BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HENRY KANE and HAL OIEN,
Petitioners,

vs.

CITY OF BEAVERTON,
Respondent,

and

BEAVERTON SCHOOL DISTRICT,
Intervenor-Respondent.

LUBA Nos. 2007-125 and 2007-126

FINAL OPINION
AND ORDER

Appeal from the City of Beaverton.

Henry Kane, Beaverton, and Hal J. Oien, Tualatin, filed the petition for review and argued on their own behalf.

Alan A. Rappleyea, City Attorney, Beaverton, filed a joint response brief and argued on behalf of respondent. With him on the brief were Steven W. Abel, Elaine R. Albrich, and Stoel Rives LLP.

Elaine R. Albrich, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With her on the brief were Alan A. Rappleyea, Steve W. Abel, and Stoel Rives LLP.

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

AFFIRMED 02/29/2008

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 decision approving a site review application to expand an existing school district transportation support center (TSC).

FACTS

The TSC site is located south of NW Twin Oaks Drive and east of NW 167th Place, on a parcel zoned light industrial. Existing site improvements include a 43,835-square foot building, parking for 48 school buses, and a vehicle parking lot for bus drivers and support staff. An easement for an overhead electric power transmission line crosses the site.

Property to the north and east are zoned and developed with industrial uses. To the west across from NW 167th Place is the Five Oaks Middle School, with athletic fields abutting the TSC site on the western border. A city park borders the entire southern boundary of the TSC site.

Intervenor-respondent Beaverton School District (BSD) filed a design review application and parking determination application with the city, seeking approval to expand bus parking from 48 to 180 buses, expand vehicle parking from 59 to 228 parking spaces, renovate the existing building and expand it to include an additional 2,227 square feet, and make miscellaneous lighting, landscaping, stormwater treatment and other site improvements.

The city planning director approved the application, and opponents appealed that decision to the city Board of Design Review (Design Board). The Design Board held two hearings and approved the applications. This appeal followed.

PETITIONERS' MOTIONS

In the week preceding oral argument, petitioners filed a number of motions, including:

1. A Motion that LUBA Receive Recorded PGE Easements as Exhibits.

2. A Motion that LUBA Accept Opponent Affidavits as True.

3. A Motion that LUBA Receive Documents Demonstrating that BSD Failed to Disclose that the District Purchased Land for Construction of New Schools.

4. A Motion that LUBA Disregard the Joint Response Brief Because of the Apparent Effort to Deceive LUBA.

5. A Motion that LUBA Receive Additional Authority.

The city and BSD filed written objections to the first two motions. We agree with respondents that petitioners do not cite any basis in our rules under which we can consider the documents attached to the first motion. Further, we agree with respondents that petitioners are simply incorrect that LUBA must accept as true statements made in affidavits that petitioners submitted into the record below. The authority that petitioners cite for that proposition, *SETO v. TriMet*, 21 Or LUBA 185, *aff'd* 311 Or 456, 814 P2d 1060 (1991), involved the question of whether allegations in an affidavit were sufficient to establish that the petitioner was adversely affected. *SETO* does not support the very different principle that petitioners claim. The first two motions are denied.

Respondents did not file written objections to third and fourth motions. We deny the third motion for the same reason as the first motion. The fourth motion—to disregard the response brief—claims that the response brief misrepresents BSD's efforts to locate other sites for the TSC and, therefore, the response brief should be disregarded in its entirety. However, petitioners make no attempt to demonstrate that BSD's representations regarding efforts to locate a different site for the TSC have any bearing on any issue in this appeal. We reject the fourth motion without further discussion.

The fifth motion, to receive additional authority, is granted. The additional authority petitioners cite is an 1886 United States Supreme Court case. It is cited for a proposition of law with no obvious bearing on any issue in the present appeal.

FIRST THROUGH EIGHTH, AND THIRTEENTH THROUGH FIFTEENTH ASSIGNMENTS OF ERROR

Petitioners present 19 assignments of error. The first eight assignments of error and the thirteenth through fifteenth assignments of error each consist of a single sentence that is essentially the assignment of error, without *any* accompanying argument. For example, the first assignment of error states in its entirety: "The Board of Design Review (BDR) erred in ruling at [Record] 6 that 'the Board found that the proposal identified in POD2007-0001 met all the approval criteria.'" Petition for Review 8. There is absolutely no explanation for why petitioners believe the Design Board erred.

Respondents argue, and we agree, that these assignments of error are undeveloped and do not provide a basis for reversal or remand. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

The first through eighth, and thirteenth through fifteenth assignments of error are denied.

NINTH ASSIGNMENT OF ERROR

Petitioners argue that the Design Board erred in ruling that two city code provisions regarding air quality and noise are "performance standards" and are thus beyond the Design Board's authority to address in considering the design review application. Record 13. The two cited code provisions, Beaverton Development Code (BDC) 60.60.25(14) and (15), are part of a set of regulations entitled "Special Use Regulations" that provide supplemental requirements for uses listed in BDC 60.50.25.[1]

[1] BDC 60.50.25 provides, in relevant part:

> "**Uses Requiring Special Regulation.** In addition to other standards and requirements by this ordinance, all uses included in this section shall comply with the provisions stated herein.
> * * *
>
> "* * * * *

Respondents argue that the TSC is not among the uses listed in BDC 60.50.25, and is therefore not subject to the requirements of BDC 60.50.25(14) and (15). In addition, respondents argue that the city correctly concluded that BDC 60.50.25(14) and (15) are "performance standards" that may apply to restrict post-development emissions from a use listed in BDC 60.50.25, but which do not operate as approval criteria. *See Oien v. City of Beaverton*, 46 Or LUBA 109, 130 (2003) (affirming the city's interpretation that air quality standards at BDC 20.15.80.2 are performance standards, not approval criteria applicable to a design review decision on an earlier application involving the same property at issue in this appeal).

Respondents appear to be correct that BDC 60.50.25(14) and (15) apply only to uses listed in BDC 60.50.25, a list that does not include anything resembling the proposed transportation support facility. Thus, any error the city may have made in concluding that BDC 60.50.25(14) and (15) are performance standards and not approval criteria is, at best, harmless error. Petitioners' other arguments under this assignment of error are undeveloped, and rejected without further discussion.

The ninth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

Petitioners allege that the Design Board simply "rubber-stamped" the planning director's decision, and failed to recognize that no deference was due to the planning director's findings.

The Design Board conducted a *de novo* hearing on the appeal of the planning director's tentative decision, deliberated and issued its own decision supported by findings.

"14. Noise Levels. Noise levels shall meet the standards established by the State of Oregon Department of Environmental Quality. (ORD 3293)

"15. Air Quality. Air quality shall meet the standards established by the State of Oregon Department of Environmental Quality. (ORD 3293)."

Petitioners cite to nothing in the decision or the record indicating that the Design Board misunderstood its function. Petitioners rely on a statement by the chair of the Design Board that she felt that staff had presented a "very strong set of findings that support the original application * * * and that the findings also address the concerns that were heard from the citizens." Record 32. That statement apparently refers to the findings that staff prepared for the Design Board, not the planning director's decision. Even if it referred to the planning director's decision, the statement falls far short of indicating that the Design Board or any member of it misunderstood the Design Board's role in conducting the appeal of the planning director's decision, or that the Design Board inappropriately deferred to the planning director.

The tenth assignment of error is denied.

ELEVENTH AND TWELFTH ASSIGNMENTS OF ERROR

Under these assignments of error, petitioners argue that the "Type II" procedure the city applied to review the applications is inconsistent with the Privileges and Immunities Clauses of the Oregon and United States Constitutions, and the Equal Protection and Due Process Clauses of the United States Constitution.

The city's Type II procedure provides for an initial tentative planning director's decision made without a hearing, with notice and opportunity to appeal the decision to a *de novo* hearing before a local appellate body. The Type II procedure appears to implement the "permit decision without a hearing" provisions of ORS 227.175(10). If we understand petitioners correctly, they argue that the city's review procedures are unconstitutional, because they allow certain types of applications (design review, for example), to be reviewed under Type II procedures (tentative decision followed by opportunity to file an appeal to a hearing), while other types of land use applications are reviewed under Type III procedures that provide for an *initial* hearing, followed by an appeal to the city council. That distinction,

petitioners appear to argue, grants "privileges" to participants of Type III proceedings that are denied Type II participants.

Respondents argue, and we agree, that petitioners' arguments under these assignments of error fall far short of demonstrating that the city's review procedures are constitutionally infirm. Petitioners cite no relevant authority and make no effort to establish that the distinction between Type II and Type III procedures violates any provision of the state or federal constitutions.

The eleventh and twelfth assignments of error are denied.

SIXTEENTH ASSIGNMENT OF ERROR

The sixteenth assignment of error is that "[t]he BSD and Respondent combined to achieve a land use order that is the land use equivalent of illegal 'spot zoning.'"[2] Petition for Review 19. However, there follows 11 pages of argument that mention "spot zoning" only once and make no attempt to explain how the challenged decision, which does not rezone the subject property, constitutes "spot zoning."

Most of the argument in those 11 pages appears to concern petitioners' view that the city should have reviewed the applications under Type III rather than Type II procedures. However, petitioners have not established that the city committed procedural error in that respect or, if procedural error was committed, that any error prejudiced petitioners' substantial rights. ORS 197.835(9)(a)(B). Any other arguments that might be gleaned from this assignment of error are too undeveloped to review. Accordingly, the sixteenth assignment of error is denied.

[2] The term "spot zoning" is generally a reference to arbitrary zoning decisions in favor of landowners. *Smith v. County of Washington*, 341 Or 380, 384, 406 P2d 545 (1965).

SEVENTEENTH ASSIGNMENT OF ERROR

Petitioners argue that the city erred in failing to provide for a neighborhood review meeting between the applicant and neighbors, which is required for all Type III reviews. BDC 50.30.2.[3]

As noted, petitioners have not established that the city erred in processing the design review application under Type II rather than Type III procedures. Petitioners appear to suggest that the neighborhood review meeting requirement is not limited to Type III reviews, but do not explain why that is the case.

The seventeenth assignment of error is denied.

EIGHTEENTH ASSIGNMENT OF ERROR

Petitioners argue that the city erred in allowing BSD to store school buses on land that is under the high power transmissions lines and within the easement for those lines without notifying or obtaining the permission of the easement owner, Portland General Electric (PGE). We understand petitioners to argue that PGE, as an "owner" of an easement on the subject property, must sign the application or otherwise authorize development of the subject property. Further, petitioners argue that under the easement BSD was required to notify and obtain PGE's authorization to store buses and to use a mobile refueling truck within the easement. Petitioners cite to testimony that it is dangerous to store vehicles and conduct fueling operations under a power line.

Respondents argue that the BDC defines "owner" as the "owner of record of real property," and that an easement owner is not an "owner" that must sign a land use

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[3] BDC 50.30.2 provides, in relevant part:

> "Prior to submittal of an application subject to a Type 3 procedure, the applicant shall provide an opportunity to meet with neighboring property owners, residents and businesses * * * within whose boundaries the site is located or within the notice radius to review the proposal. * * *"

application. BDC 90. We agree with respondents that petitioners have not demonstrated that the city code requires that PGE sign or authorize the design review application.

Further, respondents argue that BSD communicated with PGE in developing the application, and the city adopted findings recognizing that the type and extent of activity allowed consistent with the terms of the easement is a private contractual matter between PGE and BSD.[4] The Design Board also recognized that, as a result of negotiations between PGE and BSD, the number of bus parking spaces allowed under the PGE power lines may be reduced from those proposed in the application. Accordingly, the Design Board imposed a condition of approval requiring that, prior to issuance of a site development permit, BSD must provide a revised site plan showing the final number of bus and vehicle parking spaces provided. Record 7. Respondents argue that these findings and condition of approval are adequate to address any concerns regarding the easement.

Petitioners do not challenge those findings or the condition of approval, and have not established that anything in the city code requires that PGE "authorize" the proposed bus storage as part of the challenged design review decision. The Design Board decision appropriately recognized that private negotiations between PGE and BSD may require a

[4] The Design Board findings state, in relevant part:

> "The appellants raised concerns that the design of the expansion did not adequately take into consideration the existing PGE easement crossing the proposed bus storage area and that the applicant did not provide adequate advance notification to PGE of its design review application, which appellants argued may result in changes to the current design of the project, thereby constituting a basis for the BDR to deny the application. The applicant provided rebuttal evidence (Exhibit DDDD.1) indicating that contact with PGE has occurred and will continue to occur. Staff's findings and recommended conditions contained in its Memorandum dated June 13, 2007, addresses the issue of the PGE easement. The existence of, and the activity allowed within, the easement are private contractual matters between PGE and the [BSD]. While the terms of the easement may require changes to the design of the project, the level of modification to the site and any follow-up review of the project would be determined at the time a request for modifications were made and would be based upon the [BDC] thresholds and approval criteria in effect at that time. The Board concurred with staff and find that the additional conditions identified in the Staff's June 13th memorandum will adequately address the issue of PGE's involvement in the design of the storage area within the PGE easement." Record 15-16.

reduction in the number of authorized storage spaces, and adopted a condition of approval to deal with that eventuality. Petitioners identify nothing in the city code or elsewhere that requires more.

The eighteenth assignment of error is denied.

NINETEENTH ASSIGNMENT OF ERROR

BSD proposed, and the city required, a number of mitigating measures and transportation improvements to offset traffic impacts on neighboring transportation facilities, based on a traffic impact analysis (TIA). In this assignment of error, petitioners appear to challenge the adequacy of the TIA and argue that the proposed mitigation is inadequate.

Respondents reply that petitioners merely cite to opposing testimony submitted below, and fail to demonstrate that the evidence the city chose to rely upon is not substantial evidence, *i.e.*, evidence that a reasonable decision maker would rely upon, based on the whole record. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). We agree with respondents that petitioners' arguments under this assignment of error consistent mostly of citations to testimony and affidavits that petitioners submitted below and arguments that that evidence should be believed over the evidence the city chose to rely upon.[5] With limited exceptions discussed below, petitioners make no cognizable attempts to challenge the city's findings, the TIA, the proposed mitigation measures, or the evidence the city relied upon, or to demonstrate that that evidence is not substantial evidence.

First, petitioners appear to argue that the required transportation improvements are inadequate because the decision does not require BSD to either provide the improvements or finance them. However, Conditions of Approval 1 and 2 require that certain transportation

[5] Petitioners again argue that LUBA must "accept as true" the assertions made in petitioners' affidavits, citing *SETO v. Tri-Met*, 21 Or LUBA 185 (1981). Petition for Review 38. As explained above, petitioners grossly overstate the holding in that case, and we reject the argument.

improvements be in place before allowing storage of any buses beyond the existing 48 buses, and Condition 13 requires BSD to pay the county certain funds toward construction of those improvements. If those conditions are inadequate to ensure that the proposed development will not occur unless the required improvements are in place, petitioners do not explain why.

Second, petitioners aim a series of unconnected critiques at the TIA and argue that the TIA is inadequate. For example, petitioners critique the TIA for failing to clarify how many buses turning left to enter the subject property will be "short" buses and how many will be "long" buses. Petition for Review 39. What is missing is any explanation for why that alleged failure undermines the reliability of the TIA's conclusions, or the other evidence the city chose to rely upon. We agree with respondents that petitioners' critiques of the TIA and citations to petitioners' testimony below fall short of demonstrating that the TIA is not substantial evidence on which a reasonable person would rely.

The nineteenth assignment of error is denied.

The city's decision is affirmed.