BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES ELLIOTT and JACKIE ELLIOTT,
Petitioners,

vs.

CITY OF REDMOND,
Respondent.

LUBA No. 2001-072

FINAL OPINION
AND ORDER

Appeal from City of Redmond.

Elizabeth A. Dickson, Bend, filed the petition for review. With her on the brief was Hurley, Lynch and Re, P.C.

No appearance by City of Redmond.

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

REMANDED 07/10/2001

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city decision approving a site plan application for a portable espresso stand.

FACTS

The subject property is a 16,700 square foot parcel zoned Commercial/Central Business District (C-2/CBD). It is developed with an existing service station. Adjoining properties are also zoned C-2 and developed with commercial uses, with the exception of the property to the west, which contains a single-family dwelling. The subject property is accessed from NW Sixth Street, which is part of a couplet of streets that constitutes Highway 97 within the city of Redmond.

On December 13, 2000, Kim and Kevin Curtis filed a site plan application for a portable espresso stand on the subject property, between the existing service station and an alley separating the subject property from the dwelling to the west. The proposed espresso stand is a prefabricated structure with two drive-up windows, measuring eight feet by 16 feet. Administrative staff approved the proposal on January 12, 2001, imposing a number of conditions. Petitioners, who own a espresso stand one block away, appealed the staff approval to the planning commission.

The planning commission scheduled a hearing on February 26, 2001. That hearing was rescheduled to March 19, 2001, because petitioners did not receive notice of the hearing. After conducting a hearing on the appeal on March 19, 2001, the planning commission voted

to deny the appeal and affirm the administrative approval. Petitioners appealed to the city council, which on April 10, 2001, declined to hear the appeal. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioners argue that they raised an issue below regarding whether the proposed application is consistent with seven comprehensive plan goals and one code provision.[1] However, petitioners argue, the city failed to address, or demonstrate that the proposal is consistent with, these criteria.

We have some question whether the cited plan language and code provision are in fact applicable approval criteria. The subject proposal for site review is, presumably, an application for a limited land use decision. ORS 197.015(12).[2] Unless the city has formally incorporated comprehensive plan standards applicable to limited land use decisions into its land use regulations, such standards are not applicable to limited land use decisions. ORS 197.195(1).[3] No party advises us whether the city has incorporated any comprehensive

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[1]According to petitioners, the cited comprehensive plan language is found at (1) Redmond Comprehensive Plan (RCP) 3-1, No. 2; (2) RCP 3-1, No. 4; (3) RCP 3-1, No. 5; (4) RCP 4-1, paragraph 3, lines 8-13; (5) RCP 4-10, No. 3; (6) RCP 4-10, No. 4; and (7) "Transportation Goal 1." Petition for Review 7-10. However, the petition for review does not indicate the location of "Transportation Goal 1" in the city's comprehensive plan. The cited land use regulation is Redmond Code (RC) 8.0010. Petition for Review 10.

[2]ORS 197.015(12) defines "limited land use decision" as follows:

> "'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
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> "(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.
>
> "(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

[3]ORS 197.195(1) provides in relevant part:

> "A 'limited land use decision' shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. Such a decision may include conditions authorized by law. Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-

plan standards, much less the cited language, into its land use regulations as criteria applicable to limited land use decisions.[4] The city's administrative approval, which the planning commission decision adopts, states that the "Redmond Urban Area Comprehensive Plan" is applicable, "if specific policies and objectives are identified as being directly applicable to this project." Record 166. However, the administrative approval does not identify or address any applicable plan provisions. The code provisions governing site review state that the applicant must demonstrate that "[t]he proposed building, structure or landscaping is in harmony * * * with the Comprehensive Plan for Redmond * * *." RC 8.3100(4). It is not clear whether this is intended (or sufficient) to incorporate the comprehensive plan or any part of it as criteria for site design review. As for the cited code provision, that provision merely states the purpose of the city's zoning code, and petitioners do not explain why anything in such a purpose provision constitutes an applicable approval criterion for limited land use decisions.[5]

Nonetheless, because the city has not filed a response brief in this matter, and no party contends otherwise, we will assume for purpose of our analysis that the cited provisions are, potentially at least, mandatory approval criteria applicable to a decision approving site design review. Petitioners raised the issue of compliance with these provisions before the planning commission. Record 45, 51-52, 54, 56, 61. It is incumbent on the city under these circumstances to respond by either (1) determining that the cited provisions are not applicable approval criteria or (2) demonstrating that the proposal

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> acknowledgment amendment under ORS 197.610 to 197.625. If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision."

[4]The city did not file a brief in support of the challenged decision.

[5]RC 8.0010 states in relevant part that the zoning code standards "are adopted for the purpose of promoting the health, safety, peace, comfort, convenience, economic well-being and general welfare of the City of Redmond[.]"

complies with any such provisions that are deemed to be applicable approval criteria. The city's decision does neither. Therefore, remand is appropriate for the city to address these issues in the first instance.

The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city committed procedural error that prejudiced petitioners' substantial rights, when it limited the scope of testimony during the proceedings before the planning commission.

RC 8.1510 requires that a local appellant's notice of appeal contain "[a] statement raising any issues relied upon for appeal with sufficient specificity to afford the hearings Body an adequate opportunity to respond to and resolve each issue in dispute." Petitioners' notice of appeal identified five issues: (1) the adequacy of off-street parking; (2) the adequacy of loading/unloading space; (3) fire hazards; (4) whether the landowner and not the owner of the proposed espresso stand should file the application; and (5) whether the city has applied the same standards to the proposed espresso stand that were applied to petitioners' competing espresso stand. Appeal of an administrative decision before the planning commission is *de novo*. RC 8.1515(3). Nonetheless, the planning commission chairperson informed petitioners that "testimony made by the appellant [petitioners] must be directly related to the five points of appeal that [petitioners have] stated in writing as a basis for their appeal." Record 41. Petitioners contend that the planning commission erred in conducting a *de novo* appeal that "barred all new testimony from appellant[.]" Petition for Review 11.

The planning commission clearly did not bar "all new testimony" by petitioners, as petitioners testified at length regarding the five issues specified in their appeal as well as other issues. However, the planning commission did appear to understand that its scope of review, and the permissible scope of testimony, were limited to the issues specified in petitioners' notice of appeal. That understanding could be correct, notwithstanding the fact

that the planning commission's review is *de novo*, if the relevant code provisions impose such a limitation. *Johns v. City of Lincoln City*, 146 Or App 594, 600-02, 933 P2d 978 (1997). We do not know if RC 8.1510 is correctly interpreted to limit testimony to the issues specified in the notice of appeal, or whether the planning commission in fact interprets RC 8.1510 or some other applicable provision to limit such testimony.[6] We need not resolve those issues, however, because even assuming that the planning commission committed procedural error in this respect, petitioners have not demonstrated that the error violated their substantial rights. ORS 197.835(9)(a)(B). As noted above, petitioners in fact testified with respect to other issues than those specified in their notice of appeal. Petitioners have not identified any issue they were prevented from raising or evidence that was improperly rejected, as a result of the planning commission's apparent view of the permissible scope of testimony.[7]

Petitioners then shift gears to fault the city's decision for failing to resolve evidentiary conflicts and adopt findings addressing (1) whether the site design review criteria require that the city consider the existing service station and (2) whether the criteria applied to the proposed espresso stand are the same as those used to approve petitioners' stand. The city's decision adopts findings that address these issues. Record 84, 87. Petitioners do not challenge those findings and have not demonstrated that those findings lack support in the record.

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[6]If RC 8.1510 or some other applicable provision is correctly interpreted to limit the scope of permissible testimony during the planning commission's *de novo* proceedings, then it is arguable that the planning commission was not required to permit petitioners to raise issues, or required to address such issues, regarding compliance with the comprehensive plan provisions and code provision discussed in the first and second assignments of error. However, as noted above, the city has not expressed its position on this issue either in the decision or in a response brief. Absent some assistance from the city on this point, we will continue to assume for purposes of this opinion that petitioners were entitled to raise such issues before the planning commission, notwithstanding that the notice of appeal does not list those issues.

[7]Portions of the third assignment of error allege that the city committed procedural error that prejudiced persons other than petitioners. We do not address such allegations, because petitioners may not obtain remand or reversal under ORS 197.835(9)(a)(B) based on procedural errors affecting other persons. *Bauer v. City of Portland*, 38 Or LUBA 432, 436 (2000).

The third and fourth assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

The fifth assignment of error alleges that the city "improperly construed the applicable law, in violation of ORS 197.835(9)(a)(D)." Petition for Review 12. However, petitioners do not explain what law was misconstrued, or how the city misconstrued it. The text of the assignment argues that the applicant has not proven the adequacy of required off-street parking and that the city failed to address testimony regarding conflicts between parking and truck deliveries to the service station.

The arguments under this assignment of error are insufficiently developed for review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). The city adopted detailed findings regarding parking and potential conflicts with truck deliveries. Record 84-86, 88. To the extent this assignment of error is directed at those findings, petitioners have not demonstrated that those findings are either inadequate or lack evidentiary support.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners contend that the city violated ORS 197.835(10)(a)(B) when the city council declined to hear petitioners' appeal of the planning commission's decision.[8] Petitioners allege that the city council's decision not to hear petitioners' appeal was done for

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[8]ORS 197.835(10) provides in relevant part:

> "(a) [LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if [LUBA] finds:
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> "* * * * *
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> "(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178.
>
> "(b) If [LUBA] does reverse the decision and orders the local government to grant approval of the application, [LUBA] shall award attorney fees to the applicant and against the local government."

the purpose of avoiding the requirement, at ORS 227.178(1), that the city issue a decision on the application within 120 days of the date the application was complete.[9] Petitioners request that their attorney fees be paid, pursuant to ORS 197.835(10)(b), if LUBA determines that the city council's decision was an attempt to avoid the 120-day rule.

Petitioners' reliance on ORS 197.835(10) is misplaced for a number of reasons, but we need discuss only one. The cited statute applies only where the local government *denies* an application for development, and then only if, in relevant part, the local government does so in a bad faith attempt to avoid the requirements of ORS 227.178. *Miller v. Multnomah County*, 33 Or LUBA 644, 652 (1997), *aff'd* 153 Or App 30, 956 P2d 209 (1998).[10] ORS 197.835(10) is clearly designed to benefit an applicant whose application is denied, under specified circumstances. The city's decision in the present case *approves* the application for development. For that reason alone, ORS 197.835(10)(a)(B) cannot assist petitioners in this appeal.

The sixth assignment of error is denied.

The city's decision is remanded.

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[9]ORS 227.178(1) provides in relevant part:

> "Except as provided in subsections (3) and (4) of this section, the governing body of a city or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 227.180, within 120 days after the application is deemed complete."

[10]In *Miller*, we concluded after examining the text and legislative history of ORS 197.835(10)(a)(B) that it was primarily intended to discourage local governments from spuriously denying applications to avoid the necessity of refunding application fees, a necessity imposed by contemporaneously enacted legislation codified at ORS 215.428(7) and 227.178(7).