723, 732 (1989); Muller v.
10 Polk County, 16 Or LUBA 771, 775 (1988). Therefore, that
11 after the hearing, the city council overturned the hearings
12 officer's recommendation, does not constitute prejudice to
13 petitioners' substantial rights.

14 The first and fourth assignments of error are denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 "Petitioners' substantial rights were violated in
17 that petitioners were provided no opportunity to
18 rebut evidence placed before the city council
19 outside the public hearing process."

20 Under this assignment of error, petitioners argue they
21 were erroneously denied an opportunity to rebut the contents
22 of a memorandum from the Portland Department of
23 Transportation (PDOT) and staff briefings between city staff
24 and a member of the city council.

25 **A. PDOT Memorandum**

26 The city council closed the public hearing on the
27 proposed plan amendment after the public hearing of

1 September 24, 1992. However, the city council left the
2 record open until October 2, 1992 to allow the parties to
3 submit further evidence. The city council conducted its
4 deliberation concerning this matter on October 8, 1992.

5 During the period the record was left open, petitioners
6 submitted a detailed memorandum responding to the concerns
7 previously expressed by PDOT and others. In addition, PDOT
8 submitted a memorandum to the city council summarizing the
9 evidence already in the record. Further, at the city
10 council's October 8, 1992 deliberations, PDOT staff made
11 oral comments that repeated comments from staff memoranda
12 already in the record.

13 Petitioners object that PDOT was allowed to submit its
14 memorandum and provide oral comments without petitioners
15 having an opportunity to rebut either.

16 We agree with the city that it is not required to allow
17 petitioners to rebut city staff summaries of evidence in the
18 record to aid the city council in its review.

19 This subassignment of error is denied.

20 **B. Staff Briefing**

21 During the deliberations at the October 8, 1992 city
22 council meeting, a city commissioner disclosed the
23 following:

24 "Mr. Mayor, first, I wanted to mention that * * *
25 during the last hearing [I] was absent for much of
26 the hearing * * * so I did spend quite a bit of
27 time in the interim here not only reviewing the
28 record but getting a personal briefing from the

1 staff that have been involved in it. And although
2 I would say its a very difficult case to decide
3 because of all the implications, I do come down of
4 the side of supporting the Transportation Bureau's
5 recommendations, the Planning Staff
6 recommendations and I do feel that [the proposal]
7 is inappropriate from a transportation policy
8 standpoint. So that's where I come down."
9 Petition for Review 24.

10 Petitioners argue this statement establishes the city
11 commissioner was influenced by information he obtained from
12 the staff briefing. Petitioners complain that the substance
13 of the staff briefing was not, but should have been,
14 disclosed to enable them to respond.

15 In Dickas v. City of Beaverton, 92 Or App 168, 172-73,
16 757 P2d 451 (1988), the court of appeals determined:

17 "[U]nder ORS 227.180, a party has no right to
18 rebut anything in a letter sent by a city employee
19 after the governing body hearing to members of its
20 governing body. Petitioner therefore was not
21 prejudiced by the exclusion of the letter from the
22 record, by not being appraised of its contents or
23 by not being afforded an opportunity to respond to
24 it."² (Footnote omitted.)

²ORS 227.180 provides in relevant part:

** * * * *

"(3) No decision or action of a * * * city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

"(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and

1 In Toth v. Curry County, 22 Or LUBA 488, 491 (1991), we
2 noted that:

3 "* * * a governing body may not accept evidence
4 from staff outside of the public hearing process
5 and thereafter include such evidence in the record
6 and rely on that evidence without first providing
7 the parties an opportunity to rebut such evidence
8 * * *." (Emphasis in original.)

9 Here, there is nothing to suggest that the city staff
10 briefed the city commissioner on anything other than the
11 evidence already in the record. Nothing suggests the city
12 staff impermissibly advocated denial of the proposal or did
13 anything other than perform its role of providing
14 administrative support to the city council. Further, after
15 the city commissioner made the disclosure as quoted above,
16 petitioners did not request an opportunity to question the
17 commissioner about the substance of the staff briefing. In
18 sum, we do not believe the fact that the briefing by city
19 staff occurred, or that petitioners did not have an
20 opportunity to rebut the substance of that briefing,
21 provides a basis for reversal or remand of the challenged
22 decision.

"(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication where action will be considered or taken on the subject to which the communication related.

"(4) A communication between city staff and the * * * governing body shall not be considered an ex parte contact for the purposes of subsection (3) of this section."

1 This subassignment of error is denied.

2 The second assignment of error is denied.

3 **THIRD ASSIGNMENT OF ERROR**

4 "The city improperly denied petitioners'
5 application based upon consideration of the
6 proposed Albina Community Plan and the assumed
7 conflict between petitioners' proposed zoning and
8 the staff-proposed multi-family residential zoning
9 for the property under the Albina Community Plan."

10 Under this assignment of error, petitioners argue the
11 city improperly relied upon the unadopted Albina Community
12 Plan as a basis for denial of the proposed plan amendment.

13 We agree with the city that the challenged decision
14 does not rely upon the unadopted Albina Community Plan as a
15 basis for denying petitioners' application. While the
16 challenged decision mentions the unadopted Albina Community
17 Plan, it also acknowledges that a final Albina Community
18 Plan has not been adopted by the city. Record 6. Reading
19 the decision as a whole, we conclude the city denied
20 petitioners' application on the basis that it is
21 inconsistent with adopted city criteria.³

³The challenged decision also includes the following findings:

"The Albina Community Plan * * * is not an adopted plan. However, consideration of its proposed zoning is appropriate in this instance since that project has continued for three years. For this reason, altering the comprehensive plan map designations on properties inside the plan boundaries is premature until that plan is adopted." Record 14.

These findings, at most, state a reason why the city would prefer to defer consideration of the proposal until the Albina Community Plan is adopted. However, the challenged decision does not defer consideration of

1 The third assignment of error is denied.

2 **FIFTH ASSIGNMENT OF ERROR**

3 "The city misapplied and misinterpreted the
4 transportation planning standards from the city's
5 comprehensive plan, failed to take into account
6 the zoning directly affecting relevant
7 transportation facilities and made certain
8 transportation-related findings in applying those
9 standards without an adequate factual basis in the
10 record."

11 **SIXTH ASSIGNMENT OF ERROR**

12 "The city erroneously concluded that petitioners'
13 application conflicts with the 'surrounding
14 neighborhood' enclave * * *"

15 **SEVENTH ASSIGNMENT OF ERROR**

16 "The city erroneously concluded that petitioners'
17 application violates the city's Industrial
18 Sanctuaries Policy. * * *"

19 **EIGHTH ASSIGNMENT OF ERROR**

20 "The city erroneously concluded that petitioners'
21 application was contrary to the preservation and
22 maintenance of the existing neighborhood. * * *"

23 Under these assignments of error, petitioners contend
24 the city improperly balanced the relevant plan standards and
25 erroneously concluded the proposed plan amendment fails to
26 comply with PCC 33.810.050.A.1 and plan policy 10.6.
27 Petitioners also argue the determination in the challenged

the proposed plan amendment. Rather, the decision denies the proposed plan amendment on the basis of several adopted city standards. To the extent the above quoted findings suggest the unadopted Albina Community Plan provides some part of the justification for denying the proposal, something we question, those findings are unnecessary to the decision and, therefore, are surplusage. They do not provide a basis for reversal or remand of the challenged decision. Bonner v. City of Portland, 11 Or LUBA 40 (1984).

1 decision that the proposed plan amendment does not comply
2 with the plan, is not supported by substantial evidence in
3 the whole record. We address these issues separately below.

4 **A. Adequacy of Findings**

5 **1. PCC 33.810.050.A.1**

6 PCC 33.810.050.A provides as follows:

7 "Amendments to the Comprehensive Plan Map * * *
8 will be approved if the review body finds that the
9 applicant has shown that all of the following
10 criteria are met:

11 "1. The requested designation for the site has
12 been evaluated against relevant Comprehensive
13 Plan goals and policies and on balance has
14 been found to be equally or more supportive
15 of the Comprehensive Plan as a whole than the
16 old designation;

17 "* * * * *

18 PCC 33.810.050.A.1 requires the city to balance
19 applicable plan policies and goals, and determine whether
20 the proposed plan amendment is "equally or more supportive
21 of the Comprehensive Plan as a whole than the old
22 designation." This determination is inherently subjective.
23 In a case where a local government was required to balance
24 applicable standards to determine whether a particular
25 conditional use should be approved, the court of appeals
26 determined the local government was required to:

27 "* * * tak[e] account of relative impacts of
28 particular uses on particular goals and of the
29 logical relevancy of particular goals to
30 particular uses * * *." Waker Associates, Inc. v.
31 Clackamas County, 111 Or App 189, 194, 826 P2d 20
32 (1992).

1 Similarly, here we believe the city is required to consider
2 the relative impacts of the proposed plan amendment and the
3 local relevancy of particular plan policies and goals and
4 determine whether on balance the proposal is equally or more
5 supportive of the plan. We have examined the city's
6 findings balancing the relative impacts of the proposed plan
7 amendment against relevant plan policies and goals. We
8 conclude the city's findings demonstrate the city properly
9 applied PCC 33.810.050.A.1.

10 This subassignment of error is denied.

11 **2. Plan Policy 10.6**

12 Plan Policy 10.6 states the following additional
13 standards for plan amendments:

14 "For quasi-judicial amendments, the burden of
15 proof for the amendment is on the applicant. The
16 applicant must show that the requested change is:
17 (1) Consistent and supportive of the appropriate
18 Comprehensive Plan Goals and Policies, (2)
19 Compatible with the land use pattern established
20 by the Comprehensive Plan Map, (3) Consistent with
21 the Statewide Land Use Planning Goals, and (4)
22 Consistent with any adopted applicable area plans
23 adopted as part of the Comprehensive Plan."

24 We determine above the city properly determined the
25 proposal is not equally or more supportive of the plan
26 policies and goals. We similarly believe the city's
27 determination that the proposal is inconsistent with, and is
28 not supportive of, the relevant plan goals and policies, is
29 adequate.

30 We have examined the city's findings determining the

1 proposal is incompatible with the land use pattern
2 established by the comprehensive plan map and certain
3 Statewide Land Use Planning Goals, as implemented through
4 acknowledged city plan amendment criteria and other plan
5 provisions. The city's findings are adequate to explain the
6 city's rationale for determining the proposal fails to meet
7 these standards.

8 This subassignment of error is denied.

9 **B. Evidentiary Support**

10 The city cites evidence in the record supporting its
11 findings that the proposal fails to satisfy PCC
12 33.810.050.A.1 and plan Policy 10.6. Petitioners cite
13 evidence in the record to support the proposed plan
14 amendment. In addition, petitioners' traffic reports
15 conflict somewhat with evidence relied upon by the city.
16 However, none of petitioners' evidence so undermines the
17 evidence relied upon by the city such that it is
18 unreasonable for the city to rely upon the evidence that it
19 did. Further, the choice between conflicting believable
20 evidence belongs to the city. Angel v. City of Portland, 22
21 Or LUBA 649, 659, aff'd 113 Or App 169 (1992).

22 We have reviewed the evidence cited by the parties. We
23 conclude a reasonable person could determine, based on the
24 evidence in the record, that the proposal fails to satisfy
25 PCC 33.810.050.A.1 and plan Policy 10.6. Younger v. City of
26 Portland, 305 Or 346, 752 P2d 262 (1988).

1 This subassignment of error is denied.

2 The fifth, sixth, seventh and eighth assignments of
3 error are denied.

4 The city's decision is affirmed.