BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GEORGE TRINKAUS,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

TMT DEVELOPMENT CO., INC.
and FOX TOWER, LLC.,
Intervenors-Respondents.

LUBA No. 2008-043

FINAL OPINION
AND ORDER

Appeal from the City of Portland.

George Trinkaus, Portland, filed the petition for review and argued on his own behalf.

Linly F. Rees, Deputy City Attorney, Portland, filed a joint response brief and argued on behalf of respondent. With her on the brief were Steven L. Pfeiffer, Corinne S. Celko and Perkins Coie LLP.

Corinne S. Celko, Portland, filed a joint response brief and argued on behalf of intervenors-respondents. With her on the brief were Linly F. Rees, Steven L. Pfeiffer and Perkins Coie LLP.

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

AFFIRMED 06/25/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city council decision that denies petitioner's appeal of a design commission decision that granted Central City Master Plan, Design Review and Adjustment approvals for a 33-story mixed-use tower called Park Avenue West.

MOTION TO INTERVENE

TMT Development Co., Inc. and Fox Tower, LLC (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

PETITION FOR REVIEW EXHIBITS

Attached to petitioner's petition for review are Exhibits A through F. Exhibit A appears to be printout from a city website that provides a summary description of city decisions concerning the Park Avenue West Proposal. Exhibits B and C are parts of two city planning reports. Exhibit D is petitioner's history of South Park Block 5. Exhibit E is a Portland Development Commission Report. Exhibit F is copy of a Daily Journal of Commerce article dated May 21, 2007.

LUBA's review is generally "confined to the record" that is compiled and transmitted to LUBA. ORS 197.835(2)(a). Intervenors move to strike Exhibits A, B, C, E and F because they are not included in the record and are not subject to official notice. With the exception of Exhibit A, we agree with intervenors. Intervenors' motion to strike Exhibits B, C, E, and F are granted. Exhibit A is not offered for its evidentiary value and to the extent that it is, as far as we can tell, there is no dispute that Exhibit A accurately describes the land use reviews that were requested in conjunction with the Park Avenue West proposal. The motion to strike Exhibit A is denied.

REPLY BRIEF

On May 28, 2008, petitioner filed a reply brief. Under OAR 661-010-0039 a reply brief is to "be confined solely to new matters raised in the respondent's brief." On June 6,

2008, intervenors filed a motion to strike the reply brief because it merely elaborates on arguments that were made in the petition for review and responds to respondent's and intervenors' (respondents') responses to petitioner's assignments of error. Intervenors contend that respondents' responses to petitioner's assignments of error are not "new matters," within the meaning of OAR 661-010-0039. We agree with intervenors.

Intervenors' motion to strike the reply brief is granted.

FACTS

The proposed building would be located on Block 4 of the city's Park Blocks. The city's findings include the following description of the Park Blocks:

> "The site is part of the downtown Park Blocks, which run north-south between Park Avenue and 9th Avenue. Whereas the South Park Blocks run through the University District and Cultural District, and the North Park Blocks extend north from W. Burnside Street to NW Glisan Street in the Pearl District neighborhood, the subject site is located in the area known as the Midtown Park Blocks, which extends from SW Salmon Street to W Burnside. Portland's Park Blocks were platted for public use in the late 1840s by Daniel H. Lownsdale and William Chapman. While their original concept to create 25 contiguous public blocks for parks, schools, and public markets extending north to south was never fully realized, the existing 18 blocks remain a defining element in Portland. As the city has developed around them, each block has taken on its own distinct identity. Unlike the park blocks to the north and south, the Midtown Park Blocks have primarily been developed, except for South Park Block 5, O'Bryant Square and Ankeny Plaza." Record 13-14.

Block 5, which is referenced in the last sentence of the above-quoted findings, was developed for residential use and developed as a parking garage in the past. However, for approximately the past 30 years it has been used as a surface parking lot. In the 1990s, Block 5 was the subject of an application for approval of a 12-story parking garage. That proposal has been abandoned and an underground parking garage on South Park Block 5 is currently under construction. Upon completion of that underground parking garage, it is anticipated that the surface of Block 5 will be transferred to the city and developed as a park.

The property that is to be developed with the proposed Park Avenue West building (Block 4) lies immediately north of Block 5. The three existing buildings on Block 4 would be removed to accommodate construction of the Park Avenue West building. Under the Portland Zoning Code (PZC), within the Central City Plan District, properties are assigned floor area ratios or FARs.[1] The 9:1 FAR that is assigned to Block 4 would not permit construction of a 33 story building with the floor area proposed. Additional FAR would be required. To construct the proposed Park Avenue West building, the FAR that the PZC assigns to Block 5 will be transferred to Block 4. Petitioner challenges this aspect of the appealed decision in his first two assignments of error. Petitioner's remaining assignments of error challenge the procedures the city followed in adopting the appealed decision.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner argues that he took the position below that a park has no FAR to transfer and that the city council erred by failing to address this issue.

In his local appeal, petitioner listed a number of alleged errors in the design commission's decision, including the following:

> "Bogus-bulk FAR transfer. Moyer wants a 410-foot tower in a neighborhood zoned for 75 feet, stretching the code by a factor of six. *A park, by definition, is an open public space that has no FAR to transfer*. To do such a transfer would be a theft of the public open airspace traditionally preserved over Park Block 5. * * *." Record 141 (emphasis added).

Planning staff prepared a memorandum to respond to petitioner's appeal issues. Record 110-14. That memorandum included the following response to the issue of whether Block 5 has FAR to transfer:

"*Bogus-bulk FAR transfer*

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[1] PZC 33.910 provides the following definition of floor area ratio:

> **"Floor Area Ratio (FAR).** The amount of floor area in relation to the amount of site area, expressed in square feet. For example, a floor area ratio of 2 to 1 means two square feet of floor area for every one square foot of site area."

"■ Questions height allowance and FAR potential on a park. [Staff note. The site has a maximum height allowance of 460'. Park Block 5 is zoned Central Commercial, CX, and thus has FAR potential. Park Block 5 is allowed to transfer its base FAR and bonus FAR, if achieved. The building is within all height and FAR Code allowances.]" Record 113.

The city's council's FAR findings are set out below:

"The **Central City Master Plan** request is necessary to enable floor area (base floor area and bonus floor area) to transfer from Park Block 5 * * * to Park Block 4 * * *. The maximum development capacity of each of the two blocks is 12:1 (9:1 base FAR + 3:1 FAR bonus FAR).

"*Park Block 5 FAR*: Park Block 5 will achieve a 3:1 bonus FAR - .5 bonus FAR through the 'water feature/public fountain bonus option' and 2.5 bonus FAR through the 'locker room bonus option'. Park Block 5 will retain a base FAR of 0.3:1 to accommodate the 3 small park structures. The remaining 11.7:1 FAR will be transferred to Park Block 4.

Park Block 4 FAR: Park Block 4 will achieve a 3:1 bonus FAR * * *. If approved through a Central City Master Plan Park Block 4 will be allowed to develop the site with a 23.7:1 FAR – 11.7 FAR transferred from Park Block 5 and 12:1 from the maximum development potential of Park Block [4]." Record 6.

While the city could have addressed petitioner's issue more directly and clearly, we agree with respondents that petitioner's first assignment of error does not provide a basis for reversal or remand.

The issue is whether the past or present use of Block 5 and the current plan to transfer the surface of Block 5 to the city for future use as a park has any effect on the FAR that the PZC assigns to Block 5. We understand the city to have taken the position that the base FAR for Block 5 is determined by the PZC, which clearly assigns a base FAR of 9:1 to the part of the Central City Plan District where Block 5 is located.[2] The city also took the position that

[2] Although the part of the planning staff memorandum quoted in the text suggests the subject property's 9:1 base FAR is determined by its CX zoning, the subject property's base FAR appears to be established by PZC Map 510-2, which assigns FARs within the Central City Plan District that in many cases vary from the FAR that would obtain under base zoning. The area where the subject property is located is assigned a FAR of 9:1, and that area lies immediately west of areas that are assigned FARs of 15:1 and 12:1.

with the FAR bonuses that are available under the PZC, Block 5 and Block 4 each have a FAR of 12:1.[3] Under the PZC, transfer of that FAR is permitted and the city authorized transfer of 11.7:1 FAR from Block 5 to Block 4 to permit construction of the proposed tower, leaving 0.3: 1 FAR on Block 5 to accommodate anticipated surface park structures. As far as the foregoing is concerned the city appears to be correctly interpreting and applying the PZC and we do not understand petitioner to argue otherwise. With regard to whether the past use of Block 5 which has led to the current expectations that Block 5 will be developed as a park in the future has any bearing on FAR, the city's decision is less explicit. Nevertheless, we understand the city to have taken the position, at least implicitly, that FAR is a creature of the PZC. We understand the city to have taken the position that the past history and current expectation that Block 5 will be developed as a park are irrelevant in calculating the FAR for Block 5 that is available for transfer to Block 4. Petitioner clearly disagrees with that position. However, aside from his argument that a park should not have FAR potential, he cites nothing in the PZC that makes the past or anticipated use of the property a relevant consideration in the base FAR that the PZC assigns to Block 5 or the bonus FAR for which Block 5 is eligible.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, petitioner alleges that the FAR sending site (Block 5) has the same owner as the FAR receiving site (Block 4). This is significant, according to petitioner, because the FAR transfer was approved through approval of a central city master plan, pursuant to PZC 33.510.255. PZC 33.510.255 is set out in part below:

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[3] The FAR bonus provisions are somewhat complicated, but we need not discuss that aspect of the city's decision further because we do not understand petitioner to dispute the city's computations or decisions regarding the bonus FAR. Petitioner's only argument under the first assignment of error is that properties that (1) are parks, (2) have been viewed by the public as parks in the past, or (3) are expected to become parks in the future have no base or bonus FAR at all.

> **"A. Purpose.** The Central City master plan adds development potential and flexibility for projects in specified areas. The additional development potential and flexibility is possible because the plan is used to demonstrate that the policy objectives of the Central City Plan and the public service needs of the area are addressed. The Central City master plan is an option; it is not a requirement. A Central City master plan may also be created through a legislative process initiated by the City.
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> **"B. Flexibility achieved.** An approved Central City master plan allows additional flexibility in any of the following situations:
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> "1. *Allocates allowed floor area to individual development sites that will not remain in the same ownership*;
>
> "2. Defers the building of any required housing; or
>
> "3. Allows the development of required housing at a location outside of the required residential development area.
>
> "* * * * *
>
> **"E. Approval Criteria.**
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> "[Five approval criteria follow, none of which address property ownership]." (Emphasis added.)

It appears to be undisputed that county tax assessor records show that Block 5 is owned by the Tom Moyer Trust and Block 4 is owned by Fox Tower LLC. Petitioner contends, however, that because Tom Moyer and Vanessa Sturgeon are managers, registered agents or members/beneficiaries of those entities, they are the *de facto* or real owners of the property. Therefore, petitioner argues, the city erred in approving a FAR transfer as part of the approved central city master plan.

Respondents argue that petitioner waived this ownership issue because the issue was never raised as an issue below. ORS 197.763; 197.835(3).[4] Respondents also argue that petitioner waived this issue by failing to list it as a basis for its local appeal of the design

[4] These statutes generally require that a petitioner at LUBA must have raised an issue prior to the close of the final evidentiary hearing below to preserve the right to raise the issue in an appeal to LUBA.

commission's decision. *Miles v. City of Florence*, 190 Or App 500, 506-7, 79 P3d 382 (2003).[5] Petitioner does not respond to respondents' ORS 197.763 and 197.835(3) waiver argument. Petitioner's notice of local appeal does not list this issue. We therefore agree that petitioner has waived this issue.

Even if this issue had not been waived, we agree with respondents that the record includes substantial evidence that Blocks 4 and 5 are owned by different legal entities and that, while it has taken longer than anticipated, the surface of Block 5 will be transferred to the city in the future for development as a park. Therefore, there is substantial evidence that Blocks 4 and 5 are not and "will not remain in the same ownership," within the meaning of PZC 33.510.255(B)(1).[6]

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In his third assignment of error, petitioner questions why separate project site addresses were specified in the design commission notice and decision (Record 808 and 891) whereas the city's Environmental Services and Transportation Departments cites a single address. Record 750, 752.

We agree with respondents that petitioner makes no attempt to show why the listing of project site addresses has any legal significance, and this assignment of error is therefore not sufficiently developed to set out a basis for reversal or remand. *Deschutes Development v. Deschutes Cty*., 5 Or LUBA 218, 220 (1982).

The third assignment of error is denied.

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[5] Under *Miles*, a petitioner's duty to exhaust available local remedies before appealing to LUBA generally includes an obligation to raise those issues in any notice of local appeal.

[6] We need not and do not consider respondents' additional argument that because the separate ownership requirement set out at PZC 33.510.255(B)(1) does not appear in the PZC 33.510.255(E) approval criteria, any failure to demonstrate the blocks will remain in separate ownership would not provide a basis for reversal or remand.

FOURTH ASSIGNMENT OF ERROR

As required by PZC 33.730.030(A) for Type III applications, the applicant met with the city in a pre-application conference on April 10, 2007. Although not required or expressly authorized by the PZC, the applicant also appeared before the design commission in what the parties refer to as a Design Advisory Review on May 17, 2007. Record 124. Petitioner testified at the Design Advisory Review hearing. Record 21. The application that led to the decision that is before us in this appeal was submitted on June 19, 2007. Petitioner contends the real application filing date should be April 10, 2007 and that the city erred by pretending the pre-application conference and Design Advisory Review never occurred.

The April 10, 2007 pre-application conference is legally required and the city did not err by conducting that pre-application conference. We need not determine whether the city committed procedural error by allowing an ad hoc Design Advisory Review on May 17, 2007 to provide additional guidance before the application was submitted. That is because even if it was procedural error to do so, unless petitioner's substantial rights were prejudiced by that May 17, 2007 hearing, any such procedural error could not provide a basis for reversal or remand. ORS 197.835(9)(a)(B).[7] As already noted, petitioner appeared and participated in the May 17, 2007 Design Advisory Review hearing and makes no attempt to show that hearing resulted in any prejudice to petitioner's substantial rights.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In his fifth assignment of error, petitioner alleges that one of the design review commission members stated at the May 17, 2007 Design Advisory Review meeting that the proposed FAR transfer is a "poster-child for floor-area transfer." Record 141. Petitioner

[7] Under ORS 197.835(9)(a)(B), LUBA is authorized to reverse or remand a land use decision if the decision maker "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner[.]"

contends that this statement demonstrates that the design review commission favorably and improperly prejudged the application.

As respondents correctly note, there are a number of problems with the fifth assignment of error. First, an isolated statement such as the one that petitioner relies on in the fifth assignment of error is simply insufficient to demonstrate that the design review commission was biased or prejudged the disputed application. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176, 189 (2007*), Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 144, *aff'd* 183 Or App 581, 54 P3d 636 (2002); *Halvorson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 708-9 (2001). Second, the design review commission member who made the statement did not participate in the hearings on the application or the design commission's decision on the application. Finally, the decision that is before us in this appeal is not the design review commission's decision but the city council's decision that rejects petitioner's appeal and affirms the design review commission's decision. Petitioner offers no reason why we should impute to the city council any bias or prejudgment that might properly be attributable to one design review commissioner. *Jacobson v. City of Winston*, 51 Or LUBA 602, 612 (2006); *Nez Perce v. Wallowa County*, 47 Or LUBA 419, 432 (2004); *Utah Int'l v. Wallowa County*, 7 Or LUBA 77, 83 (1982).

The fifth assignment of error is denied.

The city's decision is affirmed.