BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DENNIS O'SHEA, CAROL O'SHEA,
RON BROWN, TRISH BROWN, SEARL CALAWAY,
BARBARA CALAWAY, ROBERT HOLLIPETER,
ALICE HOLLIPETER, HELEN FADDIS, BOB ROSS,
JEAN ROSS, LYLE BRUMLEY, DONNA BRUMLEY,
CAROLYN CAMPBELL, DIANE ELLIOTT,
SHIRLEY TRENT, ELIZABETH BOLES,
WAYNE THOMPSON, PATRICIA THOMPSON,
WILLIAM KELSEY and CONSTANCE KELSEY,
Petitioners,

vs.

CITY OF BEND,
Respondent,

and

RIVER'S EDGE INVESTMENTS, LLC,
Intervenor-Respondent.

LUBA No. 2004-210

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Greg Hendrix, Bend, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hendrix, Brinich and Bertalan LLP.

Peter Schannauer, Bend, filed a joint response brief and argued on behalf of respondent. With him on the brief was Forbes and Schannauer LLP.

Todd Sadlo and Frank M. Parisi, Portland filed a joint response brief and argued on behalf of intervenor-respondent. With them on the brief were Parisi and Parisi PC, Elizabeth A. Dickson and Hurley, Lynch and Re PC.

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

REMANDED 06/17/2005

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioners appeal a city ordinance approving a development agreement including all ancillary approvals for a planned unit development (PUD) expansion.

MOTION TO INTERVENE

River's Edge Investments, LLC (intervenor), the developer, moves to intervene on the side of respondent. There is no opposition to the motion and it is granted.

FACTS

Intervenor owns and operates the Riverhouse Hotel on the banks of the Deschutes River in the City of Bend. The property is currently developed as a PUD including the hotel and residential housing. Intervenor has sought to further develop the property for some time. In 2001 and 2003, intervenor filed applications with the city to develop additional motel units, a restaurant and a convention center. Those applications were denied by the city. The city then entered into a development agreement with intervenor that approves multiple land use actions that authorize, among other things, expansion of the PUD to include a 55,000-square foot convention center, expansion of the Riverhouse Hotel, construction of a new bridge, and 388 additional residential units.[1] The city council held hearings on the proposed development agreement and passed the ordinance approving the agreement over petitioners' objections. This appeal followed.

INTRODUCTION

Respondents argue that none of petitioners' six assignments of error is adequately developed for review.[2] However, respondents also attempt to identify petitioners' legal arguments and to address each assignment of error on the merits. While petitioners' assignments of error are

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[1] The development agreement encompasses at least 16 approvals, and the findings describing the development agreement are 156 pages long. We will not attempt to describe the entire development agreement, but will discuss the relevant portions as they are applicable to individual assignments of error.

[2] The city and intervenor (respondents) filed a joint response brief.

difficult to understand, we do not agree that none of the assignments of error presents a cognizable legal argument. To the extent we can discern petitioners' allegations of error, we will consider them. *Freedom v. City of Ashland*, 37 Or LUBA 123, 124-25 (1999).

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error is that the city "erred by misusing the Development Agreement process of ORS 94.508-94.528 to make a vested rights decision without properly finding the existence of vested rights." Petition for Review 8. The assignment of error includes the following subheadings: "Argument"; "The 1980 Intent to Rezone & Mythical 1980 Master Plan"; and "The Convention Center in the [Limited Commercial] Zone." Petition for Review 8, 10, 11.

Petitioners argue that the city "in essence found a vested right to the convention center and another vested right to traffic levels based on a nonexistent 1980 'Master Plan.'" *Id*. at 8. Vested rights refer to the right to continue the development of a use that is no longer allowed under current land use regulations. *Clackamas Co. v. Holmes*, 265 Or 193, 197, 508 P2d 190 (1973). However, petitioners provide no argument that the development agreement approves anything that does not fully comply with the *current* applicable regulations. In fact, the basis of the development agreement is that the proposed development complies with all applicable criteria and that resort to a vested rights theory is therefore unnecessary.[3] The challenged decision includes findings of compliance with the applicable criteria, and does not purport to approve any uses based on vested rights. Accordingly, petitioners' first assignment of error, as presented, does not provide a basis for reversal or remand.

The first assignment of error is denied.

[3] Intervenor believed that it was entitled to a vested right to certain development, and a circuit court case on that matter is apparently pending. As intervenor's attorney pointed out at oral argument, the development agreement only became necessary because the alleged vested rights have *not* been recognized.

SECOND ASSIGNMENT OF ERROR

Petitioners' second assignment of error is that the "City's procedural errors resulted in denial of substantive rights to Petitioners." Petition for Review 12. Under ORS 197.835(9)(a)(B), procedural errors are not a basis for reversal or remand unless those errors prejudice the substantial rights of a petitioner. *Venable v. City of Albany*, 149 Or App 274, 279, 942 P2d 843 (1997). The substantial rights that petitioners appear to be claiming in this case are the rights to an adequate opportunity to prepare and submit a case and a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

Petitioners first allege that the city's procedural errors prejudiced their substantial rights. Their assignment of error then provides a laundry list of alleged procedural errors. The assignment concludes, without any other legal argument, with the following paragraph:

> "What these various problems show is a governing body not acting as a quasi-judicial decision-maker, but rather as an active promoter and co-applicant of a development agreement. This process was *ad-hoc* from the beginning. There were no written procedures for this process and the City ignored its existing procedure ordinance. Petitioners were denied an opportunity to have the matter heard by a quasi-judicial decision making body. With more time Petitioners and other members of the public could have more adequately addressed traffic and wildlife issues. Instead of deferring these issues they could have been addressed prior to approval of the agreement." Petition for Review 17.

Petitioners do not make a meaningful attempt to relate their list of alleged procedural errors to any prejudice of their substantial rights. First, they allege that the city committed procedural error by presenting the development agreement to the city council for approval, rather than to lower level decision makers, such as a hearings official or the planning commission.[4] Petitioners have not related this alleged error to any prejudice to their substantial rights, but presumably it has something to do with the allegations in the above-quoted paragraph.

[4] We will not set out all of the myriad approvals contained in the development agreement. However, the city code provides that at least some of those approvals be made initially by lower level decision making bodies.

In the findings, the city explains why it used the process it did and why it had the authority to proceed in that manner. Record 68-72, 185-198. Petitioners neither acknowledge nor challenge those findings, which include interpretations of the city code and explain why the city believes the process utilized was proper. Absent a challenge to those findings, we are not in a position to review those findings, and we will not speculate on our own what errors there might be in those findings. Because petitioners fail to challenge those findings with arguments explaining why error was committed, their assignment of error is not sufficient to demonstrate a procedural error or, if there were, that any of petitioners' substantial rights were prejudiced by those errors.

Petitioners also appear to allege that the city council, certain councilors or members of the staff were biased in favor of the proposed development. To establish that a decision maker is biased, a petitioner must demonstrate that the decision maker could not render an impartial decision based on the law and evidence before it. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710-11 (2001). Petitioners' allegations of bias appear to be based on statements and attitudes of local officials who endorsed the idea of "the convention center to be funded by private dollars." Petition for Review 12. Statements that city officials would prefer a privately funded convention center rather than expending public finances do not rise to the level of bias demonstrating that the decision makers were incapable of reviewing the actual development agreement on the merits. Accordingly, petitioners have not established that the city was biased.

Finally, petitioners allege a "completeness" violation by the city.[5] We are not sure we understand petitioners' argument. If petitioners' argument is that intervenor was allowed to supplement the record to provide additional information after the application was deemed complete, they have not adequately explained how that runs afoul of the city's ordinances. Furthermore, even if some "completeness" procedural error was committed, we do not see how it prejudiced

[5] Under ORS 227.178, an application is deemed complete by operation of law 30 days after an application is submitted, unless a local government indicates the application is incomplete. The date an application becomes "complete" is meaningful under the statute for the purpose of protecting an applicant's right to a timely land use decision.

petitioners' substantial rights. The city held numerous hearings and provided ample opportunity for opponents to respond to the issues.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners' third assignment of error is that the "City erred by deferring pedestrian and traffic safety issues to be determined by a future design of the Mt. Washington bridge." Petition for Review 17. As discussed earlier, respondents argue that none of petitioners' assignments are sufficiently developed to be adequate for review. Although we do not agree with respondents that all of the assignments of error are inadequate for review, we do agree that the third assignment of error is not adequately developed. Petitioners argue that pedestrian and traffic issues were improperly deferred, but they do not identify those "pedestrian and traffic issues." Petitioners do assert that a city hearings officer, in a 2003 decision involving proposed development of the subject property, found that "the traffic generated would place an undue burden on Mt. Washington Drive, interfere with pedestrian access, and would cause the nearest intersection to fail." Petition for Review 17. Those findings presumably related to some approval criteria at issue in the 2003 case, but petitioners do not identify those criteria. Further, petitioners fail to identify what they believe is being deferred. When a petitioner challenges findings deferring compliance with an applicable approval criteria, that petitioner must at the very least identify the applicable approval criteria, identify the findings that defer consideration of those criteria, and explain how that deferral is inadequate to satisfy the approval criteria. Petitioners have not done any of those things.

The response brief explains what approval criteria petitioners appear to be concerned with, identifies the findings of compliance with those criteria, explains why no applicable approval criteria are being deferred, and finally demonstrates that even if the precise design of the new bridge were necessary for approval of the development agreement and had been deferred, approval of the bridge design will be approved through a public hearings process that would make such a deferral acceptable. Assuming the response brief accurately identifies the approval criteria that form the

basis of petitioners' improper deferral arguments under their third assignment of error, that response appears to be adequate to demonstrate that there was no improper deferral.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners' fourth assignment of error is that the "City erred by deferring wildlife impact mitigation to a future mitigation plan, thus the basis for encroachment within the 100-foot setback fails." Petition for Review 18. This assignment of error suffers from many of the same problems discussed above under our discussion of the third assignment of error. This assignment of error does, however, identify an approval criterion, Bend Zoning Ordinance (BZO) 10-10.22A.2(5)(a)(A), which allows the city to approve siting structures as close as 40 feet from the ordinary high water mark of the Deschutes River if it satisfies certain standards. The code provides that the city may approve a setback less than 100 feet

> "After the applicant has demonstrated through design review that the project provides at least the following:
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> "1. Protection of water quality, and fish and wildlife habitat;
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> "2. The improvement or restoration of riverfront riparian areas by the creation of new riparian vegetation areas or by improvements to existing riverfront riparian areas through appropriate plantings; and
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> "3. The provision of open space along the riverfront." BZO 10-10.22A.2(5).

Although petitioners identify an approval criterion, they do not identify how the city deferred a finding of compliance with this criterion until a later date. Presumably, petitioners believe that the city improperly deferred the precise location of the public walking trail design and its impact on existing wildlife.

As respondents point out, however, the city did not defer findings of compliance with BZO 10-10.22A.2(5)(a)(A). The city found that the criterion was satisfied by the development agreement and adopted detailed findings explaining how the criterion is satisfied. Record 96-99, 203-04. The findings state that it is feasible to protect wildlife habitat and that trails that cross

protected overlay zones will have to be approved by the affected agencies. Petitioners do not acknowledge these findings or make any attempt to explain why they are inadequate.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners' fifth assignment of error is that the "City erred by finding a convention center is an allowed use in the CL zone." Petition for Review 20. The city found:

> "The proposed meeting facilities and other resort amenities are customarily provided in conjunction with, and as part of, the structures and facilities of motels and hotels to accommodate participants in conventions, trade shows, seminars, conferences and all manner of business and social gatherings." Record 77.[6]

In short, the city concluded that the proposed convention center is allowed because it is "customarily provided in conjunction with" hotel or motel uses, which are permitted outright in the CL zone. BZO 10-10.15(2)(ff). Although petitioners agree that meeting rooms are ancillary or subordinate to hotel uses, they argue that a 55,000-square foot, stand-alone convention center is too large to be considered an ancillary use.[7]

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[6] The findings state, in pertinent part:

> "The proposed meeting facility, hotel units, maintenance, food and beverage service, spa and pool uses are 'motel or hotel uses,' and are permitted outright in the CL zone, as part of a motel/hotel/resort facility, and as previously interpreted by the Bend City Council in 1998 with regard to the property. * * *
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> "The Riverhouse Hotel is an existing and outright permitted use in the Limited Commercial zone. The application includes a request to build additional hotel facilities as part of the existing hotel complex, presently located immediately adjacent to, north and northeast of the proposed location. The proposed meeting facilities and other resort amenities are customarily provided in conjunction with, and as part of, the structures and facilities of motels and hotels to accommodate participants in conventions, trade shows, seminars, conferences and all manner of business and social gatherings. * * * Market analysis conducted by the Owner demonstrates that meeting facilities of the scale proposed are typically situated and marketed in conjunction with a lodging establishment, such as the existing and proposed expansion of The Riverhouse Hotel and Resort. The record contains a statewide survey of meeting facilities and lodgings. The survey demonstrates that meeting facilities are a customary part of motel and hotel complexes, like swimming pools, spas and exercise rooms. * * *" Record 77.

[7] The term "ancillary," as far as we can tell, is petitioners' term. As the quoted findings indicate, the city approved the proposed use because it found that the proposed use was "customarily provided in conjunction with" hotel and motel uses.

Petitioners base their argument that the city misconstrued the applicable law on our decision in *Sarti v. City of Lake Oswego*, 20 Or LUBA 387, 393, *rev'd* 106 Or App 594, 809 P2d 701 (1991). In *Sarti*, we explained that where a zoning ordinance specifically permits a particular use in one zoning district, an inference is created that the particular use is not allowed under a more general provision within a second zoning district that does not specifically permit the use.[8] The CL zone does not list convention centers as permitted uses. As discussed above, the proposed convention center was approved as a use that is "customarily provided in conjunction with" hotels and motels, which are permitted outright in the CL zone. Petitioners point out that the Mixed-Use Riverfront (MR) zone specifically provides for conference centers as permitted uses.[9] Although the petition for review does not mention it, we note that the BZO does not specifically provide that uses that are ancillary to permitted uses, or uses that are customarily provided in conjunction with a permitted use, are also permitted in the CL zone. By contrast, the Highway Commercial (CH) zone lists as a permitted use "[a]ccessory uses and buildings customarily appurtenant to a permitted use." BZO 10-10.16(2)(aa). Hotels and motels are permitted outright in the CH zone. BZO 10-10.16(2)(m). According to petitioners, if the principle discussed in *Sarti* is applied here, convention centers are not permitted uses in the CL zone.

Neither petitioners nor respondents acknowledge or make any attempt to address the possible significance of the Court of Appeals' reversal of our decision in *Sarti*. However, the Court

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[8] In *Sarti*, dance schools were expressly allowed in one city zone. The interpretive question in *Sarti* was whether a dance school could be allowed in another zone that did not expressly allow dance schools, but did allow "institutional uses," which were defined as including "private educational or cultural facilities."

[9] BZO 10-10.21A (5)(k) and (l) provide the following commercial uses as permitted outright:

> "(k) Motel, hotel or similar lodging facilities.
>
> "(l) Conference center and meeting facilities when associated with a motel, hotel or similar lodging facility."

While it is not entirely clear to us whether a stand-alone convention center would be allowed under the above quoted provision, it does not expressly require that a conference center must be part of a motel or hotel, only that it be "associated" with such a use.

of Appeals' opinion does not appear to disturb the principle that an inference is created in the circumstances presented in that case. In any event, the contextual analysis that we applied in our opinion in *Sarti* is appropriate under the Supreme Court's decision in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

Simply stated, the relevant issue under this assignment of error is whether large stand-alone convention centers are permitted in the City of Bend's CL zone as an accessory use. The fatal flaw in the city's findings is that they do not address this issue. First, the findings rely on surveys that conclude that *meeting facilities* in general are customarily provided in conjunction with motel and hotel complexes. However, the findings do not appear to address the customary inclusion of a large *stand-alone convention center* as part of a hotel or motel complex. Record 77. Second, the findings relate the history of the subject property and respondents' long-standing plan to allow the proposed use, or at least uses similar to the proposed use, on the subject property. Record 79-80. The city relies on this history as "context" in its findings supporting approval of the convention center.[10]

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[10] The findings state, in pertinent part:

> "[I]n 1998, the City again confirmed that the proposed uses are appropriate and allowed on the subject parcel, by adopting Ordinance No. NS-1701, rezoning the property to Limited Commercial. Again, findings adopted in support of Ordinance No. NS-1701 state:
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> > *'The City Council considered the uses that could be developed if the property was rezoned to CH, Highway Commercial. The City Council determined that the more intensive uses allowed in the CH zone are not suitable for development on the rezone property. The Council determined that the uses allowed in the CL, Limited commercial zone would be more appropriate. CL zoning is consistent with the zoning of the Riverhouse Resort, motel, and the applicant's plan to develop meeting rooms, resort recreation facilities, and accessory resort uses. The applicant concurred.'* (emphasis added)
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> "* * * * *
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> "1998 Ordinance NS-1701 applied CL zoning to the site with the specific, stated intent of allowing the types of uses now proposed by the Owner. If the CL provisions of the code were interpreted as proposed by the hearings officer, they would be in direct conflict with Ordinance NS-1701. That result is easily avoided by the Development Agreement, which identifies with clarity the types of uses that the Council believes are allowed outright or conditionally on the site under the CL zoning designation, as applied through Ordinance NS-

The city's historic intent to allow uses like the use proposed here is not "context" supporting the city's interpretation of the CL zone. It may be that the city and a previous developer intended to allow a convention center on the subject property. However, that history does not have any material bearing on the pertinent interpretive issue here. Again, that interpretive issue is whether the CL zone allows a 55,000 square foot convention center as a use that is customarily provided in conjunction with hotel and motel uses, when (1) convention centers are not expressly listed as permitted in the CL zone and (2) they are expressly permitted in other zones. Viewed in that context, it is at least questionable that the city council that enacted the CL zone intended to permit approval of large stand-alone convention centers in the CL zone. *See PGE v. Bureau of Labor and Industries*, 317 Or at 610 ("In interpreting a statute, the court's task is to discern the intent of the legislature."). The city's findings appear to relate more to the vested rights theory that respondents assert, and we agreed, is not a basis for the challenged decision. The findings do cite to *PGE v. Bureau of Labor and Industries* and purport to analyze the relevant text and context. However, they do not even mention the fact that the MR zone expressly allows conference centers, nor do they attempt to explain why the absence of a similar provision in the CL zone should not lead to a conclusion that conference centers are not allowed in the CL zone.

Finally, in their response brief, respondents cite to a traffic study that they allege states that other jurisdictions "routinely approve hotels with large, convention-style meeting and banquet rooms." Joint Respondent's and Intervenor-respondent's Brief 41 (citing Record 530-38). We fail

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1701. It is the Council's responsibility to resolve conflicts between its own enactments and to interpret its enactments in the first instance.

"The legislative history of the zoning and development of the entire River's Edge and Riverhouse Hotel expansion project also supports the Council's interpretation regarding uses allowed on site, contained in these finding and embodied in the Development Agreement. It is sufficient in this case to note that resort use, including all of the uses now proposed by the Owner and detailed in the Development Agreement and these findings and exhibits, has been anticipated to take place on the subject property since 1980. The Council did not intend, in 1998, to 'trick' the Owner in accepting a zoning designation for the property that would not allow use of the property as originally proposed. The CL designation was applied to the site with the intent of facilitating resort of the use of the property, including meeting facilities of the size and character now proposed by the Owner, and all other uses outlined in the Agreement and these findings." Record 77-80.

to see how that information supports respondents' contention that the city council, in adopting the CL zone, intended that large stand-alone convention centers be permitted outright in that zone. First, as explained previously, the evidentiary support cited by respondents appears to justify only the customary inclusion of meeting rooms, not stand-alone convention centers, as part of hotel complexes. Second, the findings do not address the contextual issue presented because convention centers are specifically allowed in another zone and are not permitted in the CL zone. Nor do the findings identify a textual basis to conclude that large stand-alone convention centers are allowed as accessory uses to hotels or motels.

Although the city adopted extensive findings justifying its decision to allow the proposed convention center in the CL zone, those findings fail to explain how the language of the CL zone and its context, *e.g.*, the language of other zones, support that conclusion.

The fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

Petitioners' sixth assignment of error is that the "City erred by granting a variance to the 30' height limitation within the setbacks of the Deschutes River Combining Zone." Petition for Review 23. According to petitioners, because the proposed convention center and the condominiums will exceed 30 feet in height, the height restrictions are violated. BZO 10-10.10(4) provides:

> "Height Regulations. No building or structure shall be hereafter erected, enlarged or structurally altered to exceed 30 feet in height *without a conditional use permit*." (Emphasis added.)

As the emphasized language illustrates, buildings exceeding 30 feet may be permitted if a conditional use permit is obtained. In this case, the city granted conditional use approval for buildings in excess of 30 feet. Petitioners do not explain why this is impermissible under a code provision that specifically provides for structures in excess of 30 feet with a conditional use permit. Petitioners make reference to a legal memorandum prepared by the city attorney in 2002 in another case that purports to limit such buildings to 30 feet. The city's findings in the present case, however, explain why the conditional use is available and why it is granted, and the findings discuss why the

2002 memorandum does not dictate otherwise. Record 44-45, 71-72, 80-81, 149-60, 207-08. Petitioners neither acknowledge those findings and interpretations nor do they challenge them. We do not see that the city's unchallenged interpretations are inconsistent with the language, purpose or policy of the BZO.

The sixth assignment of error is denied.

The city's decision is remanded.