

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

BHAGWATI PODDAR,)
)
Petitioner,)
)
vs.)
)
CITY OF CANNON BEACH,)
)
Respondent,)
)
and)
)
TOLOVANA INN CONDOMINIUM UNIT)
OWNERS ASSOCIATION,)
)
Intervenor-Respondent.)

LUBA No. 93-120
FINAL OPINION
AND ORDER

Appeal from City of Cannon Beach.

Bhagwati Poddar, Astoria, filed the petition for review and argued on his own behalf.

No appearance by respondent.

P. Stephen Russell, III, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Copeland, Landye, Bennett & Wolf.

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

AFFIRMED 01/13/94

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 Petitioner appeals a city council order determining the
4 Tolovana Inn is a motel and, therefore, is not subject to
5 city regulations governing the short term rental of
6 dwellings.

7 **MOTION TO INTERVENE**

8 Tolovana Inn Condominium Unit Owners Association moves
9 to intervene on the side of the respondent in this appeal
10 proceeding. There is no objection to the motion, and it is
11 allowed.

12 **FACTS**

13 On February 3, 1992, the city manager wrote a letter to
14 intervenor advising that the Tolovana Inn is not subject to
15 the requirements of city Ordinance No. 92-1.¹ No notice was
16 given of the city manager's decision. On December 3, 1992,
17 petitioner learned of the city manager's decision.
18 Thereafter, petitioner appealed the city manager's decision
19 to the planning commission. After a de novo evidentiary
20 hearing, the planning commission affirmed the city manager's
21 decision. Petitioner appealed to the city council. The
22 city council did not accept new evidence. However, it
23 provided an opportunity to present argument based on the

¹Ordinance No. 92-1 restricts the short term rental of dwellings.

1 existing record.² Thereafter, the city council adopted the
2 challenged decision affirming the planning commission's
3 decision, and this appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioner argues the city manager had no authority to
6 write a letter to intervenor advising it that the Tolovana
7 Inn is not subject to the requirements of Ordinance
8 No. 92-1. As we understand it, petitioner contends the
9 disputed letter is a land use decision and, although the
10 planning commission and city council have authority to make
11 land use decisions, the city manager does not have such
12 authority.

13 The challenged decision is a city council decision that
14 is based on an appeal from a decision of the planning
15 commission. Petitioner states it was not possible for the
16 planning commission and city council to adopt a fair
17 decision after the city manager wrote the disputed letter.
18 However, in the absence of evidence to the contrary, we will
19 not presume the disputed letter influenced the planning
20 commission and city council's subsequent decisions
21 concerning the status of the Tolovana Inn, as petitioner
22 asserts. Petitioner has not established the planning
23 commission and city council were incapable of making a
24 decision based on the evidence and argument presented and,

²Petitioner did not appear at either the planning commission or city council hearing.

1 therefore, does not establish bias. 1000 Friends of Oregon
2 v. Wasco Co. Court, 304 Or 76, 742 P2d 39 (1987), cert den
3 486 US 1007 (1988); Cummins v. Washington County, 110 Or App
4 468, 823 P2d 438 (1992).

5 Although the challenged decision affirms and ratifies
6 the terms of the disputed city manager's letter, the
7 challenged decision, not the city manager's letter,
8 constitutes the city council's decision. Petitioner does
9 not explain how the city manager's alleged initial lack of
10 authority to write the disputed letter to intervenor affects
11 the validity of the challenged decision, and we do not see
12 that it does. This assignment of error provides no basis
13 for reversal or remand of the challenged decision.

14 The first assignment of error is denied.

15 **SECOND AND FOURTH ASSIGNMENTS OF ERROR**

16 Under these assignments of error, petitioner argues the
17 city manager's failure to provide notice of the disputed
18 letter violates ORS 197.763(2)³ and constitutional
19 requirements.

³ORS 197.763(2) requires a local government to provide notice of quasi-judicial land use hearings to certain persons. ORS 227.175(10)(a) allows a city to make decisions on certain applications for development approval without a hearing. However, in that case, the city must provide notice of the decision in the manner provided by ORS 197.763 and an opportunity for a local appeal. Considered together, ORS 197.763(2) and 227.175(10)(a) require the city to give notice of the city manager's decision, and an opportunity to appeal that decision, to those persons who would be entitled to notice under ORS 197.763(2).

1 **A. ORS 197.763(2)**

2 Although petitioner was not provided notice of the city
3 manager's decision, there is no dispute that petitioner was
4 provided with an opportunity to appeal the city manager's
5 decision and proper notice of the planning commission and
6 city council proceedings. Petitioner's allegation
7 concerning a violation of ORS 197.763(2) in this case
8 amounts to an allegation of procedural error. LUBA may only
9 reverse or remand a challenged decision on procedural
10 grounds where the error causes prejudice to petitioner's
11 substantial rights. ORS 197.835(7)(a)(B); Stockwell v.
12 Clackamas County, 24 Or LUBA 358 (1993). Assuming the city
13 manager's failure to provide petitioner with notice of the
14 disputed letter violates the notice requirements of
15 ORS 197.763(2), petitioner does not explain how such an
16 error prejudices his substantial rights, and we do not see
17 that it does.

18 This subassignment of error is denied.

19 **B. Constitutional Claims**

20 Petitioner argues the city manager's decision results
21 in injury to his property interests. Petitioner contends
22 the city's failure to provide him with notice of the
23 disputed city manager's letter violates the "due process
24 clause of the 14th Amendment to the U.S. Constitution."
25 Petition for Review 21. However, there is no dispute that
26 petitioner received proper notice of all planning commission

1 and city council proceedings. We fail to see how
2 petitioner's due process rights are prejudiced by the
3 failure to provide notice of the city manager's decision.

4 Further, petitioner's constitutional claims are
5 undeveloped and nonspecific. LUBA has consistently held it
6 will not consider claims of constitutional violations where
7 the parties raising such claims do not supply legal argument
8 in support of their claims. Gruber v. Lincoln County, 16 Or
9 LUBA 456 (1988); Mobile Crushing Company v. Lane County,
10 11 Or LUBA 173, 182 (1984). Therefore, petitioner's
11 constitutional claims provide no basis for reversal or
12 remand of the challenged decision.

13 This subassignment of error is denied.

14 The second and fourth assignments of error are denied.

15 **THIRD ASSIGNMENT OF ERROR**

16 This assignment of error is based on the faulty premise
17 that the challenged decision approves a zone change.⁴
18 Petitioner makes a number of arguments concerning the
19 impropriety of having a "motel" in a residential zone and
20 other reasons why such a zone change decision would be
21 improper or unwise. However, the challenged decision is the
22 city's interpretation of Ordinance No. 92-1 as it applies to
23 the Tolovana Inn. It is not a zone change decision.
24 Therefore, petitioner's arguments under this assignment of

⁴The property upon which the Tolovana Inn is located is zoned High Density Residential.

1 error provide no basis for reversal or remand of the
2 challenged decision.⁵

3 The fourth assignment of error is denied.

4 **CONCLUSION**

5 During the oral argument in this appeal all parties
6 agreed, and we understand from petition for review, there is
7 no issue in this appeal concerning the correctness of the
8 city's determination that the Tolovana Inn qualifies as a
9 motel and is not subject to the requirements of Ordinance
10 No. 92-1. Therefore, we do not decide this issue here.
11 Petitioner's assignments of error provide no basis for
12 reversal or remand of the challenged decision.

13 The city's decision is affirmed.

14

⁵Petitioner includes arguments under this assignment of error that the city code required the city to provide him with notice of the disputed city manager's letter. However, as we explain above, the city's failure to provide petitioner with notice of the city manager's letter provides no basis for concluding petitioner's substantial rights to a fair hearing concerning the nature of the Tolovana Inn were prejudiced. This is because after the disputed letter was mailed, the city provided petitioner with an opportunity to appeal the city manager's decision, proper notice of a hearing before the planning commission, a de novo evidentiary hearing before the planning commission, an appeal to the city council and a hearing before the city council.