

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

3
4 JERRY C. REEVES,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WILSONVILLE,
10 *Respondent,*

11
12 and

13
14 PACIFIC N.W. PROPERTIES
15 LIMITED PARTNERSHIP
16 *Intervenor-Respondent.*

17
18 LUBA Nos. 2010-065 and 2010-066

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Wilsonville.

24
25 Jerry C. Reeves, Tigard, filed the petition for review. William C. Cox, Portland,
26 argued on behalf of petitioner.

27
28 Paul A. Lee, Assistant City Attorney, Wilsonville, filed a joint response brief and
29 argued on behalf of respondent.

30
31 Chresten J. Gram, Portland, filed a joint response brief and argued on behalf of
32 intervenor-respondent. With them on the brief was Bateman Seidel.

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

36
37 AFFIRMED

10/14/2010

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

NATURE OF THE DECISION

Petitioner appeals city decisions that approve a zoning map amendment, development plan, and site design review for development of the Wilsonville Road Business Park.

MOTION TO INTERVENE

Pacific N.W. Properties Limited Partnership (intervenor), the applicant below, moves to intervene on the side of the city in this appeal. There is no opposition to the motion, and it is granted.

FACTS

Intevenor filed applications with the city for approval of a zoning map amendment, stage I development plan, stage II final development plan, site design review, master sign plan, partition, rear yard setback waiver, and sign waiver for development of the Wilsonville Road Business Park. For purposes of this appeal, the relevant aspect of the development approval is the proposed extension of Kinsman Road. As proposed and required by the city, Kinsman Road would be extended through the middle of the subject property to its southern boundary.

Petitioner is the prior owner of the subject property, and according to petitioner he has certain rights under the sale agreement with intervenor if Kinsman Road is not extended through the property. Pursuant to that agreement, petitioner claims that he still owns the land over which Kinsman Road would be extended, and petitioner filed suit in Clackamas County Circuit Court to enforce that claim. The city Design Review Board (DRB) approved the applications over petitioner’s objections, and petitioner appealed to the city council. The city council rejected petitioner’s appeal, and adopted its decisions approving the proposed development. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 In his first assignment of error, petitioner argues that the city misconstrued its
3 transportation system plan (TSP) to require extension of Kinsman Road through the subject
4 property. Petitioner argues the TSP is merely conceptual and does not require that extension.

5 We do not understand petitioner to dispute that the TSP shows an extension of
6 Kinsman Road through the subject property. To the extent he does dispute that fact, he is
7 mistaken. Record 430, 454. The question then becomes whether it is inconsistent with the
8 TSP to require that Kinsman Road be extended through the subject property. While it may
9 be true that the TSP does not dictate the precise alignment that has been proposed and
10 approved by the city, the approved extension is certainly not inconsistent with the TSP. The
11 city’s interpretation and application of the TSP to require the disputed extension is well
12 within the city’s interpretive discretion under *Siporen v. City of Medford*, 231 Or App 585,
13 599, 220 P3d 427 (2009), *rev allowed* 348 Or 13, 220 P3d 427 (2010).

14 At oral argument, petitioner argued that TSP 4.2.1 requires the city to hold a public
15 meeting with affected property owners and other interested property owners, and the city did
16 not do so.¹ TSP 4.2.1 provides, in part:

17 “* * * Specific design issues [associated with improvement projects],
18 including roadway alignment, and concerns regarding private property and the
19 environment, will be addressed later during the design of each specific road
20 improvement. At that point, staff will hold a public meeting with affected
21 property owners and other interested parties to address such concerns.”

22 Based on the city’s alleged failure to hold a public meeting with property owners, petitioner
23 argues the city’s decisions violate TSP 4.2.1.

24 The city and intervenor objected generally at oral argument that petitioner was
25 improperly making arguments at oral argument that were not included in the petition for

¹ Petitioner filed his petition for review *pro se* but retained counsel for oral argument.

1 review. OAR 661-010-0040(1) provides that LUBA “* * * shall not consider issues raised
2 for the first time at oral argument.”

3 TSP 4.2.1 does seem to call for some sort of public meeting before specific roadway
4 alignments are selected. But as the city and intervenor point out, petitioner’s argument under
5 the first assignment of error does not specifically mention TSP 4.2.1. However, petitioner
6 does argue in the petition for review that the disputed Kinsman Road “alignment has never
7 been through the public hearing process. Rec 569-70.” Petition for Review 5. At those
8 pages of the record, another opponent of the proposal argued that TSP 4.2.1 applies and
9 requires that the city conduct a public hearing process before selecting a road alignment
10 through the subject property. Although it is an exceedingly close call, we will assume for
11 purposes of this opinion that the reference to Record 569-70 in the petition for review is
12 sufficient to raise the issue of whether the city was obligated to “hold a public meeting with
13 affected property owners” under TSP 4.2.1.

14 The city adopted the following findings addressing TSP 4.2.1:

15 “Interpretation of TSP 4.2.1. Council adopts the interpretation of this section
16 of the TSP recommended by staff * * *. [TSP 4.2.1] applies on a larger
17 project area basis, such as the network alternatives analysis the Council will
18 undertake in the future. If TSP section 4.2.1 is to have any reasonable
19 interpretation, it must be construed to apply at a very general level and not to
20 small road segments. Otherwise, the TSP would have little practical effect,
21 resulting in the need or requirement to amend the TSP upon each and every
22 land use application that touches upon the TSP. Such a process would make
23 the existing TSP meaningless and would hold up quasi-judicial land use
24 applications while the TSP is amended to address months and years of
25 hearings with affected property owners on project area alignments not shown
26 on TSP maps. If a reviewing body looked beyond this interpretation of
27 Section 4.2.1 of the TSP and determines that the section applies to this case,
28 the Council nevertheless finds compliance with the section, based upon the
29 fact that 100% of the affected property owners over whose land the extension
30 of Kinsman Road is designated (the applicants) have been involved in a public
31 meeting to address such concerns.” Record 22.

32 Petitioner offers no challenge to the above-quoted findings or the interpretation
33 included in those findings. Absent a challenge to the city’s findings on TSP 4.2.1,

1 petitioner’s undeveloped and indirect reference to TSP 4.2.1 does not provide a basis for
2 reversal or remand. Petitioner has not demonstrated that the city misconstrued the TSP or
3 made any other error in requiring and approving the extension of Kinsman Road.

4 Finally, petitioner argues:

5 “Moreover, TSPs are required to be updated every five years under Oregon
6 law, so * * * both of the City’s decisions were based on an outdated and
7 ‘expired’ TSP. (2003 TSP).” Petition for Review 5.

8 The city responds that petitioner failed to raise this issue before the city and the issue
9 is therefore waived. Petitioner has not responded to the city’s waiver argument, and the issue
10 is therefore waived. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504, 510, *aff’d* 221
11 Or App 702, 191 P3d 813 (2008); *Cummins v. Washington County*, 22 Or LUBA 129, 137
12 (1991). Even if the issue were not waived, petitioner does not identify the Oregon law under
13 which he believes a TSP “expires” if not updated every five years, and we are aware of no
14 such law.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner argues that the city violated Wilsonville City Code (WCC) 4.009(.01),
18 which requires that development “applications involving specific sites may be filed only by
19 the owner of the subject property * * *.” According to petitioner, petitioner is the actual
20 owner of the disputed property not intervenor. Although petitioner may eventually prevail in
21 circuit court regarding the property dispute, at the relevant time of the applications,
22 intervenor was the owner of record, and therefore no violation of WCC 4.009(.01) occurred.²

23 The second assignment of error is denied.

² The city and intervenor further argue that petitioner’s case against intervenor was dismissed by the circuit court and ask LUBA to take official notice of the circuit court pleadings. We need not consider the proffered pleadings because we have already determined that because intervenor was the owner of record at the time of the application, no violation of WCC 4.009(.01) occurred.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioner argues that the city did not adopt rough proportionality findings in
3 requiring that Kinsman Road be extended. Petitioner contends such findings are required by
4 *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 304 (1994). Presumably,
5 petitioner means to argue that the city violated the Takings Clause of the Fifth Amendment
6 of the United States Constitution by imposing an unconstitutional exaction. Petitioner's
7 takings claim, however, appears to be based on his claim that he is the owner of the land that
8 is being acquired for the extension of Kinsman Road. As we have already explained,
9 petitioner is not the owner of record of the disputed property. Petitioner is effectively
10 arguing that the city action constitutes an unconstitutional taking of someone else's property,
11 property that he may or may not successfully assert an interest in through his pending action
12 against the owner of record in circuit court.

13 We need not consider petitioner's taking claim further. The April 12, 2010 planning
14 staff report specifically addresses the Dolan rough proportionality requirement. Record 302-
15 04. The city council adopted that staff report as findings. Record 40. The staff report
16 discusses the proposed roadway exactions, street construction, and other infrastructure
17 improvements required as conditions of approval. Record 302-3. The staff report also
18 discusses the relationship between those conditions and the city's interest in adequate
19 transportation and utilities. Record 303. Finally, the staff report discusses the impact of the
20 development on the applicable infrastructure and finds the exactions imposed on intervenor
21 are roughly proportional to the impacts of intervenor's development. Petitioner neither
22 acknowledges nor challenges those findings.

23 The third assignment of error is denied.

24 **FOURTH ASSIGNMENT OF ERROR**

25 During the proceedings before the DRB, the DRB accepted written testimony, but
26 limited oral testimony to 10 minutes. When the matter was appealed to the city council, the

1 city council reviewed the matter on the record, and stated that it would not consider any new
2 evidence. Petitioner argues that the city’s procedure violated his “due process” rights.

3 Petitioner does not explain how the DRB’s decision to limit oral testimony to 10
4 minutes per person deprived him of due process, other than to claim this caused “[p]etitioner
5 and the public to limit the issues they presented to the DRB.” Petition for Review 7.
6 Petitioner does not point to any provision of the WCC that the 10-minute limitation on oral
7 testimony violates. Furthermore, petitioner was not limited to oral testimony before the
8 DRB; petitioner also had the opportunity to submit written evidence and argument with no
9 limit on the issues that could be addressed. Finally, the only issue that petitioner identifies as
10 an issue he was prevented to presenting to the DRB because of the 10-minute limitation
11 (regarding railroad crossings) was in fact raised by petitioner below. Record 282.

12 The city did not violate petitioner’s right to due process by limiting the city council
13 review to the evidentiary record that was compiled by the DRB. The WCC clearly provides
14 for on-the-record review at the city council level. WCC 4.022(.06).³ Further, the city did
15 not deprive petitioner of due process by limiting oral testimony before the DRB to ten
16 minutes. The fourth assignment of error is denied.

17 The city’s decisions are affirmed.

³ At oral argument, petitioner argued for the first time that the city erred by allowing intervenor to submit new evidence at the city council on-the-record hearing. That argument, however, is not included in the petition for review, and we therefore do not consider the argument. OAR 661-010-0040(1).