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

PETER STERN,)
)
Petitioner,) LUBA No. 93-041
)
vs.) FINAL OPINION
) AND ORDER
CITY OF PORTLAND,)
)
Respondent.)

Appeal from City of Portland.

Peter Stern, Vancouver, Washington, filed the petition for review and argued on his own behalf.

Adrienne Brockman, Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 02/18/94

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision denying his request
4 for an adjustment to a code fence height limitation.

5 **FACTS**

6 The subject property is zoned Residential 7,000 (R7).¹
7 The subject property is 15,100 square feet in size and is
8 developed with a one-story single family dwelling. The
9 house faces onto SE 118th Avenue, and is set back
10 approximately 80 feet from the front property line. An
11 approximately 6-foot high wooden fence is located along the
12 front property line.

13 The R7 zone has a 15-foot front building setback
14 requirement. Portland City Code (PCC) 33.110.220(B).
15 PCC 33.110.255(C)(1) limits the height of fences within the
16 required front building setback to 3-1/2 feet. After the
17 city notified petitioner that the front fence on the subject
18 property is not in compliance with PCC 33.110.255(C)(1),
19 petitioner applied for an adjustment to
20 PCC 33.110.255(C)(1), pursuant to PCC Chapter 33.805, to
21 allow a 6-foot fence within the front building setback.

22 The city planning department issued a decision denying
23 the requested adjustment. Petitioner appealed the planning

¹The R7 zone is a single family dwelling residential zone with a 7,000 square foot minimum lot size.

1 department decision to the city Adjustment Committee
2 (committee). After a hearing, the committee denied
3 petitioner's application. This appeal followed.

4 **SIXTH ASSIGNMENT OF ERROR**

5 Petitioner contends the city decision maker was biased.
6 Petitioner argues this bias is evidenced by the fact the
7 record submitted to the committee, and subsequently to this
8 Board, is "jam-packed with intentional[ly] misleading,
9 inaccurate, irrelevant, immaterial, abusive and inflammatory
10 statements, inferences and distorted facts obviously
11 designed to influence the reviewing bodies." Petition for
12 Review 13.

13 We have repeatedly stated that to establish actual bias
14 or prejudgment on the part of a local decision maker,
15 petitioner has the burden of showing the decision maker was
16 biased or prejudged the application and did not reach a
17 decision by applying relevant standards based on the
18 evidence and argument presented. Spiering v. Yamhill
19 County, 25 Or LUBA 695, 702 (1993); Heiller v. Josephine
20 County, 23 Or LUBA 551, 554 (1992); Schneider v. Umatilla
21 County, 13 Or LUBA 281, 283-84 (1985).

22 The city decision maker was the Adjustment Committee.
23 Petitioner's complaints are directed primarily at the
24 evidence submitted to the committee by the planning
25 department staff. However, petitioner had an opportunity to
26 rebut and respond to that evidence at the hearing before the

1 committee. Petitioner does not argue the committee members
2 exhibited personal bias or were incapable of making a
3 decision by applying relevant standards to the facts
4 presented to them. Consequently, petitioner does not
5 demonstrate the decision maker was biased.

6 The sixth assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioner argues the challenged decision constitutes
9 an uncompensated taking of his property in violation of
10 Article I, section 18, of the Oregon Constitution.²
11 Petitioner argues "[a]ny restriction or interruption of the
12 common and necessary use and enjoyment of the property of a
13 person for a public purpose constitutes a 'taking' * * *."
14 Petition for Review 11. Petitioner further argues the
15 challenged decision requires him to allow "public viewing
16 and easy public access into his property." Id.

17 This case does not involve a zoning decision made in
18 contemplation of the eventual acquisition of petitioner's
19 property for public use, but rather the application of
20 zoning regulations that limit the permissible uses of
21 petitioner's property. In such an instance, there is no
22 unconstitutional taking if the challenged decision allows

²Petitioner alludes to other constitutional issues in his argument under this assignment of error. However, petitioners' other constitutional arguments are insufficiently developed to warrant response. See Joyce v. Multnomah County, 23 Or LUBA 116, 118, aff'd, 114 Or App 244 (1992); Van Sant v. Yamhill County, 17 Or LUBA 563, 566 (1989); Chemeketa Industries Corp. v. City of Salem, 14 Or LUBA 159, 165-66 (1985).

1 petitioner "'some beneficial use' of [his] property." Dodd
2 v. Hood River County, 317 Or 172, 182, 855 P2d 608 (1993);
3 quoting Fifth Avenue Corp. v. Washington County, 282 Or 591,
4 609, 581 P2d 50 (1978).

5 In this case, the challenged decision simply determines
6 that petitioner cannot have a fence more than 3-1/2 feet
7 high within 15 feet of his front property line along SE
8 118th Avenue. There is no dispute that the existing
9 dwelling on the subject property can continue to be used for
10 residential purposes. Accordingly, the challenged decision
11 does not deny petitioner "some beneficial use" of his
12 property.

13 The second assignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR**

15 Petitioner's entire argument under this assignment of
16 error is the following:

17 "In denying petitioner's request for adjustment,
18 the decision maker failed to demonstrate the
19 required substantial compelling city interest that
20 is required by law as essential for denial of a
21 reasonable and very minor adjustment request. No
22 compelling city interest exists." Petition for
23 Review 11-12.

24 Petitioner asserts denial of an adjustment must be
25 based on a "compelling city interest," but does not explain
26 the legal basis for such a requirement. It is petitioner's
27 responsibility to tell this Board the basis on which it
28 might grant relief. It is not LUBA's function to supply
29 legal arguments for petitioner. Deschutes Development v.

1 Deschutes County, 5 Or LUBA 218, 220 (1982).

2 The fourth assignment of error is denied.

3 **FIRST, THIRD AND SEVENTH ASSIGNMENTS OF ERROR**

4 The approval criteria for an adjustment are:

5 "A. Granting the adjustment will equally or
6 better meet the purpose of the regulation to
7 be modified; and

8 "B. If in a residential zone, the proposal will
9 not significantly detract from the livability
10 or appearance of the residential area * * *;
11 and

12 "C. If more than one adjustment is requested, the
13 cumulative effect of the adjustments results
14 in a project which is still consistent with
15 the overall purpose of the zone; and

16 "D. City-designated scenic resources are
17 preserved; and

18 "E. Any impacts resulting from the adjustment are
19 mitigated to the extent practical.

20 * * * * *³ PCC 33.805.040.

21 The purpose of the city's fence regulations, required to be
22 considered by PCC 33.805.040(A) above, is as follows:

23 "The fence standards promote the positive benefits
24 of fences without negatively impacting the
25 community or endangering public or vehicle safety.
26 Fences can create a sense of privacy, protect
27 children and pets, provide separation from busy
28 streets, and enhance the appearance of property by
29 providing attractive landscape materials. The

³PCC 33.805.040 states an adjustment will be approved if an applicant satisfies either standards A through E, quoted in the text, or standards F through H. However, petitioner does not contend the requested adjustment should have been approved under standards F through H. Therefore, we do not consider those standards further.

1 negative effects of fences can include the
2 creation of street walls that inhibit police and
3 community surveillance, decrease the sense of
4 community, hinder emergency access, lessen solar
5 access, hinder the safe movement of pedestrians
6 and vehicles, and create an unattractive
7 appearance. These standards are intended to
8 promote the positive aspects of fences and to
9 limit the negative ones." PCC 33.110.255(A).

10 The challenged decision denies petitioner's application for
11 failing to satisfy PCC 33.805.040(A), (B) and (E).

12 Petitioner contends the approval standards for the
13 requested adjustment are "largely ambiguous, uncertain,
14 conflicting and vague." Petition for Review 5. However,
15 petitioner provides no legal argument in support of his
16 contention and, therefore, we do not consider it. Deschutes
17 Development v. Deschutes County, supra.

18 Petitioner also argues the committee's findings are
19 inadequate because they fail "to state what facts were
20 determined to be relevant facts; what specific facts were
21 relied upon in reaching a decision, and why those facts led
22 [the committee] to the decision it made." (Emphasis in
23 original.) Petition for Review 13.

24 The challenged decision states the committee adopts as
25 its findings the analysis, findings and conclusions set out
26 in the original decision by the planning department.
27 Record 3. Those findings are found at Record 16-19. Those
28 findings appear to identify the applicable criteria, state
29 the facts relied on and explain why the facts lead to the
30 conclusion that PCC 33.805.040(A), (B) and (E) are not

1 satisfied. Except as discussed below, petitioner does not
2 explain why he believes these findings are inadequate.

3 Finally, petitioner contends the decision fails to
4 consider "the positive benefits of fences," as required by
5 PCC 33.805.040(A) and 33.110.255(A).⁴

6 According to PCC 33.110.255(A), the purpose of the
7 city's fence regulations is both "to promote the positive
8 aspects of fences and to limit the negative ones." The
9 challenged decision recognizes that the fence at issue
10 provides "the positive benefits of privacy, protection and
11 separation from the street for this property owner."
12 Record 17. However, the challenged decision also finds the
13 fence creates negative impacts by detracting from the
14 appearance of the neighborhood, creating a sight-obscuring
15 street wall, decreasing the neighborhood's sense of
16 community and hindering emergency access. The decision
17 concludes "the negative impacts on the community of the
18 over-height fence * * * in the front yard outweigh the
19 positive benefits for this one property owner" and,
20 therefore, "the proposed adjustment does not equal or better
21 meet the purposes of the [fence] regulations," as required
22 by PCC 33.805.040(A). Record 18.

⁴Under the first assignment of error, petitioner also expresses general disagreement with various statements in the challenged decision. Petition for Review 6-9. However, such general expressions of disagreement provide no legal basis for reversing or remanding a challenged decision. Neuharth v. City of Salem, 25 Or LUBA 267, 280 (1993); McCarty v. City of Portland, 20 Or LUBA 86, 89 (1990).

1 Contrary to petitioner's assertion, the challenged
2 findings do consider the positive benefits provided by
3 petitioner's six-foot fence. However, the findings go on to
4 explain why the decision maker believes those positive
5 benefits are outweighed by the negative impacts of the
6 fence. We see nothing wrong with the city's interpretation
7 and application of this approval standard.

8 The first, third and seventh assignments of error are
9 denied.

10 **FIFTH AND EIGHTH ASSIGNMENTS OF ERROR**

11 Petitioner contends the city's "complaint driven"
12 process for enforcing its code fence height limitations is
13 arbitrary, selective and discriminatory and violates the
14 equal privileges and immunities clause of Article I,
15 section 20, of the Oregon Constitution. Petitioner also
16 asserts the city planning department has harassed him for
17 the past three years by making multiple warrantless
18 searches, trespassing on his property and invading his
19 privacy.

20 The decision challenged in this appeal is the city's
21 decision to deny petitioner's request for an adjustment to
22 the code limitation on fence height in the required front
23 building setback. That decision is governed by the criteria
24 of PCC 33.805.040. Under these assignments of error,
25 petitioner does not contend the challenged decision fails to
26 comply with PCC 33.805.040. Rather, petitioner appears to

1 argue he has constitutional defenses against an action by
2 the city to enforce its fence height limitation. However,
3 even if petitioner is correct in this regard, that would not
4 provide an independent basis upon which to compel the city
5 to grant an adjustment. Scott v. City of Portland, 17
6 Or LUBA 197, 201 (1988), aff'd 95 Or App 582, rev den 308 Or
7 79 (1989).

8 The fifth and eighth assignments of error are denied.

9 The city's decision is affirmed.