BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TILLAMOOK PEOPLE'S UTILITY DISTRICT,
*Petitioner,*

vs.

CITY OF TILLAMOOK,
*Respondent,*

and

DON AUFDERMAUER, DENNIS JOHNSON
and TILLAMOOK COUNTY CREAMERY ASSOCIATION,
*Intervenors-Respondents.*

LUBA No. 2013-035

FINAL OPINION
AND ORDER

Appeal from City of Tillamook.

Tommy A. Brooks, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Cable Huston.

No Appearance by City of Tillamook.

Gregory S. Hathaway, Portland, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was Hathaway Koback Connors LLP.

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

AFFIRMED 01/03/2014

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 decision that denies conditional use approval for a new electric transmission line through the city.

**FACTS**

Petitioner proposes to construct a new 115-kilovolt electric transmission line between an existing Bonneville Power Administration substation located a short distance east of the city and a proposed substation near the community of Oceanside located west of the city, a total distance of seven miles. Approximately 1.1 miles of the transmission line would be located within the City of Tillamook. That 1.1-mile section of the proposal would be located parallel to, and a short distance north of, Highway 6, the main east-west thoroughfare through the city. Ten support poles, ranging from 70 feet to 90 feet in height, would be required for the 1.1-mile section through the city. According to the application, the route for the 1.1-mile section was selected to maximize "use of existing [highway and railroad] rights of way." App 2-1.[1] The 1.1-mile section will require a corridor with a minimum width of 100 feet. Petitioner proposes to secure that 100-foot corridor from affected property owners through purchase of easements or through eminent domain if necessary.

One of the conditional use approval criteria requires that the city find that a proposed conditional use "will not alter the character of the surrounding area" such that "permitted uses" on "surrounding properties," may be "substantially" limited, impaired or prevented. Tillamook Zoning Ordinance (TZO) 27.5(D)(4).[2] Like the parties we will refer to this

[1] The first page of the application is Record 376, but the individual pages of the application were not assigned record page numbers. We cite to the application as "App" and we cite to the original, hyphenated page numbers of the application, for example App 1-1.

[2] TZO 27.5(D)(4) provides:

criterion as criterion 4. The planning commission held the only evidentiary hearing in this matter on January 3, 2013. At that planning commission hearing two persons testified. One of those persons was intervenor-respondent Aufdermauer. Record 252.[3] One of the other intervenors-respondents, Tillamook County Creamery Association, submitted a letter opposing the application before the January 3, 2013 hearing. Record 260. We discuss the substance of the testimony and letter later in this opinion.

The planning commission approved the application on January 7, 2013. That decision was appealed to the city council. The city council's March 5, 2013 hearing was limited to the evidentiary record compiled before the planning commission. In an April 1, 2013 decision, the city council found that petitioner failed to carry its burden of proof regarding criterion 4 and reversed the planning commission and denied the requested conditional use approval. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

In its first assignment of error, petitioner argues that the city council should have summarily denied the local appeal of the planning commission's decision without reaching the merits of that appeal, because no party raised issues regarding criterion 4 or any other conditional use approval criteria before the planning commission.

Petitioner's first assignment of error relies entirely on TZO 33.2(A), which among other things requires that an appeal of a planning commission decision to the city council must be based on an issue that was raised before the planning commission.[4] All parties cite

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> "The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zone."

[3] A transcript of that testimony is included in the petition for review. Petition for Review 5.

[4] TZO 33.2(A) provides:

> "The appellant must be an interested party who has participated either orally or in writing in previous Planning Commission proceedings pertaining to the decision under appeal. The

and rely on cases that have analyzed "raise it or waive it" issues under the similar statutory requirement that issues presented in a LUBA appeal of a quasi-judicial land use decision, with some exceptions, must have first been raised locally. ORS 197.763(1); 197.835(3).[5] No party argues that TZO 33.2(A) imposes a more rigorous or less rigorous standard than ORS 197.763(1) and 197.835(3). Intervenors do suggest that any city council interpretation of TZO 33.2(A) is entitled to deference under *Siporen v. City of Medford*, 349 Or 247, 255, 243 P3d 776 (2010). However the only interpretation that the city council adopted (that local appellants themselves need not have raised the issue on appeal so long as some other party raised the issue) is not challenged in this appeal. Therefore, like the parties, we look to cases that have construed ORS 197.763(1) and 197.835(3) for guidance in determining whether the criterion 4 issue raised in this appeal was adequately raised before the planning commission.

Before turning to the dispositive testimony and letter, it is useful to set out the Court of Appeals' description of what is and is not required to raise an issue adequately in a quasi-judicial land use hearing to preserve that issue for appeal to LUBA. First, in *Boldt v. Clackamas County*, 107 Or App 619, 813 P2d 1078 (1991), the Court of Appeals recognized

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> appeal must be made within ten (10) days of the action of the Planning Commission, in writing to the Tillamook City Council. All appeals shall be made in writing, based on a specific issue about the criteria and/or standards raised during the Planning Commission Hearing, dated and signed by the appellant. Such appeal shall be filed with the appropriate fee listed in Section 10 of this Ordinance within ten (10) days after the action of the Planning Commission with the City Recorder." TZO 33.2(A)

[5] ORS 197.763(1) applies to quasi-judicial land use hearings, such as the planning commission's January 3, 2013 hearings, and provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals 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*." (Emphasis added.)

ORS 197.835(3) governs LUBA's scope of review and provides, in part that "[i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763 * * *"

that land use quasi-judicial hearings are less formal than judicial proceedings and that ORS 197.763(1) specifically recognizes and accommodates this difference:

> "Petitioner's overriding contention is that the 'sufficient specificity' required by ORS 197.763(1) is analogous to the specificity that is necessary for preservation in judicial proceedings and that the issues that can be raised before LUBA must accord precisely with those that the party raised in the local proceeding. Those arguments are contrary to the statutory text and to the reality of local land use proceedings, of which the legislature was presumably aware. ORS 197.763(1) does not simply require 'sufficient specificity,' but goes on to define what the objective of the requisite specificity is, *i.e.*, to afford the decisionmaker and the parties 'an adequate opportunity to respond to each issue.' The plain thrust of that language is that the statute requires no more than fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts. Indeed, there would have been no need for the second sentence in the statute [ *see* n 5] if the strict preservation principles that petitioner urges had been intended." *Boldt*, 107 Or App at 623.

Perhaps more importantly for purposes of this appeal, the Court of Appeals also made it clear in *Boldt* that a petitioner need not have cited to the precise sections of the zoning ordinance where approval criteria appear, so long as an issue is raised with regard to the "subject matter of the criteria." *Id*. at 626. Petitioner correctly points out that LUBA has held that raising general arguments about traffic issues may not be sufficient to preserve issues regarding compliance with the detailed technical requirements of the transportation planning rule (TPR). *Savage v. City of Astoria*, ___ Or LUBA __ (LUBA No. 2013-059, October 8, 2013), slip op at 7. LUBA also cited other cases where such general arguments, without citing the administrative rule or statutory substantive requirements, are insufficient to preserve more technical arguments under LCDC administrative rules or state statutes in other contexts.

> "*See Cornelius First v. City of Cornelius*, 52 Or LUBA 486, 495 (2006) (generalized arguments about lack of justification for commercial zoning are insufficient to raise an issue under Goal 9 (Economic Development) or the Goal 9 rule where neither Goal 9 nor the Goal 9 rule were cited and no issue was raised regarding the substantive requirements of Goal 9 or the Goal 9 rule); *Cox v. Yamhill County*, 29 Or LUBA 263, 266 (1995) (general argument that good farm land should not be used for a church insufficient to raise an

> issue under OAR 660-033-0120 which prohibits churches on high value farm land); *Spiering v. Yamhill County*, 25 Or LUBA 695, 712 (1993) (no issue raised regarding the ORS 215.296 EFU zone standards where the statute was not cited and none of the operative terms of the statute were employed in petitioner's arguments below)[.]" *Id*.

But *Savage* and the cases cited in *Savage* are inapposite here. The criterion 4 substantial impairment criterion is a straightforward, subjectively worded criterion; it does not impose a structured, step-by-step analysis requirement like parts of the TPR and Goal 9 rule do. Under the reasoning in *Boldt*, the local appellants adequately raised an issue under criterion 4, so that the issue was properly presented in their appeal to the city council under TZO 33.2(A), if the written or oral testimony before the city council was sufficient to raise an issue regarding the "subject matter of" criterion 4. *Boldt* at 626. And as we have already explained, the subject matter of criterion 4 is whether the proposed conditional use will substantially limit, impair or prevent uses that are permitted in the zone. *See* n 2.

Turning first to the testimony that was presented to the planning commission during the January 3, 2013 hearing, intervenor Aufdermauer testified, in part, as follows:

> "I'm Don Aufdermauer. I am kind of speaking also on behalf of Dennis Johnson at Coastwide and he had some concerns. * * * If he owns the property that they are going to go on through and he had concerns about if the building – *if the building blew down, burnt down, is it going to be rebuilt, what I gathered the County or the City would give him a year, but bottom line is it would be up to the PUD to okay whatever he wanted to do I guess is what I gathered*.
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> "* * * * *
>
> "And what are these businesses going to be worth? These people have owned those businesses – there's some Union jobs down there and some other good paying jobs you know? Are we going to run them out too, you know? * * * Petition for Review 5.

In its December 31, 2013 letter, the Tillamook County Creamery Association makes the following points:

> "1. Constructing a transmission line along the Front Street Right-of-Way thwarts community renovation and enhancement plans for the

> Tillamook City core. The City of Tillamook has discussed enhancing the core of downtown Tillamook by renovating properties along Front and First Streets. *Constructing a transmission line in this area effectively 'freezes' development as it is now and limits the opportunity for future development*.
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> "2. Use and value of TCCA's property will be reduced by its proximity to the transmission line. While the TCCA warehouse is vital to the continued operation of the Farm Store it is not the best and highest use of the property. *Use restrictions within the Right-of-Way will reduce development opportunities and the value of the TCCA property*." Record 260 (emphases added).

The city council found that the criterion 4 issues were preserved for their consideration by the above testimony and letter and by other unidentified "discussions before the Planning Commission:"

> "* * * The City Council determined the record demonstrates that the issues identified in the appellants' notice of appeal were generally raised by appellants, and were also raised in other discussions before the Planning Commission prior to the close of the hearing, and were therefore properly before the City Council." Record 51.

The above-quoted testimony and letter, particularly the emphasized parts, were sufficient to raise the criterion 4 issue that the city council ultimately relied on to deny the application. That issue is whether existing uses within the 100-foot wide power line easement will be allowed to remain and whether other uses permitted in the applicable zones will be allowed to be constructed in the future. We discuss that issue in more detail under the second assignment of error.

Petitioner concedes that the planning commission recognized the criterion 4 issue raised by the testimony before them, and discussed it before voting to approve the application. Petition for Review 11. Therefore, the testimony before the planning commission was sufficient to serve the apparent purpose of TZO 33.2(A), which presumably is to give the decision maker fair notice that the issue is presented. We reject petitioner's arguments to the contrary.

Petitioner also contends the planning commissioners themselves, as decision makers, could not raise criterion 4 issues, since only participants can raise and preserve issues for appeal. We agree with petitioner. *Fleming v. City of Albany*, 54 Or LUBA 168, 173 (2007). However, although the city council's reference to "other discussions before the Planning Commission prior to the close of the hearing" could be understood to refer to the planning commissioners' deliberations, that reference could just as easily be to other discussions by the parties. We do not understand the city council or intervenors to rely on the planning commissioners' deliberations in arguing that the criterion 4 issue presented to the city council and presented to LUBA in this appeal was raised.

Because we conclude the criterion 4 issue presented in the second assignment of error was adequately raised to preserve that issue for the appeal to the city council under TZO 33.2(A), it follows that petitioner's first assignment of error must be denied.

**SECOND ASSIGNMENT OF ERROR**

The city council found that petitioner did not carry its burden of proof under criterion 4 with regard to the properties that are located within the corridor and will be subject to easements. Petitioner's application explained how properties in the corridor would be affected:

> "After construction, the corridor will be used by the PUD as needed to perform inspection and maintenance work on the transmission line. The corridor under and around the transmission line can continue to be used for its current purpose if the landowner chooses to do so, *as long as the use does not conflict with the safe operation of the line and meets the National Electric Safety Code (NESC), Rural Utilities Services (RUS), and PUD standards for clearances and uses.* Allowed uses typically include agricultural, grazing, hunting, and some development such as parking lots or roads. *Uses that are disallowed include development of buildings or any use that degrades the required ground-to-line clearances as stipulated by the NESC, RUS, and PUD standards.*" App 2-2 (emphases added).

The city council's findings that petitioner failed to carry its burden of proof with regard to the impact the corridor would have on existing and future uses and buildings include the following:

> "(1). The transmission line corridor can continue to be used for its current use and purpose so long as the use does not conflict with the safe operation of the line and meets the NESC, RUS, and PUD standards for clearances and use. There is no evidence in the record, however, that existing uses of property within the easement corridor comply with the applicable safety and electrical standards and will be allowed to remain. As a result, the City Council finds the Applicant has not met its burden of proof of demonstrating that the proposed transmission line will not substantially limit, impair or prevent existing uses of properties within the proposed 100 foot corridor.
>
> "(2) Future redevelopment or new development of buildings and other aboveground structures will be substantially impaired or limited within the easement corridor and specifically within close proximity to the transmission line. Uses that are not permitted are development of buildings or any use that degrades the required ground-to-line clearances as stipulated by the NESC, RUS, and PUD standards. There is no evidence in the record demonstrating what future redevelopment or new development of buildings and other aboveground structures will be allowed within the easement corridor. As a result, the City Council finds the Applicant has not met its burden of proof demonstrating that the proposed transmission line will not substantially limit, impair or prevent future redevelopment or new development of buildings and other aboveground structures o[n] properties within the proposed 100 foot corridor. Record 67 (underlining added).

Petitioner challenges the city council's findings that there "is no evidence in the record" that existing uses will be allowed to remain within the easement or that future uses that are permitted by the applicable zone can be constructed in the future. Petitioner first points out that it took the position below that the "[t]ransmission line will accommodate existing above-ground buildings/structures." Record 240. Petitioner also points out that there is evidence that redevelopment or new development may be allowed within the corridor.

In the petition for review, petitioner selectively quotes the underlined portion of the second sentence of the first paragraph of findings "[t]here is no evidence in the record, however, that existing uses of property within the easement corridor … will be allowed to remain." Petition for Review 17. In doing so Petitioner changes the meaning of the finding

and its evidentiary challenge is therefore directed at a finding the city council did not adopt. The second sentence of the first finding finds that there is no evidence in the record that existing uses "comply with the applicable safety and electrical standards," as they must if they are to be allowed to remain. If there is evidence in the record that all or any of the existing structures that will be subject to the easement "comply with the applicable safety and electrical standards," and therefore will be allowed to remain, petitioner does not point us to that evidence. We reject petitioner's evidentiary challenge to the first paragraph of findings addressing existing uses.

Petitioner's challenge to the second paragraph of findings is similarly off-target. Petitioner suggests, by quoting the underlined sentence but without quoting the preceding sentence for context, that the city council found there is no evidence that any future uses could be approved in the corridor. When the underlined sentence in the second paragraph is read together with the preceding sentence it is clear that the city council was continuing with the same concern regarding potential future uses in the corridor that led to the first paragraph of findings addressing existing uses—that the necessity that any future structures in the corridor must comply with NESC, RUS, and PUD standards leaves it uncertain whether any new structures could be constructed in the easement in the future. We reject petitioner's evidentiary challenge to the city's findings concerning criterion 4.

Petitioner also argues the city erred by considering the impact of the corridor limitations on uses at all:

> "At the outset, it is important to note that the 'easement corridor' is a management tool Tillamook PUD uses in conjunction with its overhead transmission lines and is not a 'land use' that requires approval from the City or any other jurisdiction. * * *
>
> "* * * Thus, the impacts of the easement corridor should not be a consideration of the conditional use permit at all, because the ultimate scope of the easement is wholly within the control of the underlying property owner, who is in the best position to determine what impacts he or she is willing to accept on the property. The underlying property owner will either be the

> existing property owner, who elects to impose restriction by negotiating easement terms, or be Tillamook PUD in the event of a condemnation proceeding. The City Council should therefore have limited its review to the actual development being proposed in the application which consisted only of the transmission lines and support poles. * * *" Petition for Review 16.

Petitioner appears to argue that in applying criterion 4 the city council should have focused exclusively on the towers and transmission lines and should not have considered the fact that limits on existing and future development within the corridor may be negotiated or acquired by eminent domain as petitioner acquires the easements necessary to establish the corridor and construct the transmission line.

Intervenors first contend that this issue was never raised below and it therefore was waived under ORS 197.763(1); 197.835(3). We agree with intervenors. Petitioner explained to the city council that the easements would be negotiated with individual property owners and that the property owners presumably would agree with any limitations petitioner might negotiate with those property owners. But petitioner cites to nothing in the record that suggests petitioner ever took the position below that in applying criterion 4 the city council must ignore any limits that might be imposed on future or existing uses in the corridor through the negotiated or condemned easements.

And even if the issue had not been waived, petitioner's contention that the potential for limits on existing and future uses in the easement corridor should not have been considered in applying criterion 4 is without merit. Although not determinative, the application itself describes the corridor as one of the "Project Components." App 2-1. More to the point, it is an artificial and incorrect characterization to claim that the possible limits on existing and future uses in the corridor are a product of the negotiated and condemned easements and not a product of the power transmission line. The application explains that the reason those limits might be imposed through the easements is to ensure that the transmission line complies with "the National Electric Safety Code (NESC), Rural Utilities Services (RUS), and PUD standards for clearances and uses." App 2-2. But for the proposed

construction of the power transmission line, there would be no reason to impose any limits on uses through the easements.

Finally, petitioner suggests that any limits on existing or future uses should be ignored because those limits would be agreed to willingly or with compensation. Criterion 4 requires that the city find that "[t]he proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or prevents the use of surrounding properties for the permitted uses listed in the underlying zone." We need not decide here whether the city *could*—under the deferential standard of review that is required under *Siporen*—interpret criterion 4 such that alterations that the city found would otherwise violate criterion 4 would nevertheless be permissible under criterion 4 if the affected property owners agreed to the alteration, with or without compensation. It is clear that the city council did not adopt such a limited view of criterion 4, and there is certainly nothing in the text of criterion 4 that compels such an interpretation.

The second assignment of error is denied.

The city's decision is affirmed.