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

DAVID LAINE,)
)
Petitioner,)
)
and)
)
JAMES W. WATTS,)
)
Intervenor-Petitioner,)
ORDER)
)
vs.)
)
CITY OF ROCKAWAY BEACH,)
)
Respondent.)

LUBA No. 94-053
FINAL OPINION
) AND

Appeal from City of Rockaway Beach.

David Laine, Rockaway Beach, filed a petition for review and argued on his own behalf.

James W. Watts, Rockaway Beach, filed a petition for review and argued on his own behalf.

No appearance by respondent.

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

REMANDED 07/08/94

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 Petitioners appeal a city decision approving a
4 conditional use permit authorizing the construction of seven
5 single family dwellings.

6 **MOTION TO INTERVENE**

7 James W. Watts moves to intervene on the side of
8 petitioner in this appeal proceeding. There is no objection
9 to the motion, and it is allowed.

10 **FACTS**

11 This is the second time a city decision approving the
12 proposal has been appealed to this Board. In Laine v. City
13 of Rockaway Beach, 26 Or LUBA 417, 418 (1993) (Laine I), we
14 stated the following relevant facts:

15 "A portion of the subject property is zoned
16 Waterfront Development (WD), and another portion
17 of the property is zoned Special Area Wetlands
18 (SA). The applicant below requested approval for
19 the construction of eight dwellings on the subject
20 property. The planning commission approved seven
21 of the requested eight dwellings. Petitioner
22 appealed the planning commission's decision to the
23 city council. City council approved the planning
24 commission decision, and this appeal followed."
25 (Footnote omitted.)

26 We remanded the decision challenged in Laine I because
27 it failed to identify applicable standards and explain how
28 the proposal satisfies those standards. On remand, the city
29 conducted no further hearings and accepted no new evidence.
30 Instead, the city adopted the challenged decision. This
31 appeal followed.

1 **ASSIGNMENTS OF ERROR**

2 **A. Petitioner**

3 Petitioner contends the city's notices of the public
4 hearings leading to the decision challenged in Laine I were
5 the only public notices the city provided regarding the
6 proposal. While the city's notices identified some
7 applicable standards, petitioner argues the city never
8 conducted a public hearing preceded by a notice identifying
9 three standards that the challenged decision applies to the
10 proposal -- Rockaway Beach Zoning Ordinance (RBZO) 3.070(3),
11 3.080 and 4.041. As we understand it, petitioner contends
12 the city erred by failing to provide a notice of a public
13 hearing identifying RBZO 3.070(3), 3.080 and 4.041 as
14 applicable standards and, therefore, prejudiced petitioner's
15 substantial rights by denying him an opportunity to be heard
16 concerning those standards.

17 ORS 197.763(3)(b) and (5)(a) require the city to
18 provide notice of the standards applicable to an application
19 for a quasi-judicial land use decision, prior to its hearing
20 on such an application. This case is somewhat similar to
21 Bradbury v. City of Independence, 22 Or LUBA 398, 401-03
22 (1991), in the sense that the first time the city provided
23 notice of certain standards it applied to the subject
24 application was in the challenged decision. This deficiency
25 means the city is required to (1) provide notice of a public
26 hearing, identifying RBZO 3.070(3), 3.080 and 4.041 as

1 applicable standards; and (2) conduct a public hearing to
2 give interested persons a reasonable opportunity to be heard
3 concerning those standards. Bradbury, supra.

4 Petitioner's second, third and fourth "subassignments"
5 of error concern specific procedural deficiencies in the
6 conduct of the public hearing leading to the decision
7 challenged in Laine I and the mayor's participation during
8 those proceedings. These arguments were not, but could have
9 been, included in the Laine I petition for review and were
10 not addressed in our decision in Laine I. Therefore,
11 petitioner is barred from raising those issues here. Mill
12 Creek Glen Protection Assoc. v. Umatilla County, 88 Or
13 App 522, 746 P2d 728 (1987).

14 Petitioner Laine's first subassignment of error is
15 sustained. Petitioner Laine's other subassignments of error
16 are denied.

17 **B. Intervenor**

18 Intervenor argues the city failed to address a relevant
19 standard in the challenged decision. Specifically,
20 intervenor argues the city failed to address Comprehensive
21 Plan Map seven, note three, concerning construction
22 limitations on the subject property.

23 Comprehensive Plan Map seven, note three, appears to
24 contain a standard applicable to the proposal. The city
25 must either explain in the challenged decision why that
26 standard is inapplicable to the proposal or is satisfied by

1 it. This Board may not make such determinations for the
2 city. Weeks v. City of Tillamook, 117 Or App 449, 454, 844
3 P2d 914 (1992).

4 Similarly, intervenor argues the proposal is subject to
5 the city's Planned Unit Development (PUD) ordinance.¹

6 We cannot determine the applicability of the city's PUD
7 provisions in the first instance. It is the city's
8 responsibility to explain why its PUD ordinance is
9 inapplicable or is satisfied by the proposal. Weeks, supra.

10 Intervenor's assignments of error are sustained.

11 The city's decision is remanded.

¹We stated in Laine I that the decision in that case did not identify the portions of the subject property zoned WD or SA, and did not identify the amount of property that was subject to the proposal. We noted in Laine I, supra, 26 Or LUBA at 418 n 1, that the decision suggested the proposed development would occur on seven 3,500 square foot lots, but that another part of the decision stated the proposed development would be "clustered."