BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TROY BUNDY and GINA BUNDY,
Petitioners,

vs.

CITY OF WEST LINN,
Respondent.

LUBA No. 2010-089

FINAL OPINION
AND ORDER

Appeal from City of West Linn.

Michael C. Robinson, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Seth J. King and Perkins Coie LLP.

Timothy V. Ramis, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Jordan Schrader Ramis PC.

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

AFFIRMED 03/08/2011

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 city council decision denying their application for a water resources area permit necessary to authorize a pool, patio and landscaping in the back yard of their residence.

FACTS

The subject property is a rectangular one-half acre lot developed with a single-family dwelling that is located in the approximate middle of the lot. The entire rear yard of the lot is within a wetland transition and setback zone intended to protect a delineated wetland located close to the property line on the adjoining parcel, a PGE right-of-way. Most of the lot is also within a designated riparian corridor and setback area extending 115 feet from the wetland. In addition, in 2001 the city acquired an open space conservation easement from petitioners' predecessor-in-interest as a condition of land division approval, which easement was duly recorded. The easement is 15 feet wide and extends from the rear property line to about the middle of the back yard.

Petitioners acquired the subject property in 2003. In 2009, petitioners applied to the city for a building permit to construct a pool and patio in their backyard close to the rear property line, within the wetland transition zone, riparian corridor and conservation easement. The city denied the building permit. In July 2009, petitioners contacted the then–current city mayor in office and invited the mayor to visit the property. The mayor did so, viewed the back yard and according to petitioners told them "Go ahead and put in your pool. Do not go through the city, you do not need a permit. If anyone has any questions about it, have them call me directly." Record 1048.[1]

[1] The mayor later denied making those statements. Record 1885.

1 Petitioners decided to construct the pool and patio without city permits, and by
2 October 2009 had constructed within the wetland transition area, riparian corridor and
3 conservation easement an in-ground concrete pool, surrounding concrete patio area, and a
4 brick wall. In addition, petitioners graded the area, removed native vegetation, installed non-
5 native rolled grass sod and non-native plants, and installed two footbridges across a
6 drainageway near the rear property line.

7 Based on subsequent discussions with the city, on November 11, 2009, petitioners
8 applied to the city for a Water Resources Area (WRA) permit necessary to authorize the
9 constructed improvements within the wetland transition zone and riparian corridor. On
10 February 19, 2010, the city planning director denied the permit. Petitioners appealed that
11 permit denial to the city council. On July 19, 2010, the city council, under a new mayor,
12 held a hearing on the appeal, and left the record open until July 26, 2010 for all parties to
13 submit additional evidence and argument, and until August 2, 2010 for all parties to submit
14 rebuttal evidence and argument to respond to materials submitted during the first open record
15 period. On September 27, 2010, the city council issued a decision denying the appeal and
16 upholding the director's denial. This appeal followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 Petitioners contend that the city council members erred at the July 19, 2010 hearing
19 in failing to disclose an *ex parte* communication with third parties opposed to the application,
20 as required by ORS 227.180(3).[2]

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[2] ORS 227.180(3) provides:

> "No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and

At the July 19, 2010 city council hearing, the city council members declared various *ex parte* contacts with the public regarding the appeal. Petitioners argue, however, that on February 21, 2010, two days after the planning director denied petitioners' permit application, four council members (including the current mayor, who was then a city council member) were forwarded an e-mail chain between an opponent to the application and the city planning director. Record 1759a to 1759f. In earlier parts of the e-mail chain dated February 17 and 18, 2010, the opponent had attached a letter urging the director to institute enforcement proceedings against petitioners for constructing the back yard improvements without a permit. The planning director replied that the letter would be placed in the record. The opponent responded with some additional arguments for why the city should institute enforcement proceedings. The planning director replied on February 19, 2010, noting that he had on that date issued a denial of the permit, which was posted on the city's website. Two days later, on February 21, 2010, the opponent forwarded the entire e-mail chain to a number of persons, including the then-current mayor and four city council members. Another opponent replied, also copying the mayor and city council members. Strangely, the mayor then forwarded the entire e-mail chain to petitioner Troy Bundy, with the comment "FYI." Record 1759a.

Petitioners contend that the city council members who received the e-mail were required to disclose receipt of this e-mail chain at the first available opportunity, the July 19, 2010 public hearing, and allow participants the opportunity to rebut the e-mails, but failed to do so.

The city responds, and we agree, that the city council members were not required to disclose receipt of the e-mail chain. As the city points out, the letter attached to the e-mail

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"(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

chain and the bulk of the e-mail chain itself, including the additional arguments the opponents made to the planning director regarding enforcement proceedings, were placed in the public record presented to the city council for the appeal proceeding. Record 1515, 1864. The only portion of the e-mail chain not placed in the public record was the brief exchanges that occurred on February 21, 2010, where two opponents forwarded the e-mail chain to the former mayor and city council members and the former mayor forwarded the e-mail chain to petitioner. Petitioners identify nothing substantive in those February 21, 2010 exchanges, certainly nothing that could possibly be "rebutted." Stated differently, the February 21, 2010 exchanges do not "concern[] the decision or action" for purposes of ORS 227.180(3), because those exchanges include nothing having an arguable bearing on or relationship to any issue before the city council in its subsequent review of the planning director's decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the city committed procedural error in accepting and considering evidence after the close of the evidentiary record on August 2, 2010. According to petitioners, sometime after August 2, 2010, city staff submitted to the city council a chapter from a book entitled *Wetlands in Washington State*, found at Record 464-520 and Record 623-679. Petitioners argue that the chapter was subsequently included in the packet given the city council for its August 31, 2010 meeting, prompting petitioners to object. The city council found that staff submitted the chapter prior to 5:00 p.m. on August 2, 2010, within the open record period. Record 14.

Petitioners disagree that the chapter was submitted within the open record period, but do not explain why. As the city points out, both copies of the chapter in the record bear the handwritten notation "entered into record 8-2-10 by staff." Record 464, 623. Absent some explanation for why that notation is incorrect, petitioners' arguments do not demonstrate a basis for reversal or remand.

1 The second assignment of error is denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 **A. Passive Use Recreational Facility**

4 The West Linn Community Development Code (CDC) chapter 32 generally prohibits
5 disturbances and development within a wetland transition area and setback, but CDC
6 32.050(F) does allow "[r]oads, driveways, utilities [and] passive use recreation facilities"
7 within water resource areas "when no other practical alternative exists." Petitioners argued
8 to the city that use of the swimming pool constituted a "passive use recreation facilit[y],"
9 because it is not an organized recreational activity like baseball or football.

10 The city council rejected that argument, interpreting the term "passive use recreation
11 facilities" to refer to public nature parks and associated footpaths/trails and similar non-
12 structural recreational uses.[3] Petitioners acknowledge that the city council's interpretation is
13 entitled to deference under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243
14 P3d 776 (2010), and must be affirmed unless it is inconsistent with the express language of

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[3] The city council findings state:

> "* * * [The] City Council interprets the passive recreational language [to] accommodate public nature parks and associated footpaths/ trails in water resource areas. Additional support for the City Council's interpretation comes form Metro's Greenspaces Master Plan (Adopted 1992), Definitions p. 131 & 133, and OAR 141-120-0080, the DSL's Wetland Conservation Plan, Wetland Resource Designations and Analysis of Alternatives. Metro's Greenspace Master Plan defines passive recreation as 'recreation not requiring developed facilities that can be accommodated without change to the area or resource (sometimes called low-density recreation).' The fact that swimming on the subject property would require a developed facility, which could not be accommodated without a change to the area or resource, takes this activity out of the definition for 'passive recreation.' In addition, OAR 141-120-0080, Uses Allowed in the Protection Category, defines 'passive recreational activities as 'activities that require no structures, such as bird watching, canoeing or nature walks.' This definition does not include swimming in a backyard swimming pool.
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> "Council also finds that passive recreation activities are allowed in the WRA only when 'no other practical alternative exists.' So even if the Appellants' pool was deemed passive recreation, the applicant has not provided a study of all practical and less obtrusive alternatives to a swimming pool in the WRA. For example, the appellants should have considered alternatives such as other locations on the property, other pool dimensions, and other types of recreational activities. There is no evidence that such consideration of alternatives was undertaken." Record 23.

1 the code.[4] However, petitioners fault the city for relying on definitions of the similar term
2 "passive recreation" in the Metro Greenspaces Master Plan and a state wetland conservation
3 plan embodied in a state administrative rule. Instead, petitioners argue the city should have
4 relied upon general dictionary definitions of the different code terms.

5 We see no error in the city's reliance on the Metro Greenspaces Master Plan and state
6 administrative rule definitions of nearly identical terms, to help determine the meaning of the
7 code phrase "passive use recreational facilities." Those sources seem much more germane
8 than general dictionary definitions of the individual words of the code phrase, and indeed it
9 would not be surprising if the Metro Greenspaces Master Plan or the administrative rule was
10 the original source of that phrase. The ultimate question under ORS 197.829(1) and *Siporen*
11 is whether the governing body's code interpretation is consistent with the express language,
12 purpose and underlying policy of those code terms. In the context of a wetland protection
13 zone that generally prohibits development in wetland transition setback areas, the city's
14 interpretation that the phrase "passive use recreational facilities" refers to paths, trails and
15 similar facilities, and does not include a developed recreational facility such as a swimming
16 pool, cannot be reversed under ORS 197.829(1). In any case, as the city points out,
17 petitioners do not challenge the city's subsequent finding that petitioners failed to
18 demonstrate that "no other practical alternative exists" to the size and location of the
19 swimming pool.

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[4] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

B. Structure

CDC 32.050(E) provides that the water resource area includes the "required setback and transition area," in which structures are apparently proscribed. Petitioners argued to the city that the swimming pool is not a "structure" as that term is defined at CDC 2.030, and therefore is not subject to the setback requirement. The city council rejected that argument.

CDC 2.030 defines "structure" as "[s]omething constructed or built and having a fixed base on, or fixed connection to, the ground or another structure, and platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below." Citing this definition, the city council found:

> "[T]he in-ground 15 x 30 foot concrete and steel rebar construction swimming pool has a fixed connection to the ground and is therefore a structure. City Council [draws] additional support for this interpretation that the pool is a structure from the Oregon Residential Specialities Code as adopted by the West Linn Municipal Code. That code defines a swimming pool as 'Any structure intended for swimming or recreational bathing that contains water over 24 inches (610 mm) deep. This includes in-ground, aboveground and on-ground swimming pools, hot tubs and spas.
>
> "The Council interprets the reference to '30 inches above grade' to modify the term 'driveways.' We do not interpret this code section to exempt from the definition of structure all patios that are less than 30 inches above grade." Record 22 (italics omitted, underline original).

Petitioners first challenge the interpretation that an in-ground swimming pool is a structure, arguing that the CDC 2.030 definition does not refer to things that are "in" the ground. The city responds, and we agree, that the city's interpretation that a concrete in-ground swimming pool has a "fixed connection" to the ground is easily within the city's interpretative discretion under ORS 197.829(1).

Next, petitioners challenge the city's second interpretation that the phrase "30 inches above grade" modifies only the immediately preceding term "driveways," and not all of the preceding terms "platforms, walks, and driveways." The city responds, and we agree, that even if the city's interpretation is erroneous and the phrase "30 inches above grade" modifies

1 the entire phrase "platforms, walks and driveways" rather than just "driveways," that
2 interpretative error has no apparent bearing on whether the swimming pool is a "structure."
3 Petitioners do not argue that the swimming pool is a platform, walk or driveway.[5]
4 The third assignment of error is denied.
5 **FOURTH ASSIGNMENT OF ERROR**
6 Petitioners argue that denial of a permit to construct a swimming pool in their back
7 yard effects an uncompensated taking of petitioners' property in violation of the Takings
8 Clause of the Fifth Amendment to the United States Constitution. According to petitioners,
9 the city's decision to strictly apply the provisions of the Water Resources Area, parts of
10 which apply to the majority of petitioners' property, including the portion developed with
11 their single family dwelling, renders the entire property worthless. Petitioners contend that if
12 their house were destroyed, they might not be unable to reconstruct it under the city's strict
13 interpretation of CDC chapter 32. In the alternative, petitioners argue that the city's decision
14 constitutes a partial taking of their property, because it interferes with their reasonable
15 investment-backed expectations to utilize their property in a manner consistent with single-
16 family residential purposes, including accessory uses such as constructing a pool in the back
17 yard.
18 The city responds that no issue was raised below under the Takings Clause, and the
19 issue is thus waived under ORS 197.763(1).[6] Petitioners replied at oral argument that their

[5] The focus of the city council's second interpretation appears to be on the patio, which might well be considered a "platform" or "walk," but petitioners' argument under this subassignment of error is clearly focused on the swimming pool. Petition for Review 11-13. Petitioners do not even mention the patio.

[6] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

claim for relief from the requirements of the Water Resource Area provisions should have sufficed to put the city on notice that denial of the permit would take petitioners' property in violation of the Takings Clause. We disagree. Under ORS 197.763(1), an issue must be raised in a manner sufficient to put a reasonable decision maker on notice that an issue warranting a response has been raised. In raising the issue of a constitutional violation, that would at a minimum entail citing the constitutional provision or at least making an argument based on the substance of the constitutional provision that would give fair notice that petitioners' claim was based on the constitutional provision. Requesting relief from permit requirements falls far short of putting the city on notice that petitioners believe that denial of the permit violates the Takings Clause.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the city erred in relying upon the conservation easement to deny the Water Resources Area permit. According to petitioners, the easement is invalid, because the only statutory authority to acquire such an easement is ORS chapter 271, and the record does not reflect that the city complied with the requirements of that statutory chapter in acquiring the easement.

The city responds, and we agree, that petitioners cannot challenge the validity of a recorded easement in the context of the present appeal. In any case, the city found that the easement was acquired pursuant to CDC 30.100(C) as part of the 2000 land division, not ORS chapter 271, and while petitioners disagree with that finding, they have not explained why it is erroneous. Finally, the city argues, and we agree, that even the city could not rely upon the easement as a basis to deny the permit to approve the developments within the easement, the city also denied the development for the reasons stated above under CDC chapter 32, and we have affirmed those bases for denial. Any error in relying on the easement would thus not provide a basis to reverse or remand the city's decision.

1 The fifth assignment of error is denied.

2 The city's decision is affirmed.