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

BLAZER CONSTRUCTION, INC.,)
)
Petitioner,)
)
vs.)
)
CITY OF EUGENE,)
)
Respondent,)
)
and)
)
DEPARTMENT OF TRANSPORTATION,)
)
Intervenor-Respondent.)

LUBA No. 98-137
FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Michael E. Farthing, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Gleaves Swearingen Potter Scott and Smith.

No appearance by City of Eugene.

Kathryn A. Lincoln, Assistant Attorney General, Salem, filed the response brief and argued on behalf on intervenor-respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 07/09/99

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's site design review approval for a maintenance facility.

4 **MOTION TO INTERVENE**

5 The Department of Transportation (intervenor), the applicant below, moves to
6 intervene on the side of respondent. There is no objection to the motion, and it is allowed.

7 **FACTS**

8 The subject property is a vacant, 11.92-acre parcel zoned Light-Medium Industrial
9 with a Site Review overlay district (SR District). In 1991, the city conducted a review of an
10 area including the subject property. As a result of that review, the city applied to a city
11 hearings officer to rezone a number of industrial parcels within that area to SR District,
12 pursuant to the provisions of Eugene Code (EC) 9.688(b).¹ In a single order (Z 91-5), a city

¹EC 9.688(b) provides in relevant part:

"On its own initiation, the commission, council, or hearings official may consider imposition of a site review sub-district. The commission, council, or hearings official shall include a statement explaining why the site review sub-district may be necessary based on one or more of the following criteria:

- "1. Compatibility with the surroundings, particularly when residential in character. This factor shall not take precedence over the need to provide housing for all income groups in the city.
- "2. Efficient, workable, and safe interrelationships among building, parking, circulation, open space, and landscaped areas, as well as related activities and uses.
- "3. Due consideration to the preservation of attractive and distinctive historical and natural features.
- "4. Signs and illumination in scale and harmony with the site and area.
- "5. Adequate provision for flood control and storm drainage.
- "6. Safe and efficient ingress and egress.
- "7. Additional specific factors as necessary to fulfill concerns raised at the time of rezoning.

1 hearings officer approved the rezoning of a number of parcels, including the subject
2 property, to SR District. The order was based upon five site review criteria developed from
3 the provisions of EC 9.688(b)(1), (4), (5), (6), and (7).²

4 In 1998, intervenor applied to the city to develop a maintenance facility on the
5 subject property, an allowed use for which site review is required pursuant to EC 9.690(4)(a):

"8. Adequate provision for public pedestrian, bicycle and transit circulation among buildings and related uses on the development site as well as to and from adjacent and nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks. At a minimum, 'nearby' is interpreted to mean uses within 1/4 mile which can reasonably be expected to be used by pedestrians, and uses within one to two miles which can reasonable be expected to be used by bicyclists.

"9. There will be adequate provision for bus stops, bus shelters, or other transit facilities."

²The site review criteria addressed and developed in Order Z 91-5 are as follows:

"A. Compatibility with the surroundings, particularly when residential in character. Every effort shall be made to buffer surrounding residences from the visual and noise impact of the industrial development, including creation of a ten-foot buffer zone with minimum improvements of:

"1. A six-foot wooden fence or masonry wall which shall be constructed to provide a uniform site-obscuring screen; or

"2. An earth berm combined with evergreen plantings or fence which shall form a sight and noise buffer at least six feet in height within two years of completion; or

"3. A planting screen of year-round site-obscuring vegetation planted a minimum of six feet in depth and which shall form a sight and noise buffer at least six feet in height within two years of completion.

"B. Signs and illumination in scale and harmony with the site and area. Illumination shall be designed so as to reflect the light away from neighboring residential properties.

"C. Adequate provision for flood control and storm drainage.

"D. Safe and efficient ingress, egress, and on-site traffic circulation, including emergency vehicle access, with particular attention to the impact of industrial traffic on surrounding residences, minimizing industrial traffic in front of residential development as much as possible.

"E. Heating, cooling, and other mechanical equipment should be designed and located to minimize noise impacts to adjacent residences." Record 42.

1 "* * * Approval for applications within the site review subdistrict shall be
2 based on [EC] 9.688 criteria, and particularly when applicable, those criteria
3 addressed at the time of site review subdistrict rezoning."

4 In previous applications for site review under EC 9.690(4), planning staff and hearings
5 officers had required that the applicant address only those criteria at EC 9.688 that had
6 previously been applied to the property at the time the SR District was imposed.
7 Accordingly, intervenor's application addressed only EC 9.688(b)(1), (4), (5), (6), and (7),
8 and planning director approved the application. The planning director did not address EC
9 9.688(b)(2), (3), (8), or (9).

10 Petitioner appealed to a hearings official, who denied the appeal, affirming the
11 director's approval. This appeal followed.

12 **ASSIGNMENT OF ERROR**

13 Petitioner argues that the city misconstrued EC 9.690(4)(a) in failing to apply the site
14 review criteria at EC 9.688(b)(2), (3), (8), and (9) to intervenor's proposed facility.
15 According to petitioner, the plain terms of EC 9.688(b) require that the city apply, without
16 limitation, each of the criteria at EC 9.688. Petitioner argues that the second clause of EC
17 9.690(4)(a), rather than limiting the applicable criteria to those applied in the initial rezoning,
18 functions to ensure that the city applies in addition to the EC 9.688(b) criteria any particular
19 criteria that might have been applied at the time of subdistrict rezoning.

20 The hearings official rejected petitioner's interpretation of EC 9.690(4)(a):

21 "The language in [EC 9.690(4)(a)] is too muddled to suggest any kind of
22 clarity. The problem, as this hearings officer sees it, is that the relevant
23 sentence of [EC] 9.690(4)(a) contains two clauses which, when combined do
24 not make much sense. If the first clause is emphasized, [petitioner] is correct,
25 and all the criteria of 9.688 should be applied. If the second clause is
26 emphasized, the City's practices have been correct, and the only important
27 criteria are those applied at the time of site review. [Petitioner] is correct
28 when it argues that the City's methodology does not correspond with the
29 instructions of the sentence as it is written. But that is more of a problem with
30 the sentence than it is with the City's practices. [Petitioner's] offered
31 interpretation does not make sense either: if the first part of the sentence tells
32 the Planning Director to apply all of the criteria of 9.688 (which it does not

1 say), why does the second part of the sentence point to the criteria applied
2 earlier? It should go without saying that the criteria applied earlier would be
3 applied again, since they are a part of the criteria of 9.688. [Petitioner] argues
4 that the second part of the sentence is a reference to the special criteria of [EC
5 9.688(7)], but the sentence does not say this.

6 * * * * *

7 "It appears that interpretative surgery is necessary to give [EC] 9.690(4) some
8 intelligible meaning. The surgery should be guided by the apparent purpose
9 of Eugene's site review process, which is a predevelopment parcel designation
10 rather than a universal designation applied to particular uses. The
11 comparative sentences offered by [petitioner] and used by the City seem to be
12 as follows, with additions in bold [and deletions struck-through]:

13 "[Petitioner]: 'Approval for applications within the site review
14 subdistrict shall be based on **the** section 9.688 criteria, and particularly
15 when applicable, those **special** criteria addressed **pursuant to 9.688(7)**
16 at the time of site review subdistrict rezoning.'

17 "City: 'Approval for applications within the site review subdistrict
18 shall be based on section 9.688 criteria ~~and particularly when~~
19 ~~applicable, those criteria~~ addressed at the time of site review
20 subdistrict rezoning **and particularly when those criteria are**
21 **applicable to the application.**'

22 "Written on a clean slate, [petitioner's] language seems more logical.
23 However, it would reduce the importance of the original site review
24 subdistrict rezoning, and make Eugene's site review more like the type of site
25 review [that is] applied to a parcel for the first time upon the submission of an
26 application for development. The City's language applies the particular logic
27 of Eugene's special site review process and works to preserve the importance
28 of the special process of an individual decision to apply site review to a parcel
29 before development. * * *" Record 10-11 (emphasis in original).

30 Intervenor devotes almost the entirety of its response brief to arguing that our review
31 of the hearings officer's interpretation of EC 9.690(4)(a) is subject to the deferential review
32 standard described in ORS 197.829(1) and Clark v. Jackson County, 313 Or 508, 836 P2d
33 710 (1992). We disagree. Gisler v. Deschutes County, 149 Or App 528, 532 n 1, 945 P2d
34 1051 (1997); Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309, rev den
35 320 Or 407 (1994). Our standard of review is whether the hearings officer's interpretation of

1 EC 9.690(4)(a) is reasonable and correct. Knee Deep Cattle Company v. Lane County, 28 Or
2 LUBA 288, 304 (1994), aff'd 133 Or App 120, 890 P2d 449 (1995).³

3 We agree with petitioner that the hearings officer misconstrued EC 9.690(4)(a). The
4 hearings officer's interpretation of EC 9.690(4)(a) reorders the operative terms and combines
5 the two clauses of that standard to derive a meaning that is inconsistent with the original
6 terms of EC 9.690(4)(a). The two clauses of EC 9.690(4)(a) are joined by the term "and,"
7 which denotes that the relationship between the two clauses is conjunctive and additive. The
8 first clause of EC 9.690(4)(a) expressly requires that in approving development within the
9 SR District the city must apply the EC 9.688 criteria. It is true, as the hearings officer points
10 out, that the first clause of EC 9.690(4)(a) does not state that all of the criteria in EC 9.688
11 must be applied. However, it is equally true that nothing in either clause of EC 9.690(4)(a)
12 suggests that some of the nine criteria set out in EC 9.688 need not be addressed. If the city
13 intended the words in the second clause to perform that function, that is, to limit the
14 applicable EC 9.688 criteria to those that were specifically addressed when the city applied
15 the site review subdistrict, the words it selected simply do not express that intent.⁴

16 The hearings officer's interpretation of EC 9.690(4)(a) fails to give effect to the first
17 clause of that provision, and, as a result, fails to give effect to provisions of EC 9.688(b) that
18 could otherwise be applicable to specific proposals for industrial development in the SR
19 District. The rezoning process described by EC 9.688(b) apparently is intended to identify

³At oral argument, intervenor cited to Holland v. City of Cannon Beach, 154 Or App 450, 962 P2d 701, rev den 328 Or 115 (1998) for the proposition that LUBA must affirm the hearings officer's interpretation to ensure that the city approves or denies its application based on standards and criteria applicable at the time the application was first submitted, pursuant to ORS 227.178(3). However, the issue of whether ORS 227.178(3) is a basis to defend the city's decision was not raised in the response brief and cannot be raised for the first time at oral argument. OAR 661-010-0040(1).

⁴A much more plausible interpretation, albeit an interpretation with its own textual problems, is that the second clause was intended to refer to criteria developed (rather than criteria applied) at the time of site review subdistrict rezoning. As noted earlier, the hearings officer who conducted the rezoning in Order Z 91-5 developed additional criteria at the time of site review subdistrict rezoning. See n 2.

1 requirements such as those developed by the hearings officer in Order Z 91-5 that would
2 apply to all foreseeable industrial use on the property, without foreclosing the possibility that
3 specific proposed uses might have design features or impacts requiring evaluation under
4 other EC 9.688(b) criteria. For example, EC 9.688(b)(2) requires that the city consider
5 "[e]fficient, workable, and safe interrelationships among building, parking, circulation, open
6 space, and landscaped areas, as well as related activities and uses." Similarly, EC
7 9.688(b)(8) requires that the city consider "[a]dequate provision for public pedestrian,
8 bicycle and transit circulation among buildings and related uses on the development site[.]"
9 Imposing requirements based on EC 9.688(b)(2) or (8) at the time of rezoning would be an
10 exercise in speculation in the absence of a particular site design and proposal for industrial
11 use. Under the hearings officer's interpretation, EC 9.688(b)(2) and (8) would never apply to
12 proposed development on lands rezoned under the 1991 order, notwithstanding that those
13 provisions may be applicable by their terms to a particular site design or proposed industrial
14 use.

15 For the foregoing reasons, we conclude that the hearings officer misconstrued EC
16 9.690(4)(a) in failing to apply all of the criteria listed in EC 9.688(b).

17 The assignment of error is sustained.

18 The city's decision is remanded.