

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

3
4 SUE BEILKE,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF TIGARD,
10 *Respondent,*

11 and

12
13 SPECTRUM DEVELOPMENT, INC.,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2006-017

17
18 FINAL OPINION
19 AND ORDER

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22 Appeal from City of Tigard.

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24 Sue Beilke, Tigard, filed the petition for review and argued on her own behalf.

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26 No appearance by City of Tigard.

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28 Elaine R. Albrich, Portland, filed the response brief and argued on behalf of
29 intervenor-respondent. With her on the brief were Robert D. Van Brocklin, Greg D. Corbin
30 and Stoel Rives LLP.

31
32 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
33 participated in the decision.

34
35 DISMISSED

12/14/2006

36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a decision by the Tigard City Council declining to review under ORS 227.180 a city hearings officer's decision approving certain development applications submitted by Spectrum Development, Inc. (intervenor).

FACTS

Intervenor submitted three development applications to the city of Tigard for approval: (1) site development review, (2) sensitive lands review, and (3) various adjustments, for a proposed development of two commercial office buildings and three buildings containing nine residential units on 8.33 acres. On November 14, 2005, the city hearings officer conducted a public hearing on the three applications. He issued his decision approving the applications on December 22, 2005. One of the findings supporting approval was a finding that a railroad underpass access easement providing access to the subject property exists at the northeast edge of the proposed development. On December 27, 2005, the city mailed notice of the hearings officer's decision to those entitled to such notice, including petitioner. Neither petitioner nor any other party entitled to appeal filed a local appeal before the deadline set forth in Tigard Community Development Code (TCDC) Section 18.390.040.G.2.¹

On January 10, 2006, a citizen appeared before the city council during a regularly scheduled meeting and, during the citizen comment portion of the meeting, requested that the city council exercise its authority pursuant to ORS 227.180(1)(a) to review the hearings officer's decision, and in particular, his finding that an access easement exists under the railroad underpass right-of-way.² In response, the city council approved a motion to

¹ We assume, without deciding here, that the appeal period set forth in TCDC Section 18.390.040.G.2 for appealing the hearings officer's decision under that code section expired on January 11, 2006.

² ORS 227.180(1) provides, in relevant part:

1 schedule a special city council hearing on January 24, 2006 to determine whether to exercise
2 review authority under ORS 227.180. Record 74-75, 89.

3 At the January 24, 2006 hearing, the city council proceeded to accept testimony on
4 both (1) whether the council should review the hearings officer's decision and (2) the merits
5 of whether an access easement existed. At the end of the hearing, the city council voted to
6 decline to reopen the case.³ This appeal followed.

7 **JURISDICTION**

8 **A. LUBA's May 26, 2006 Order**

9 On May 26, 2006, the Board issued an order denying intervenor's motion to dismiss.
10 *Beilke v. City of Tigard*, 51 Or LUBA 837, 845 (2006). We refer to the May 26, 2006 order
11 herein as the "May Order."

"(a) A party aggrieved by the action of a hearings officer may appeal the action to the planning commission or council of the city, or both, however the council prescribes. The appellate authority on its own motion may review the action. The procedure for such an appeal or review shall be prescribed by the council, but shall:

"(A) Not require that the appeal be filed within less than seven days after the date the governing body mails or delivers the decision of the hearings officer to the parties;

"(B) Require a hearing at least for argument; and

"(C) Require that upon appeal or review the appellate authority consider the record of the hearings officer's action. That record need not set forth evidence verbatim.

"(b) Notwithstanding paragraph (a) of this subsection, the council may provide that the decision of a hearings officer or other decision-making authority in a proceeding for a discretionary permit or zone change is the final determination of the city."

³ The transcript attached at Record 15 provides:

"Man: I move that the council decide to uphold the hearings officer's decision and decline to reopen it.

"Woman: I second it.

"Man: It's moved and seconded to not reopen the case and to uphold the previous decision."

1 In the May Order, we addressed intervenor’s argument that the Board did not have
2 jurisdiction to hear this appeal because the city council’s decision was not a “land use
3 decision as defined in ORS 197.015(11)(a)(A).⁴ We noted that “the relevant inquiry [was]
4 whether the city council, in substance, reviewed the determination of the hearings officer, or
5 whether it in fact declined to review the matter.” 51 Or LUBA at 842-43. In short, we found
6 that if the city council’s actions were a de facto exercise of its authority to review the
7 hearings officer’s decision under ORS 227.180, then its decision was a land use decision
8 under ORS 197.015(11)(a)(A).

9 In the May Order, we found that the procedures followed and comments provided by
10 council members and the city attorney were “confusing at best,” but we concluded that the
11 circumstances supported petitioner’s position that the city council’s decision was a land use
12 decision.⁵ We stated:

13 “The city council motion that was unanimously approved at the January 10,
14 2006 meeting included a direction to investigate the railroad’s position on the
15 existence of the easement at issue. [footnote citation omitted]. The motion
16 also provided that the public would have an opportunity to respond to the
17 information from the railroad and the existence of the easement at the January
18 24, 2006 hearing. Finally, the motion directed staff to prepare notices and to

⁴ ORS 197.015(11)(a)(A) defines a land use decision as:

“a final decision or determination made by a local government * * * that concerns the adoption, amendment or application of:

“(i) the goals;

“(ii) [a] comprehensive plan provision;

“(iii) [a] land use regulation; or

“(iv) [a] new land use regulation.”

⁵ Petitioner has the burden of demonstrating that the appealed decision is a land use decision subject to LUBA’s jurisdiction. *Rohrer v. Crook County*, 38 Or LUBA 8, 11, *aff’d* 169 Or App 587, 9 P3d 162 (2000).

1 mail those notices to all interested persons, just as would be done for a local
2 appeal of the hearings officer's decision.

3 "The notices that were mailed to interested persons were in the form of a
4 notice of a quasi-judicial local appeal hearing:

5 "NOTICE IS HEREBY GIVEN THAT THE TIGARD CITY
6 COUNCIL, AT A MEETING ON TUESDAY, JANUARY 24, 2006
7 AT 7:30 PM, * * * WILL CONSIDER THE FOLLOWING
8 APPLICATION:

9 "FILE NOS. SITE DEVELOPMENT REVIEW (SDR) 2005-
10 00002

11 "SENSITIVE LANDS REVIEWS (SLR) 2005-00017, 18, 19 & 20

12 "ADJUSTMENTS (VAR) 2005-00055 & 56

13 "*****

14 "HEARING ITEM: On January 10, 2006, the Tigard City Council
15 moved to review the Hearings Officer decision of December 27, 2005
16 in regard to whether there is an access easement under the Southern
17 Pacific Railroad right-of-way.' Record 63.

18 "The notice went on to direct citizens how to provide testimony on the matter.
19 The notice clearly indicated, and any person receiving the notice would
20 reasonably assume, that the city council would be reviewing the applications
21 listed in the notice.

22 "The city council's final determination could be read to support both
23 petitioner's contention that the city reviewed the hearings officer's decision
24 and intervenor's position that it did not; *i.e.*, the motion that was unanimously
25 approved by the city council was a motion 'that the Council uphold the
26 hearings officer decision and decline to re-open the case.' Record 8. During
27 the public hearing, however, the city council accepted and considered
28 evidence regarding the existence of the easement at issue. The minutes reflect
29 that the city council relied almost exclusively on the evidence regarding the
30 easement in making its determination. [footnote citation omitted]. Based on
31 the discussion of the councilors set forth in [one of the omitted footnotes], ***
32 it is apparent that the determination was, in substance, an affirmation of the
33 hearings officer's determination regarding the easement at issue. The city
34 council did review the hearings officer's decision and, based on the evidence
35 presented at the hearing, decided to uphold that decision. It did not, as
36 intervenor asserts, decline to review the matter." May Order, 51 Or LUBA at
37 843-845.

1 The first of the omitted footnotes set out the following discussion by the city council:

2 “Councilor Harding said it would be nice if the railroad were represented at
3 this meeting. There is no new evidence but there is still a question in her
4 mind. The fact that the railroad is not here doesn’t prove the existence of an
5 easement.

6 “Mr. Corbin said all of this evidence was before the Hearings Officer when he
7 made his decision. The evidence was substantial enough for him to make that
8 decision.

9 “Mr. Sprague said the trestle is indicative that there is an easement in that
10 location. The railroad would only have built it to allow people to cross under.
11 By building a trestle, the railroad acknowledges that there is access. The
12 railroad has not objected to this easement.

13 “Mr. Frewing stated that the applicant has not produced anything saying that
14 the railroad gave anyone the easement.

15 “Councilor Wilson said that the adjacent property owners could not convey
16 the railroad easement because it was not theirs to convey; however, this does
17 not imply that there is no easement. He said he would vote not to reopen the
18 case.

19 “Attorney Ramis said Mr. Frewing does make a point that the property deeds
20 do not show access but it is an overstatement to say there is no evidence of the
21 right to cross. There is a great deal of indirect evidence.

22 “Councilor Harding said she would rather not see the second access.

23 “Mayor Dirksen said he came to the meeting tonight ready to approve striking
24 the second access but the testimony convinces him that there is a historical
25 easement. If there is an access concern in the future, the dispute will be
26 between the railroad and the applicant.” 51 Or LUBA at 844-845 n 7.

27 At oral argument and in its response brief, intervenor moved that the Board
28 reconsider its previous motion to dismiss. With the benefit of full briefing and oral
29 argument by the parties on the issue, including review of complete transcripts of both the
30 January 10, 2006 and the January 24, 2006 city council hearings, we reconsider our prior
31 decision denying intervenor’s motion to dismiss.

1 **B. Motion to Dismiss**

2 In its motion to dismiss and in its response brief, intervenor argues that the city
3 council’s decision on January 24, 2006 not to exercise its review authority was not a land use
4 decision within the meaning of ORS 197.015(11)(a)(A).⁶ In support of its contention,
5 intervenor notes that: (1) the hearings officer’s decision was not before the city council,⁷ (2)
6 the city council’s decision was not supported by findings as required by ORS 227.173(3),
7 and (3) the city council did not provide written notice of the January 24, 2006 decision as
8 required by ORS 227.173(4).⁸ Petitioner views the same facts from a different perspective,
9 and argues that the city erred in not adopting findings in support of its decision and in not
10 providing written notice of the decision. Petition for Review 4, 7.

11 After the benefit of briefing and argument, and with our new understanding that the
12 city council did not actually have the hearings officer’s decision before it, it now seems to us
13 that a more accurate characterization of the council’s action on January 24, 2006 is that it
14 was declining to exercise its statutory authority to review the hearings officer’s decision.
15 Resolving that question depends at least in part on the council’s intent. Discerning that
16 intent is difficult in this case, because as noted above, the council confusingly voted both to

⁶ Intervenor maintains that petitioner’s remedy for the city council’s decision not to exercise its review authority was to challenge the decision by filing a writ of review with the appropriate circuit court under ORS 34.020 and ORS 34.102.

⁷ The May Order and a subsequent order issued by the Board on August 3, 2006 directed the city to supplement the record in this appeal with the “city council packet” referenced in the meeting minutes for the January 24, 2006 meeting, including the hearings officer’s decision. Although the city complied with the Board’s order, the city and intervenor have maintained throughout the proceedings and continue to maintain that the hearings officer’s decision was not before the city council at the January 24, 2006 city council meeting.

⁸ ORS 227.173(3) and (4) provide:

“(3) Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.

“(4) Written notice of the approval or denial [of a permit] shall be given to all parties to the proceeding.”

1 decline review and to “uphold” the hearings officer’s decision, after what seemed like a
2 review of the merits. However, we now believe that language and other relevant indicators
3 did not reflect an intent on the part of the council to exercise its review authority and uphold
4 the hearings officer’s decision on the merits. Viewing the city council’s actions in their
5 totality, it now seems to us that the council in fact intended to decline to exercise its review
6 authority.

7 At the January 24, 2006 hearing, the city attorney explained the procedure for the
8 hearing, and described what the council was deciding:

9 “In this hearing, the Council will consider whether it should review the
10 decision and may also consider whether to amend the decision as it relates to
11 the rail crossing. The Council will accept argument on whether to review the
12 decision and will accept testimony on the merits of the decision as it relates to
13 the rail crossing. In order to get through this procedure in a reasonable time,
14 the Council will allow both the argument on whether to review and the
15 testimony on the substantive issue at the same time. After it has heard
16 argument and testimony, *the Council will decide whether it wishes to review*
17 *the hearing officer’s decision*. If it decides to review the decision, it will then
18 make a decision on the application as it relates to the proposed rail crossing
19 for the secondary access to the property. *If the Council decides to review the*
20 *matter, the Council’s role will be to make a land use decision* applying the
21 existing laws of the City of Tigard, but limited to the crossing issue.” Record
22 55 (emphasis added).

23 Given that explanation, the city council’s subsequent actions are more consistent with
24 declining review than accepting review. In addition, we now think it less significant that the
25 city council accepted testimony on the merits and gave some consideration to those merits in
26 deciding whether or not to exercise its review authority. No statutory or other standards
27 cited to us set forth procedures governing the city council’s decision *whether to exercise* its
28 review authority under the statute.⁹ In almost all cases where a governing body is

⁹ Petitioner argued, and we noted in the section of the May Order quoted above, that the notice of the January 24 council meeting referenced the hearings officer’s decision and ORS Chapters 215 and 197. However, the relevant question is not what the hearing notice stated, but whether the council did in fact apply any land use goal, regulation, or comprehensive plan provisions in making a decision at the hearing.

1 determining whether to exercise review authority, the determination will necessarily be based
2 on at least a limited review of the evidence, allegations and arguments on some disputed
3 point in the underlying decision. As long as the governing body makes it clear whether it is
4 exercising or declining to exercise its review authority, we do not believe that the governing
5 body’s review of arguments and evidence on the merits of the underlying decision
6 automatically renders the governing body’s ultimate action an exercise of its review authority
7 under ORS 227.180(1), and hence a “land use decision” under ORS 197.015(11)(a)(A).

8 In the present case, while the council’s intent and the character of its final action
9 could have been much clearer, for the reasons stated above we believe that the council’s final
10 action was to decline to exercise its review authority, rather than to exercise that authority.¹⁰
11 Accordingly, the city council’s action was not a land use decision.

12 This appeal is dismissed.

¹⁰ Our conclusion is supported by the council’s treatment of its decision: it did not send written notice of the decision to any party as required under ORS 227.173(4), or adopt any findings in support of its decision as required by ORS 227.173(3).