

LAND USE
BOARD OF APPEALS

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

JUN 9 2 24 PM '87

HOOD RIVER VALLEY RESIDENTS)
COMMITTEE, INC., DONNA DAVIS,)
POLLY TIMBERMAN, JEAN HARMON,)
CHRISTOPHER NEIHLS, STEVE)
DATNOFF, PAUL RANDALL,)
CHARLES LAVENTURE, STEVE)
DAVIS, DEE FRAHM,)
STEPHEN BRONSVELD,)
Petitioners,)
vs.)
CITY OF HOOD RIVER,)
Respondent.)

LUBA No. 87-015
FINAL OPINION
AND ORDER

Appeal from City of Hood River.

B. Gil Sharp, Hood River, filed the petition for review and argued on behalf of Petitioners.

Deborah M. Phillips, Hood River, filed a response brief and argued on behalf of Respondent City of Hood River.

Mark McCulloch, Portland, filed a response brief and argued on behalf of Respondent-Intervenor McDonald's Corporation. With him on the brief were Powers, McCulloch & Bennett.

BAGG, Referee; DuBAY, Chief Referee; participated in the decision.

AFFIRMED

06/09/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a decision of the Hood River City
4 Council interpreting a provision in its zoning ordinance.
5 Petitioners ask that we reverse the city's interpretation.

6 STANDING

7 Standing is an issue in this case. Respondent City of Hood
8 River argues that petitioners have failed to state any facts
9 showing adverse affect or aggrievement as a result of the
10 city's decision. As a consequence, respondent urges us to
11 dismiss this proceeding.¹

12 Petitioners' claim to standing is as follows:

13 "This case involves the same parties as LUBA Case No.
14 86-043, the record of which has been incorporated into
15 the record of this case. The issues to be resolved
16 arise out of the City's response to the remand in the
17 prior case. Petitioners adopt as a statement of
standing the statements set out in the Petition for
Review and Brief filed in LUBA Case No. 86-043, which
is hereby incorporated herein by reference." Petition
at 1

18 In the petition filed in Hood River Valley Residents
19 Committee v. City of Hood River, ___ Or LUBA ___ (LUBA No.
20 86-043, October 10, 1986), petitioners made the following
21 statement in support of this standing:

22 "Petitioners Donna Davis, Polly Timberman, Jean
23 Harmon, Christopher Neihls, Steve Datnoff, Paul
24 Randall and Stephen Bronsveld appeared and presented
testimony opposing the granting of the variance at
issue in these proceedings at the Hood River City
Planning Commission hearing on March 27, 1986.
25 Record, pp. 31-34. Petitioners Polly Timberman,
Charles LaVenture, Steve Davis, Dee Frahm, and Stephen
26 Bronsveld appeared and presented testimony opposing

1 the granting of the variance at the Hood River City
2 Council hearing on May 12, 1986. Record, pp. 13-14.
3 These petitioners were all aggrieved by the City
4 Council's decision. Jefferson Landfill Comm. v.
5 Marion Co., 297 Or 280, 686 P2d 310 (1984).

6 "Petitioners Jean Harmon, Christopher Neihls, Steve
7 Datnoff, Paul Randall, Stephen Bronsveld and Charles
8 LaVenture are members of petitioners Hood River Valley
9 Resident's Committee, Inc., (hereinafter referred to
10 as HRVRC). HRVRC is a non-profit corporation
11 qualified under the Internal Revenue Code as a tax
12 exempt organization. Its stated purposes include
13 monitoring the enforcement of land use legislation in
14 the Hood River County area. See attached copy of the
15 organization's Bylaws, pp. 1-2. Appendix 1.
16 Petitioner HRVRC is aggrieved and adversely affected
17 by the aggrievement and adverse effect of this
18 decision on its members.

19 "Petitioners Donna and Steve Davis, Polly Timberman,
20 Jean Harmon, Christopher Niehls, Steve Datnoff, Paul
21 Randall, Dee Frahm and Stephen Bronsveld are all
22 residents of the City of Hood River. The proposed
23 sign will be visible to all residents or visitors to
24 the city from many locations within the city.
25 Petitioner Dee Frahm could see the proposed sign from
26 her residence. These petitioners will be affected by
the visual impact of a sign exceeding the allowed
height. These petitioners are all adversely affected
by the decision [sic] at issue." Petition at 1-2.

This statement includes the requisite allegation of
aggrievement. Petitioners have standing to bring this appeal.
Jefferson Landfill, supra.

FACTS

This case is about the same commercial sign that was at
issue in Hood River Valley Residents Committee, Inc., supra.

In that case, we remanded the grant of a variance for a free
standing sign which exceeded city height limitations.

Following our remand, the city reconsidered its decision. The
city did not finally resolve the issues in the remand.

1 However, on January 19, 1987, the city council held what it
2 called a "legislative hearing." The purpose of the hearing was
3 to consider an interpretation of the city code that the city
4 has no ordinance regulating sign heights. The city found this
5 interpretation of the ordinance was correct. This appeal
6 followed.

7 FIRST ASSIGNMENT OF ERROR

8 "The City of Hood River's zoning ordinances limit the
9 McDonald's sign structure to a height of 45 feet."

10 Petitioners argue the McDonald's sign is a "structure"
11 under the city code as distinguished from a "building." The
12 city code definitions of structure and building are as follows:

13 "Sec. 17.01.060 - 'Building' means a structure used or
14 intended for supporting or sheltering any use or
15 occupancy.

16 'Structure' is that which is built
17 or constructed, an edifice or building of any kind, or
18 any piece of work artificially built up or composed of
19 parts joined together in some definite manner. . . ."

20 Petitioners argue the code provides that in the zone applicable
21 here, a commercial zone, no commercial structure may exceed 45
22 feet in height.

23 "Sec. 17.03.050(A)(4) - 'General commercial zone.
24 Permitted Uses. Maximum Building Height. No
25 commercial structure shall exceed a height of
26 forty-five feet.'"

The city argues petitioners are quite mistaken. The city
points to Section 17.05.020 which provides an exception to
height limitations as follows:

"Sec. 17.05.020 - 'General exceptions to building
height limitations. Vertical projections such as

1 chimneys, spires, domes, towers, aerials, flagpoles
2 and similar objects not used for human occupancy are
not subject to the building height limitations of this
title.'"

3
4 The city states its ordinance is ambiguous as to whether
5 signs are regulated.² Given this ambiguity, the city says it
6 is entitled to interpret its code, and it interprets its code
7 to exclude signs from height limitations.

8 The city code does not define a sign as either a structure
9 or a building. There is a city sign code, incorporated into
10 the zoning ordinance, but the sign code does not provide height
11 limitations. The sign code does, however, regulate
12 projections. A projection under the sign code "means the
13 distance by which a sign extends over public property or beyond
14 the building line. The code does not appear to regulate
15 vertical projections, or recognize a projection as something
16 which extends vertically above the building or the ground,
however.

17 Webster's New International Dictionary (3d Ed, 1966)
18 defines projection as "a jutting out or causing to put out to;
19 a part that projects or juts out; an extension beyond something
20 else...." Applying this definition to the city's code, it
21 would appear that only vertical projections extending out of a
22 building or other structure will be exempt from the city's
23 height limitations. Free standing signs or other vertical
24 projections having their base on the ground and not on another
25 structure or building, would be subject to the sign
26

1 limitations.

2 However, the city code gives examples of projections which
3 suggest free standing structures. Section 17.05.020 includes
4 as examples of vertical projection: "chimneys, spires, domes,
5 towers, aerials, and flagpoles." Any of these structures could
6 be attached to or separate from another building or structure.
7 This list of examples gives credance to the city's view that
8 free standing signs are indeed part of the exception to height
9 regulations.

10 Given this ambiguity, the city is entitled to interpret its
11 code in the first instance. Bienz v. City of Dayton, 29 Or App
12 761, 566 P2d 904 (1977). We conclude the city's interpretation
13 is reasonable given the ambiguous code language.

14 The First Assignment of Error is denied.

15 SECOND ASSIGNMENT OF ERROR

16 "Under its own ordinances, the city was not authorized
17 to overturn the decision of its planner that a
variance is required in this case."

18 Petitioners correctly note the city's code provides that
19 the planner will interpret the code. Petitioners claim that
20 any argument as to his interpretation should be appealed to the
21 planning commission and from there to the city council.

22 The code provides as follows:

23 "17.01.040 Interpretation. A. The city planner
24 or other city official as designated by the city
25 council, shall have the initial authority and
responsibility to interpret and enforce all terms,
provisions and requirements of this title. If

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1 requested, the planner shall make his interpretation
2 in writing.

3 "B. The planner's decision may be appealed to the
4 planning commission. The planning commission's
5 decision may be appealed to the city council. (Ord.
6 1488 (part), 1980)."

7 We do not agree with petitioners' interpretation of the
8 code. The appeal of the city planner's decision is not an
9 exclusive remedy locking the planning commission or the city
10 council into the planner's interpretation of a code provision.

11 Further, we consider the city's failure to utilize the
12 appeals procedure as a procedural error, if it is error at
13 all. As a procedural error, petitioners are entitled to
14 reversal or remand only if they can explain how their
15 substantial rights are prejudiced by this procedure. ORS
16 197.835(8)(a)(B). Petitioners have not done so.

17 This assignment of error is denied.

18 THIRD ASSIGNMENT OF ERROR

19 "The Final Opinion and Order issued by LUBA on October
20 10, 1986, in LUBA Case No. 86-043 invalidated the June
21 11, 1986, building permit."

22 Petitioners complain that the city essentially ignored our
23 opinion in Hood River Valley Residents Committee, supra.
24 Petitioners say the city has "taken the position that the
25 building permit remained valid pending further proceedings on
26 the remand." Petitioners ask that we specifically address the
validity of the building permit for the McDonald sign as the
building permit was conditioned upon this Board's ruling on the
grant of a variance. Because we remanded the grant of the

1 variance, petitioners claim the building permit is no longer
2 valid.

3 The prior review proceeding involving the permit is no
4 longer before us. In essence, petitioners' request asks us to
5 enforce our prior order. Enforcement of LUBA's order is a
6 matter for the circuit court. ORS 197.825(4)(b). What process
7 the city uses to resolve the issues on remand and what the city
8 does with any permits issued are not subject to our review.

9 The Third Assignment of Error is denied.

10 The city's decision is affirmed.

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FOOTNOTES

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Respondent characterizes the decision as "legislative." We are inclined to agree that the decision is legislative, but we do not believe the procedural characterization of the city's decision has any bearing on the standing issue given the facts as presented.

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The city asserts its home rule authority. While we recognize the city operates under a home rule charter, that fact does not prevent this Board from interpreting its ordinance in a manner inconsistent with the city's interpretation where the city's interpretation is not logical. We are not bound by local interpretation. Gordon v. Clackamas County, 73 Or App 16, 21, 698 P2d 49 (1985).