

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

3
4 RICHARD FRANZKE,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF TIGARD,
10 *Respondent,*

11
12 and

13
14 VENTURE PROPERTIES, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2006-131

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Tigard.

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24 Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief was Josselson, Potter & Roberts.

26
27 Gary Firestone, Portland, filed a response brief and argued on behalf of respondent.
28 With him on the brief were Timothy V. Ramis and Ramis Crew Corrigan, LLP.

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30 Roger A. Alfred, Portland, filed a response brief and argued on behalf of intervenor-
31 respondent. With him on the brief were Michael C. Robinson and Perkins Coie, LLP.

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

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36 AFFIRMED

10/31/2006

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

NATURE OF THE DECISION

Petitioner appeals a hearings officer’s decision affirming the decision of the city’s planning director approving an application for a 17-lot subdivision on approximately 2.53 acres of land located in unincorporated Washington County, at the intersection of S.W. Bull Mountain Road and S.W. 133rd Avenue.

MOTION TO INTERVENE

Venture Properties, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is located within a 3.4 square mile area of unincorporated Washington County (Bull Mountain area) that is subject to the Bull Mountain Community Plan (BMCP), a comprehensive plan adopted by Washington County.¹ The city processed the application under Tigard Community Development Code (TCDC) Section 18.390.040 as a “Type II Procedure,” which provides for notice and an opportunity to comment in writing on the application within 14 days.² Under TCDC 18.390.040.G, appeals of planning director’s decisions are heard by a hearings officer, and are generally limited to persons with

¹ The subject property is located outside of the city limits of the City of Tigard, but within its urban service area. Under a 1997 intergovernmental agreement (IGA) and related agreements between the City of Tigard and Washington County, the city administers land development services for the Bull Mountain area, according to the provisions of the Washington County Community Development Code (WCCDC). In order to facilitate the city’s administration of its land use ordinances within the Bull Mountain area, shortly after entering into the IGA Washington County amended the BMCP and zoning maps to apply the city’s zone and use designations to properties within the Bull Mountain area. In *Friends of Bull Mountain v. City of Tigard*, ___ Or LUBA ___ (LUBA No. 2006-005, May 25, 2006), we considered in some detail the relationship between the city and the county with respect to the applicability and administration of land use plans and regulations in the Bull Mountain area.

² The decision is a statutory “limited land use decision” under ORS 197.015(13) and ORS197.195.

1 standing (as defined in TCDC), and to issues raised during the written comment period.³
2 Although petitioner did not submit written comments during the initial 14-day comment
3 period, and did not appeal the director’s decision, he did receive written notice of the
4 director’s decision, and submitted written comments to the hearings officer. Record 71-77.

5 The hearings officer issued a decision denying the appeal, affirming the decision of
6 the planning director, and approving the application subject to conditions set forth in his
7 decision. Record 9. Regarding the issues raised by petitioner in his letter, the hearings
8 officer adopted the following finding:

9 “The hearings officer finds that the issues raised in Mr. Franzke’s letter
10 exceed the limited scope of appeal permitted by TDC 18.390.040.G.2.b,
11 because those specific issues were not raised during the initial comment
12 period and they are not otherwise ‘necessary to resolve the case.’ TDC
13 18.390.040.G.2.b. However, for the sake of completion, the hearings officer
14 makes the following findings with regard to the issues raised in Mr. Franzke’s
15 letter.” *Id.*

16 This appeal followed.

17 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

18 Petitioner’s first and second assignments of error maintain generally that the city
19 improperly construed applicable law, specifically the BMCP and the TCDC, in (1) allowing
20 removal of trees, (2) failing to require a tree mitigation plan to be approved prior to the
21 decision, and (3) allowing payment of a fee in lieu of mitigation planting.

³ TCDC 18.390.040G.2.b provides:

“Scope of appeal. The appeal of a Type II Administrative Decision by a person with standing shall be limited to the specific issues raised during the written comment period, as provided under Section 18.390.040C, unless the Hearings Officer, at his or her discretion, allows additional evidence or testimony concerning any other relevant issue. The Hearings Officer may allow such additional evidence if he or she determines that such evidence is necessary to resolve the case. The intent of this requirement is to limit the scope of Type II Administrative Appeals by encouraging persons with standing to submit their specific concerns in writing during the comment period. The written comments received during the comment period will usually limit the scope of issues on appeal. Only in extraordinary circumstances should new issues be considered by the Hearings Officer on appeal of a Type II Administrative Decision.”

1 Intervenor argues as an initial matter that petitioner’s issues were not raised during
2 the initial 14-day comment period, and therefore, petitioner may not raise these issues before
3 LUBA under ORS 197.763(1). More significantly, intervenor argues that petitioner did not
4 assign error to the hearings officer’s finding set forth above, namely that the issues raised in
5 petitioner’s letter exceeded the limited scope of the appeal from the planning director’s
6 decision, and were not “necessary to resolve the case.” Intervenor argues that because
7 petitioner has not assigned error to that finding, the hearing’s officer’s conclusion that the
8 issues raised by petitioner were outside the scope of his review must be affirmed.

9 We agree with intervenor. The hearings officer found as an initial matter that
10 petitioner failed to take the steps required under the TCDC to bring the issues he attempted to
11 raise before the hearings officer within the hearings officer’s limited scope of review under
12 TCDC 18.390.040.G.2.b. That code section gives the hearings officer limited authority to
13 consider unpreserved issues and additional evidence on appeal, if the hearings officer finds
14 the unpreserved issues or additional evidence is “necessary to resolve the case.” The
15 hearings officer found that the unpreserved issues that petitioner attempted to raise on appeal
16 were not “necessary to resolve the case.” With that finding, the hearings officer lacked
17 authority under TCDC 18.390.040.G.2.b to consider petitioner’s issues. Although the
18 hearings officer adopted alternative findings “for the sake of completion,” it is clear that the
19 hearings officer did not apply TCDC 18.390.040.G.2.b to expand his scope of review.⁴
20 Regardless of the merits of the hearings officer’s findings regarding his scope of review,
21 petitioner may not fail to assign error to those findings, and then attempt in this appeal to rely
22 on the same issues that the hearings officer found were not preserved. *See Wetherell v.*
23 *Douglas County*, 51 Or LUBA 699, 717, *aff’d* __ Or App __, __ P3d __ (2006) (assignment

⁴ We understand the hearings officer’s alternative findings addressing petitioner’s issues to have been adopted for consideration on appeal, in the event LUBA sustained an assignment of error that challenged his finding that petitioner’s issues were beyond his scope of review under TCDC 18.390.040(G)(2)(b).

1 of error alleging county failed to adopt any findings addressing a criterion will be denied
2 where there are two unchallenged findings addressing that criterion); *Wal-Mart Stores, Inc.*
3 *v. City of Hillsboro*, 46 Or LUBA 680, 684-85, aff'd 194 Or App 211, 95 P3d 269 (2004) (a
4 city's decision denying a permit application must be affirmed, where there is an
5 unchallenged finding that the proposal violates an applicable approval criterion); *DLCD v.*
6 *Josephine County*, 18 Or LUBA 798, 801-802 (1990) (an assignment of error that does not
7 challenge the legal theory that the decision maker relies on must be rejected).

8 The first and second assignments of error are denied.

9 The city's decision is affirmed.