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

BARRY SULLIVAN and DALE BAKER,)
)
Petitioners,)
)
vs.)
)
CITY OF WOODBURN,)
)
Respondent,)
)
and)
)
GARRY LaPOINT,)
)
Intervenor-Respondent.)

LUBA No. 95-195
FINAL OPINION
AND ORDER

Appeal from City of Woodburn.

Vance M. Croney, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief was Wallace W. Lien, P.C.

No appearance by respondent.

Dale L. Crandall, Salem, filed the response brief and argued on behalf of intervenor-respondent.

LIVINGSTON, Chief Referee; HANNA, Referee, participated in the decision.

REMANDED 05/24/96

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the city council
4 approving a site plan for a gas station.

5 **MOTION TO INTERVENE**

6 Intervenor-respondent Gary LaPoint (intervenor) moves
7 to intervene on the side of the city in this proceeding.
8 There is no opposition to the motion, and it is allowed.

9 **FACTS**

10 Intervenor proposes to construct a gas station with a
11 car wash on a vacant lot within the city's General
12 Commercial (CG) zone. We adopt petitioners' undisputed
13 description of the site:

14 "The subject property is surrounded on all four
15 sides by commercially zoned property. * * * It is
16 bordered on the north by an existing McDonald's
17 restaurant, on the west by Lawson Street, on the
18 south by a vacant lot and on the east by a vacant
19 lot which has been approved for the construction
20 of a Super 8 motel. * * * The subject property is
21 one-half block south of State Highway 214 and a
22 block and a half east of Interstate-5. * * *

23 "The proposed gas station and car wash are
24 permitted uses within the CG zone. * * *" (Record
25 citations omitted.) Petition for Review 3.

26 Intervenor's application was submitted in March, 1995,
27 and considered by the city planning commission on May 25,
28 1995. The planning commission approved the site plan.

29 Petitioners appealed the planning commission's decision
30 to the city council, which considered the appeal on July 24,

1 1995. Petitioners describe the appeal:

2 "[At oral argument] Petitioners presented oral
3 testimony in opposition to the site plan
4 application. * * * At the close of the hearing,
5 the City Council voted to continue the hearing
6 until August 14, 1995. * * *

7 "On August 14, 1995, Petitioners submitted written
8 evidence into the record. * * * At the hearing,
9 the city Planning Director submitted a memorandum
10 introducing written evidence in response to
11 testimony provided at the July 24, 1995 hearing. *
12 * * Additional written materials were submitted
13 into the record on behalf of [intervenor].

14 "Petitioners requested the record be kept open an
15 additional seven days in order to evaluate the
16 information submitted at the August 14, 1995
17 hearing and to determine whether to submit
18 rebuttal evidence on behalf of opponents. * * *
19 The City Council denied the request. * * * The
20 City Council then voted to approve the application
21 * * *." Petition for Review 4-5.

22 This appeal followed.

23 **PRELIMINARY ISSUE**

24 Intervenor contends that under ORS 215.428, the city
25 was required to issue its final decision within 120 days.
26 Intervenor reasons that (1) since the city's final decision
27 was not issued within 120 days, he was entitled to apply for
28 a writ of mandamus under ORS 215.428(7); and (2) since ORS
29 215.428(7) provides that a writ of mandamus to compel the
30 city to issue the approval shall be issued unless the
31 approval would violate a substantive provision of the city's
32 comprehensive plan or land use regulations, and since
33 petitioners do not claim such a substantive violation,

1 petitioners' entire appeal is moot.

2 We see two problems with intervenor's argument. First,
3 ORS 215.428 governs county, rather than city, actions on
4 permit applications. However, since ORS 227.178, which
5 governs city actions, contains similar provisions, we apply
6 it instead.¹

7 Second, ORS 227.178(7) provides a remedy to an
8 applicant in the event the governing body of the city or its
9 designate does not take final action on an application for a

¹ORS 227.178 provides, in relevant part:

"(7) Except when an applicant requests an extension under subsection (4) of this section, if the governing body of the city or its designate does not take final action on an application for a permit, limited land use decision or zone change within 120 days after the application is deemed complete:

"(a) The city shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.

"(b) The applicant may apply in the circuit court of the county where the application was filed for a writ of mandamus to compel the governing body or its designate to issue the approval. The writ shall be issued unless the governing body shows that the approval would violate a substantive provision of the city comprehensive plan or land use regulations as defined in ORS 197.015. The writ may specify conditions of approval that would otherwise be allowed by the city comprehensive plan or land use regulations."

1 permit, limited land use decision or zone change within 120
2 days after the application is deemed complete.² If that
3 remedy is exercised, the circuit court, rather than the city
4 governing body or its designate, becomes the decision maker.
5 However, the mere existence of a remedy under ORS 227.178(7)
6 for delay in processing an application does not affect the
7 city's review of an application or the standard of review at
8 LUBA. If the remedy is not exercised, it has no import.

9 **FIRST ASSIGNMENT OF ERROR**

10 **A. Area of Building**

11 Petitioners challenge the city's decision on the ground
12 that it is not supported by substantial evidence.
13 Petitioners contend there is no evidence to support the
14 city's order "approving construction of a 6,237-square-foot
15 building." Petition for Review 6.

16 The challenged decision finds "the proposed building
17 area is approximately 6,237 square feet in size." Record 3.
18 The application describes the "project data," in relevant
19 part, as:

20 "Office/Restroom Building Areas: 828 s.f.

21 "Pump Canopy Building Areas: 4,508 s.f.

22 "Car Wash Building Areas: 901 s.f.

²As an approval of an application for site review within an urban growth boundary, the challenged decision falls within the definition of "limited land use decision" stated in ORS 197.015(12)(b). However, the city processed the application using the procedures for a land use decision.

1 "Total Building Footprint Area: 6,237 s.f."

2 Record 59.

3 We see no inconsistency between the project data and
4 the city's finding. The project data show that the total
5 building area (the sum of the areas of the office/restroom
6 building, pump canopy building, and car wash building) is
7 6,237 square feet. That is what the city found.

8 This subassignment of error is denied.

9 **B. Impact on Traffic**

10 Petitioners contend that in response to Woodburn Zoning
11 Ordinance (WZO) 11.070(d), the city found "the proposed use
12 will have a minimal impact on traffic patterns." Petition
13 for Review 8. Petitioners argue the city's determination is
14 not supported by substantial evidence.

15 WZO 11.070(d) states in full:

16 "Access to the public streets shall minimize the
17 impact of traffic patterns. Wherever possible,
18 direct driveway access shall not be allowed to
19 arterial streets. Wherever possible, access shall
20 be shared with adjacent uses of similar nature."

21 The challenged decision addresses WZO 11.070(d) as
22 follows:

23 "The applicant's proposal indicates shared
24 driveway access points to Lawson Street and the
25 private access road between McDonald's and the
26 subject property, therefore, this criteria [sic]
27 has been satisfied."

28 The city did not determine that "the proposed use will
29 have a minimal impact on traffic patterns." The challenged
30 decision finds only that the proposed driveway access

1 minimizes the impact of traffic patterns by sharing driveway
2 access points to Lawson Street and utilizing a private
3 access road between McDonald's and the subject property.
4 Petitioners challenge the evidentiary support for a
5 determination the city did not make.

6 Furthermore, the above-quoted finding indicates the
7 proposed design itself minimizes the impact of traffic
8 patterns in exactly the manner suggested by WZO 11.070(d).
9 Petitioners do not dispute the finding, and no further
10 evidence of compliance with WZO 11.070(d) is necessary.

11 This subassignment of error is denied.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 **A. Site Plan Procedure**

15 Petitioners contend intervenor's site plan should not
16 have been considered by the city, because it did not contain
17 information required by WZO 11.020 and therefore was
18 incomplete when filed. We disagree with petitioners. The
19 absence of relevant or even essential information in an
20 application does not preclude consideration by the city,
21 although it may result in a denial of the application.³

³Consideration of an incomplete application is inevitable if neither the governing body nor the applicant are aware when the application is submitted that information is missing. An applicant can provide additional information during the proceedings prior to a decision. ORS 227.178(2) specifically allows consideration of an incomplete application when the governing body notifies the applicant of exactly what information is missing and the applicant refuses to submit the missing information.

1 This subassignment of error is denied.

2 **B. Inadequate Information**

3 Petitioners contend the city approved intervenor's site
4 plan without certain information required by WZO 11.020(d)-
5 (f). WZO 11.020 provides, in relevant part:

6 **"Site Plan Composition.** The following shall be
7 required for any application for Site Plan Review:

8 * * * * *

9 "(d) Specifications as to type, color and texture
10 of exterior surfaces of proposed structures.

11 "(e) A sign plan, drawn to scale, showing the
12 location, size, design, material, color and
13 methods of illumination of all exterior
14 signs.

15 "(f) Shadow patterns of proposed structures
16 (showing shadow during the Solar Access
17 Standard period)."

18 **1. WZO 11.020(d) (Exterior Surfaces)**

19 The challenged decision addresses WZO 11.020(d) as
20 follows:

21 "The staff report submitted to both the City
22 Council and Planning Commission contained
23 illustrations of what the structure would look
24 like and the type of siding. Although a specific
25 color board was not submitted the applicant's
26 report states on page one, paragraph 2, 'the
27 design will be based upon the architectural style
28 developed by recent projects'. This would
29 indicate the structure will conform to all other
30 Texaco stations such as the one on the west side
31 of the I-5 interchange."

32 Petitioner's challenge is expressly directed at
33 "missing information." The apparent consequence of that

1 missing information is a finding that does not respond to
2 WZO 11.020(d). The above-quoted finding addresses the
3 architectural style of the proposed gas station, not the
4 "type, color, and texture of exterior surfaces."

5 This subassignment of error is sustained.

6 **2. WZO 11.020(e) (Sign Plan)**

7 The challenged decision states:

8 "The proposed signs as submitted, do not meet the
9 standards of the Sign Ordinance relative to
10 directional signs and off premise signs and the
11 applicant has not applied for a variance.
12 However, the applicant has indicated on the site
13 plan the location of some of the signs. Therefore
14 this standard has not been met." Record 7.

15 The decision explains that a sign plan will be resubmitted
16 for staff review and "[t]his is an administrative decision
17 not requiring Planning Commission approval." Id.

18 The approval of a site plan without the sign plan
19 violates WZO 11.020, which unequivocally requires a sign
20 plan prior to site plan approval.

21 This subassignment of error is sustained.

22 **3. WZO 11.020(f) (Shadow Patterns)**

23 Petitioners object that intervenor failed to provide
24 any diagrams or site plans depicting the shadow patterns of
25 the proposed structures. The challenged decision concludes
26 WZO 11.020(f) is not applicable, both because the proposed
27 one-story building would have to cast a shadow over 280 feet
28 to reach an adjacent property; and because there are no
29 solar access recordations in the city. We agree WZO

1 11.020(f) is not applicable.

2 This subassignment of error is denied.

3 The second assignment of error is sustained, in part.

4 **THIRD ASSIGNMENT OF ERROR**

5 Petitioners contend the challenged decision is unlawful
6 because the city did not require intervenor to "go through a
7 conditional use procedure as required by its ordinance."
8 Petition for Review 18. Petitioners' contention is based on
9 intervenor's request for a waiver of the off-street loading
10 facilities requirement in WZO 10.010 under the procedure set
11 forth in WZO 10.060, which provides:

12 "Off-street loading space shall be provided in the
13 amounts listed below, except that in appropriate
14 cases the Planning Commission may waive the
15 requirements for loading space after proceedings
16 are had as for a conditional use as provided for
17 in Sections 10.010 [14.010] to 10.070 [14.070] * *
18 *."⁴ (Emphasis added.)

19 WZO 14.030 requires a hearing before the city planning
20 commission on conditional use applications. We interpret
21 the emphasized phrase to mean only that such a hearing is
22 required to address a request for a waiver of the WZO 10.010
23 off-street loading facilities requirement. Because
24 intervenor's proposed gas station is a permitted use, we
25 reject petitioners' argument that WZO 10.060 requires an

⁴WZO 10.010 to 10.070 establish parking requirements. We accept petitioners' conclusion that the reference in WZO 10.060 to WZO "10.010 to 10.070" is in error, and that the reference should read "WZO 14.010 to 14.070."

1 application for a conditional use be filed to obtain a
2 waiver of the off-street loading space requirement. Since
3 the planning commission held a public hearing on the site
4 plan review application, including the request for a waiver,
5 WZO 10.060 is satisfied.

6 The third assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 On July 24, 1995, the city council held a hearing on
9 petitioners' appeal from the planning commission. Because
10 of uncertainty surrounding the meaning of WZO 10.060, as
11 discussed under the third assignment of error, the hearing
12 was continued to August 14, 1994 at petitioners' request.
13 Petitioners then requested the record be kept open an
14 additional seven days to provide an opportunity to address
15 "new evidence" in the form of (1) oral testimony of
16 intervenor's attorney; and (2) a memorandum and oral
17 testimony submitted by the planning staff on the topic of
18 WZO 10.060. Petitioners now assign error to the city's
19 refusal to accede to their request.⁵

⁵Petitioners rely on ORS 197.763(6) (1993 edition), which provides:

"[I]f a participant so requests before the conclusion of the initial evidentiary hearing, the record shall remain open for at least seven days after the hearing."

The legislature amended ORS 197.763(6) in 1995. The relevant provision is now found in ORS 197.763(6)(b), which states:

"If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing."

1 Oral evidence submitted at a continued hearing provides
2 no basis for a request that the record be left open for a
3 response. See ORS 197.763(6)(b). A memorandum from the
4 planning staff to the city council concerning the
5 appropriate interpretation of the city code is not evidence.
6 Therefore, the fact that petitioners did not have an
7 opportunity to rebut the substance of the memorandum
8 provides no basis for reversal or remand of the challenged
9 decision. See McInnis v. City of Portland, 25 Or LUBA 376,
10 381-82, aff'd 123 Or App 123 (1993).

11 Moreover, petitioners have not shown how the city's
12 interpretation of WZO 10.060, if incorrect, prejudiced their
13 substantial rights. The off-street loading facilities
14 waiver was considered by both the planning commission and
15 the city council. The conditional use process requires no
16 more.

17 The fourth assignment of error is denied.

18 The city's decision is remanded.

An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence and testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence or testimony for the purpose of responding to the new written evidence."