

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

3
4 JOANNA PAINTER,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF REDMOND,
10 *Respondent,*

11 and

12
13 JOHNNIE MURRAY TRUST,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2007-214

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19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Redmond.

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24 Robert S. Lovlien, Leanne Ryan-Nokell, Bend, filed the petition for review. Robert
25 S. Lovlien argued on behalf of petitioner. With them on the brief was Bryant, Lovlien &
26 Jarvis, P.C.

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28 No appearance by City of Redmond.

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30 Kristen G. Williams, Bend, filed the response brief and argued on behalf of
31 intervenor-respondent.

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

35
36 AFFIRMED

03/06/2008

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

NATURE OF THE DECISION

Petitioner appeals a city decision granting conditional use and site plan approval for multi-family dwelling units.

FACTS

Intervenor-respondent (intervenor) submitted applications for conditional use and site plan approval to construct 37 multi-family dwelling units on a 3.99-acre parcel zoned Limited Residential (R-2). Although multi-family dwellings are no longer permitted in the R-2 zone, they were an allowed conditional use at the time the applications were submitted. The city provided notice of the public hearing on the applications by mail to property owners within the notice area, including petitioner, and published notice of the public hearing in the local newspaper. The hearings officer approved the applications over petitioner’s objections. Petitioner appealed to the city council, but the city council declined to hear the appeal. This appeal followed.

FIRST ASSIGNMENT OF ERROR

At oral argument, petitioner withdrew her first assignment of error, and we do not consider it further.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city did not provide proper notice for the public hearing concerning the proposed development. Redmond Development Code (RDC) 8.1340(1) provides that the notice for a public hearing must:

- “a. Describe the nature of the applicant’s request and the nature of the proposed uses that could be authorized.
- “b. List the criteria from the zoning ordinance and the plan applicable to the application at issue.
- “c. Set forth the street address or easily understood geographical reference to the subject property.

- 1 “d. State the date, time and location of the hearing or date by which
2 written comments must be received.
- 3 “e. State that any person may comment in writing and include a general
4 explanation of the requirements for submission of testimony and the
5 procedures for conduct of testimony.
- 6 “f. If a hearing is to be held, state that any interested person may appear.
- 7 “g. State that failure to raise an issue in person at a hearing or in writing
8 precludes appeal by that person to the Land Use Board of Appeals
9 (LUBA), and that failure to provide sufficient specificity to afford the
10 decision maker an opportunity to respond to the issue precludes appeal
11 to LUBA based on that issue.
- 12 “h. State the name of the City Planner to contact and the telephone
13 number where additional information may be obtained.
- 14 “i. State that a copy of the application, all documents and evidence relied
15 upon by the applicant and applicable criteria are available for
16 inspection at no cost and copies will be provided at reasonable cost.
- 17 “j. State that a copy of the staff report will be available for review at no
18 cost at least seven (7) days prior to the hearing and copies will be
19 provided at reasonable cost.”

20 According to petitioner, the city committed procedural error because the notice failed to
21 provide the information required by RDC 8.1340(1)(f), (g), (i), and (j).

22 Under ORS 197.835(9)(a)(B), in order to obtain reversal or remand of a decision on
23 procedural grounds, a petitioner must also establish that her substantial rights were
24 prejudiced by the procedural error.¹ A party’s substantial rights under ORS
25 197.835(9)(a)(B) include the adequate opportunity to prepare and submit her case and a full
26 and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). Petitioner makes no
27 attempt to explain how any violation of RDC 8.1340(1)(f), (g), (i), or (j) prejudiced her

¹ ORS 197.835(9)(a)(B) provides that LUBA may only reverse or remand the decision if the decision maker:

“Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]”

1 substantial rights. Merely providing a list of alleged procedural errors without making any
2 meaningful attempt to explain how the alleged errors prejudiced a petitioner's substantial
3 rights does not establish a basis for reversal or remand. *O'Shea v. City of Bend*, 49 Or LUBA
4 498, 502 (2005).

5 Petitioner's only attempt to demonstrate that her substantial rights were prejudiced is
6 her argument that the city violated RDC 8.1340(1)(b), which requires that the notice list the
7 applicable approval criteria. As stated earlier, the proposed multi-family dwellings were a
8 conditional use in the R-2 zone when the applications were filed but are no longer permitted
9 in the zone under subsequent amendments to the RDC. According to petitioner, "by not
10 stating that the city's expired development code standards would be applied," the city
11 "prejudiced petitioner's substantial rights in that she was unaware of the full impact and
12 scope that the [proposed] development would have on her property." Petition for Review 9.

13 Apparently, petitioner is claiming that her substantial rights were prejudiced because
14 she was unaware, due to the allegedly defective notice, that the old version of the RDC that
15 conditionally allowed multi-family dwellings was the applicable RDC rather than the
16 amended RDC which does not allow multi-family dwellings. The notices state: "Applicable
17 Criteria; Redmond Code, Chapter 8 Developmental Regulations, Article I – Zoning
18 Standards, Article IV, Site Design Review, Conditional Use Sections 8.0600-8.0645."
19 Record 385, 389. Those are the applicable criteria that were applied by the hearings officer.
20 The hearings officer found:

21 "[T]he city's notices met the development code requirements. While the city
22 could have clarified that the applicable criteria were those in the former code,
23 I find there is nothing inaccurate in the statement of applicable criteria in
24 these notices. I also find the notices were adequate to advise [petitioner] and
25 other interested parties that the applicant proposed multi-family residential
26 development permitted conditionally under the former development code."
27 Record 81-82 (emphasis omitted).

1 The city's notices stated the criteria applicable to the proposed development. The city
2 applied those applicable criteria in making the decision. We do not see any violation of RDC
3 8.1340(1)(b), and therefore no procedural error.

4 Even if the city committed a procedural error by failing to explain that the applicable
5 criteria were part of the RDC that had subsequently been amended to restrict the proposed
6 use, petitioner would still have to demonstrate that her substantial rights had been prejudiced.
7 Even if a local government fails to list the applicable criteria in the notice, if the applicable
8 criteria are listed in a staff report and the petitioner was aware of the applicable approval
9 criteria and addressed them in the proceedings below, there is no prejudice to that
10 petitioner's substantial rights. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA
11 498, 504 (1998). In the present case, the staff report explained that the applicable criteria
12 were from the RDC that were in effect when intervenor filed the application. Record 310.
13 Petitioner was aware of the applicable criteria. Record 249.² Petitioner was aware of the
14 scope and nature of the proposed application and provided detailed opposition to the
15 development. Record 231-264, 283-286. Petitioner had an adequate opportunity to prepare
16 and submit her case and received a full and fair hearing. Therefore, petitioner's substantial
17 rights were not prejudiced.³

18 The second assignment of error is denied.

19 The city's decision is affirmed.

² Petitioner submitted a letter to the hearings officer stating in part:

“On July 11, my daughter emailed the city planner to indicate that we were not opposed to multi-family housing but were concerned about the views. This was based upon reading the staff report * * * and noting that the planner had determined that the pre-November 9 code applied.” Record 249.

³ Because we do not sustain the second assignment of error, we need not address intervenor's argument that petitioner's argument was not properly preserved.