BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HENRY KANE,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 2011-066

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

Henry Kane, Beaverton, filed the petition for review and argued on his own behalf.

William J. Scheiderich, Assistant City Attorney, Beaverton, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 12/07/2011

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

Petitioner appeals a planning commission decision approving a design review application to construct two sports fields and a park district maintenance facility.

FACTS

This appeal involves a proposal by the Tualatin Hills Parks and Recreation District to construct two sports fields and equipment storage and maintenance facilities for the district, on a large parcel zoned for industrial use partially developed with an existing warehouse. The Industrial zoning district allows public and private recreational facilities by right, subject to design review.

The city determined that the design review application for the proposed use is a "Design Review Two" type of application as described in Beaverton Development Code (BDC) 40.20.15. The city's "Type II" procedures are specified for Design Review Two applications. BDC 40.20.15(2)(B). The city's Type II procedures generally provide for written notice to nearby property owners, an opportunity to submit written comments, and a decision by the city planning director, with a right of appeal to the planning commission. The city's Type II procedures track the procedures required in ORS 197.195 for "limited land use decisions" as defined in ORS 197.015(12)(a)(B).[1]

Petitioner was provided notice of the pending application and submitted comments to the planning director. On April 21, 2011, planning staff issued a notice of decision approving the design review application. Petitioner appealed that decision to the planning commission, which conducted a hearing and, on June 17, 2011, issued the city's final decision denying the appeal and approving the application. This appeal followed.

[1] ORS 197.015(12)(a)(B) defines a limited land use decision in relevant part as a final decision pertaining to a site within an urban growth boundary that concerns "[t]he approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review."

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the planning commission's June 17, 2011 decision is "null and void" because the planning staff's April 21, 2011 decision did not take the form of a signed order. According to petitioner, the planning commission cannot affirm an order or decision that does not exist.

The planning staff's notice of decision is at Record 117-18, followed by findings and conditions of approval at Record 119-150. The notice of decision is initialed but not signed, and does not take the form of an "order." However, petitioner cites no BDC requirement or other authority that requires the planning staff decision on a design review application to take the form of a signed order.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner argues that the planning commission decision denying his appeal and approving the design review application is not supported by the findings required by ORS 227.173(3).

ORS 227.173(3) provides in relevant part that "[a]pproval or denial of a permit application * * * 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."

The city observes, correctly, that ORS 227.173(3) applies only to "permit" decisions, and as defined at ORS 227.160(2), a permit decision does not include a limited land use decision, as in the present case. The more pertinent authority is ORS 197.195(4), which imposes a similar findings requirement for limited land use decisions. In any case, petitioner has not demonstrated that the planning commission's findings violate either statutory requirement. The planning commission decision at Record 7-11 addresses and rejects the

issues petitioner raised on appeal, and expressly affirms the planning staff's April 21, 2011 decision, which includes numerous findings addressing the design review approval criteria. Petitioner makes no attempt to explain why these findings are inadequate.

The second and third assignments of error are denied.

FOURTH AND SEVENTH ASSIGNMENTS OF ERROR

Petitioner argues that the city erred in failing to provide a quasi-judicial evidentiary hearing on the applications, as required by ORS 197.763. Relatedly, petitioner argues that the city erred in processing the design review application as a Design Review Two type of application, rather than a Design Review Three application, which would require use of the city's Type III procedures. The city's Type III procedures provide for notice and a hearing, and are presumably intended to implement the requirements of ORS 227.175 for processing of applications for a permit or zone change.

The gist of petitioner's argument is that the design review criteria require the exercise of "discretion," and therefore the city is required to process the application as a Design Review Three type of application, subject to the city's Type III procedures. Petitioner relies on BDC 50.15.1, which provides that where the procedure type is not specified by the BDC, the director shall determine which procedure to use to process an application based on descriptions of the Type I, Type II, and Type III procedures. The Type II procedure is described as one that "typically involves an application that is subject to criteria that require the exercise of limited discretion about non-technical issues and about which there may be limited public interest."[2] According to petitioner, the present application required more than

[2] BDC 50.15.1 provides:

> "*An application shall be subject to the procedure type specified in the Code, if any*. If the Code does not specify a procedure type for a given application and another procedure is not required by law, the Director shall determine the appropriate procedure based on the following guidelines. Where two or more procedure types could be applied to a particular application, the selected procedure will be the type providing the broadest notice and opportunity to participate.

the exercise of limited discretion and there is more than limited public interest in the proposed sports fields.

However, the general descriptions set out in BDC 50.15.1 apply only if the code "does not specify a procedure type for a given application and another procedure is not required by law[.]" Where the code specifies a particular procedure for a particular application, the application is subject to the specified procedure. *Id.* The differences between a Design Review Two and a Design Review Three application are set out in detail in BDC 40.20.15(2) and (3). Petitioner makes no attempt to explain why the subject design review application meets the threshold requirements for a Design Review Three application rather than a Design Review Two application, and we do not see that it does. Petitioner has not demonstrated that the city erred in concluding that the application constitutes a Design Review Two application. Importantly, BDC 40.20.15(2)(B) specifies use of the *Type II* procedure for review of a Design Review Two application.[3] It follows under BDC 50.15.1 that the city was required to use the Type II procedure to process the Design Review Two application, regardless of how the application might be characterized under the general descriptions at BDC 50.15.1, in the absence of a specified procedure.

> "A. A Type 1 procedure typically involves an application that is subject to non-discretionary criteria or criteria that require the exercise of professional judgment only about technical issues.
>
> "B. A Type 2 procedure typically involves an application that is subject to criteria that require the exercise of limited discretion about non-technical issues and about which there may be limited public interest.
>
> "C. A Type 3 procedure typically involves an application that is subject to criteria that require the exercise of substantial discretion and about which there may be broad public interest, although the application applies to a limited number of land owners and properties." (Emphasis added.)

[3] BDC 40.20.15(2)(B) provides:

> "Procedure Type. The Type 2 procedure, as described in Section 50.40 of this Code, shall apply to an application for Design Review Two. The decision making authority is the Director."

Further, petitioner has not demonstrated that use of the city's Type II procedure, which provides for initial notice and opportunity to submit written comment, followed by the opportunity to file an appeal of the planning director's decision to a hearing before the planning commission, violates any statute, including ORS 197.763. As explained above, the subject design review application meets the definition of a "limited land use decision" at ORS 197.015(12)(a)(B), and can be reviewed under the procedures set out in ORS 197.195, which the city's Type II procedures track. ORS 197.195(2) provides that a limited land use decision is *not* subject to the requirements of ORS 197.763.

The fourth and seventh assignments of error are denied.

FIFTH AND SIXTH ASSIGNMENTS OF ERROR

Petitioner's original petition for review omitted pages 10 through 12, which included most of the argument under the fifth and sixth assignments of error. Petitioner was given an opportunity to submit the missing pages, but submitted an amended petition for review that did not comply with the Board's order. Consequently, we rejected the amended petition for review and limited our review in this proceeding to the original petition for review that omitted pages 10 through 12. Because the arguments under the fifth and sixth assignments of error in the original petition for review were not sufficiently developed for review in the absence of pages 10 through 12, we declined to consider those assignments of error further in this proceeding. *Kane v. City of Beaverton*, __ Or LUBA __ (LUBA No. 2011-066, October 19, 2011), Order on Petition for Review.[4]

[4] As far as we can tell, the fragmentary arguments under the fifth and sixth assignments of error were similar to those made under the fourth and seventh assignments of error, arguing that the city erred in processing the design review application as a Design Review Two application subject to the city's Type II procedures, and the city should have processed the application under its Type III procedures, which generally track those required under ORS 227.175 for review of permit applications. To the extent it is necessary or possible to consider petitioner's fragmentary arguments under the fifth and sixth assignments of error in the original petition for review, or even those in the amended petition for review that we declined to consider, we would reject the fifth and sixth assignments of error on their merits for the reasons set out in our discussion of the fourth and seventh assignments of error.

The fifth and sixth assignments of error are denied.

EIGHTH ASSIGNMENT OF ERROR

The eighth assignment of error alleges that the "traffic study erred by underestimating motor vehicle traffic" generated by the proposed development.

As the city explains, BDC 60.55.15 requires a "traffic management plan" (TMP) when proposed development would add 20 trips per hour to a residential street. BDC 60.55.20 requires a more detailed "traffic impact analysis" (TIA) when proposed development would generate more than 200 trips per day. BDC 60.55.20(2)(A). The city required the applicant to submit a TMP, but did not require submission of a TIA, based on evidence that the proposed use will generate less than 200 *new* trips per day. Based on a standard trip generation manual, the applicant estimated that the proposed use would generate 867 trips per day, compared to the 669 trips per day generated by the former use of the property, which was a 24-hour distribution center.

Petitioner's arguments under this assignment of error are not well-developed. For example, petitioner does not cite either BDC 60.55.15 or BDC 60.55.20 or connect any argument to any specific code provision. Nonetheless, petitioner clearly objects to the conclusion that the proposed use will generate less than 200 trips per day for purposes of BDC 60.55.20. We understand petitioner to fault the city for failing to require the applicant to submit a TIA as required under BDC 60.55.20, because the development would generate more than 200 trips per day. Even with that understanding, however, petitioner's arguments are not well-taken.

Petitioner first appears to dispute the estimate that the proposed use will generate a total of 850 daily trips. According to petitioner, the city should have relied on actual traffic counts generated by using pneumatic road tube counters, rather than estimates from the trip generation manual. However, petitioner does not explain how the city could have calculated actual trip generation figures at the site for a set of uses not yet in place, or why the city is

required to do so rather than rely on the trip generation manual. The closest petitioner comes is to suggest that the park district could identify how many and which district employees will be transferred to the new facility, and conduct studies of the number of trips those employees actually generate at their current work site. While that might be an acceptable method of estimating some portion of total daily trips generated by the proposed uses, petitioner cites no BDC requirement that such a method be employed instead of or as an adjunct to estimates derived from an authoritative trip generation manual. The estimates derived from the trip generation manual are substantial evidence that the city could rely upon to conclude that the proposed sports field and park district maintenance facility will generate approximately 850 daily trips.

Second, petitioner seems to dispute the city's position that the estimate of 850 daily trips is offset by the 669 daily trips generated by the former use of the property, a 24-hour distribution center, for purposes of determining whether the proposed use would generate more than the 200-daily-trip threshold under BDC 60.55.20(2)(A). The city adopted findings that take the position that when evaluating a proposal to redevelop property, the 200-daily-trip threshold at BDC 60.55.20(2)(A) represents *net* additional trips, over and above trips generated by the former use of the property. Record 111. Petitioner offers no focused challenge to that conclusion.

The eighth assignment of error is denied.

The city's decision is affirmed.