BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LAMAR OUTDOOR ADVERTISING CO.,
Petitioner,

vs.

CITY OF TIGARD,
Respondent.

LUBA Nos. 2013-085/090

FINAL OPINION
AND ORDER

Appeal from City of Tigard.

Brooks M. Foster, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Chenoweth Law Group.

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

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

AFFIRMED 06/04/2014

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals two decisions by the city revoking two previous approvals for replacement of billboard faces.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to alleged "new matters" raised in the response brief. The city opposes the reply brief and argues that the reply brief does not respond to "new matters" but instead responds to the merits of arguments made in the petition for review. We tend to agree with the city that the reply brief address responses in the response brief that are not appropriately characterized as "new matters" within the meaning of OAR 661-010-0039. However, the disputed responses and replies seem peripheral to resolving the merits of this appeal, and the effort necessary to resolve the dispute would benefit no party. Accordingly, the reply brief is allowed.

FACTS

Petitioner applied to replace the sign faces on two billboards it owns within the city. On April 16, 2013, an associate planner for the city approved petitioner's application to replace an existing fourteen foot by forty-eight foot (672 square feet) sign face, located at 10185 S.W. Cascade Avenue (the Cascade Sign), with an identically-sized light emitting diode (LED)-faced sign. The Cascade Sign is located on property zoned Mixed Use Commercial (MUC). On April 30, 2013, the same associate planner for the city approved petitioner's application to replace another 672-square foot sign face, located at 16358 S.W. 72nd Street (the 72nd Street Sign), with an identically-sized LED-faced sign. The 72nd Street Sign is located on property zoned Light Industrial

(I-L). We refer in this opinion to the April 16, 2013 approval and the April 30, 2013 approval as the April Sign Approvals.

On August 19, 2013, a different associate planner sent an email message to petitioner's representative stating that "the City finds it necessary to revoke" the previous approval of the 72nd Street Sign. Record 14. That August 19, 2013 email message takes the position that the city's approval of the 72nd Street Sign "is not consistent with the provisions of the Tigard Development Code," but does not include any detailed explanation for the city's reasons for revoking the previously approved 72nd Street Sign. On August 28, 2013, the city's assistant community development director sent a letter to petitioner's attorney that states that the city's approval of the Cascade Sign is "hereby rescinded * * *." Record 1. The August 28, 2013 letter takes the position that various provisions of the Tigard Development Code (TDC) do not allow the sign to be approved. Petitioner filed two LUBA appeals. On September 9, 2013, petitioner appealed the associate planner's decision to revoke the 72nd Street Sign approval and on September 18, 2013, petitioner appealed the assistant community development director's decision to revoke the Cascade Sign approval. Those appeals were consolidated for LUBA review.

In a February 12, 2014 order, we denied the city's motion to dismiss the appeals based on the exception to our jurisdiction at ORS 197.015(10)(b)(A), which excludes from the definition of "land use decision" in ORS 197.015(10)(a) a decision of a local government that "is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." *Lamar Outdoor Advertising Co. v. City of Tigard*, __Or LUBA __ (Order, LUBA Nos. 2013-085/090, February 12, 2014). We concluded that the

city's decisions to revoke the April Sign Approvals required interpretation of the relevant TDC provisions.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error is that the city erred in revoking the April Sign Approvals. The first assignment of error contains five subheadings in support of the assignment of error.

A. The City's Interpretation of the TDC

In its first and second subheadings under the first assignment of error, petitioner argues that the city erred in concluding that the April Sign Approvals were issued in conflict with the TDC, and argues that the signs are allowed under the relevant provisions of the TDC. In these arguments, we understand petitioner to argue that the city "[i]mproperly construed the applicable law[]" in revoking the April Sign Approvals. ORS 197.835(9)(a)(D).[1]

---

[1] ORS 197.835(9) provides in part:

> "In addition to the review under subsections (1) to (8) of this section, the board shall reverse or remand the land use decision under review if the board finds:
>
> "(a) The local government or special district:
>
> "(A) Exceeded its jurisdiction;
>
> "(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
>
> "(C) Made a decision not supported by substantial evidence in the whole record; [or]
>
> "(D) Improperly construed the applicable law[.]"

In the challenged decisions, the city explains that "it was not within the City's authority to approve permits at the time of their issuance (TDC 18.210.070)," and that issuance of the April Sign Approvals was "inconsistent with the provisions of the TDC." Record 1. That is so, according to the city, because the signs are "electronic information signs" or "electronic message centers" (EMCs) and EMCs are one of the many types of "special condition signs" regulated under TDC 18.780.090 that are allowed only in specified zones in the city.[2]

TDC 18.780.090 provides in relevant part:

"**Special Condition Signs**

> "A. Applicability. Special-condition signs shall have special or unique dimensional, locational, illumination, maximum number or other requirements imposed upon them in addition to the regulations contained in this chapter.
>
> " * * * * *
>
> "D. Electronic message centers.
>
> "1. Electronic message center (variable message) sign regulations shall be as follows:

---

[2] TDC 18.780.015.A.18 defines "[e]lectronic information sign" to mean "signs, displays, devices or portions thereof with lighted messages that change at intermittent intervals, each lasting more than two seconds, by electronic process or remote control. Electronic information signs are not identified as rotating, revolving or moving signs. *Also known as an * * * electronic variable message center*." (Emphasis added.) There is no dispute in this appeal that the signs petitioner seeks to install are "electronic information signs" and we and the parties use the terms "electronic message center" or "EMC" synonymously with "electronic information sign."

"a. Electronic message center signs shall be permitted only in the C-G and MU-CBD zones, and at schools that front an arterial street where the sign is not less than 200 feet from an abutting residential use and is oriented to the arterial street;

"b. The maximum height and area of an electronic message center sign shall be that which is stipulated in Section 18.780.130;

"c. An electronic message center shall be allowed to substitute for one freestanding sign or one wall sign;

"d. One electronic message center sign, either freestanding or wall-mounted, shall be allowed per premises;

"e. With regard to light patterns:

"(1) Traveling light patterns ('chaser effect') shall be prohibited;

"(2) Messages and animation shall be displayed at intervals of greater than two seconds in duration." (underlining in original).

We refer in this opinion to TDC 18.780.090.D as the EMC Regulations. According to the city, under subsection 1.a of the EMC Regulations, EMCs are allowed only in the C-G and the MU-CBD zones and at certain schools, and are not allowed in the MUC or the I-L zones, the zones where they are proposed to be located. We refer to subsection 1.a in this opinion as the Zoning District Limitation Provision.

Petitioner, on the other hand, cites subsection 1.c of the EMC Regulations, and argues that the provision allows petitioner to substitute an EMC for each of its existing freestanding signs in any zone. We refer to subsection 1.c in this opinion as the Substitution Provision. According to

petitioner, the structure of the EMC Regulations does not subordinate the Substitution Provision to the Zoning District Limitation Provision because they are both subsections under subsection 1 of the EMC Regulations.

In its response brief, the city takes the position that the EMC Regulations are conjunctive rather than disjunctive. Stated differently, the city's position is that an application for an EMC must satisfy TDC 18.780.090.D.1.a through e. According to the city, then, an applicant could rely on the Substitution Provision to substitute an EMC for a freestanding sign only in one of the zoning districts that allows EMCs, or at a qualifying school, as specified in the Zoning District Limitation Provision, and only if the proposed EMC complies with the remaining height, quantity, and light pattern requirements in the other subsections of the EMC Regulations: b., d., and e.

We review the city assistant community development director's interpretation of the relevant TDC provisions to determine whether it is correct. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995); *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323 (1988). The methodology that we are required to apply in deciding the meaning of the relevant TDC language, so that we can determine if the city correctly interpreted that language, is set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Under that methodology we look first at text, context and any available legislative history.

Looking first at the text of the relevant TDC provisions, we conclude that the city's interpretation is correct and is consistent with the text of the EMC Regulations themselves. First, although the word "and" does not appear in the EMC Regulations, the structure of the EMC Regulations is clearly

conjunctive or cumulative. The Zoning District Limitation Provision in subsection 1.a is a limit on where EMCs can be located. Subsection 1.b of the EMC Regulations adds height and area limits to EMCs in those two zones and at certain schools. Subsection 1.d further limits EMCs in the two zones and at certain schools to one EMC per premises. And subsection 1.e limits light patterns on EMCs in the two allowed zones and at certain schools.

Although the meaning and function of the Substitution Provision could be clearer, petitioner's interpretation of the Substitution Provision as a stand-alone provision that allows an EMC to substitute for one freestanding sign or one wall sign even if it fails to comply with all of the other EMC Regulations is difficult to square with the text of the EMC Regulations.[3] The city's interpretation is the better interpretation of all of the relevant text.

Further, the city's interpretation is supported by other parts of the TDC. For example, TDC 18.780.130 is referenced in subsection 1.b of the EMC Regulations, and contains the city's "Zoning District Regulations." TDC 18.780.130.C.4 provides that in the C-G and MU-CBD zones, the same zones

---

[3] TDC 18.780.015(23) defines "[f]reestanding sign" to mean "a sign erected and mounted on a freestanding frame, mast or pole and not attached to any building." TDC 18.780.015(8) defines "[b]illboard" to mean "a freestanding sign in excess of the maximum size allowed, with adjustments, in the locations where it is located or proposed to be located. Billboards are prohibited by Tigard Municipal Code 18.780.070.M, Certain Signs Prohibited."

As we understand it, the city takes the position that petitioner could substitute an EMC for a "freestanding sign" that is a "billboard" if the proposed EMC also complies with the remaining requirements of the EMC Regulations. Response Brief 4-5.

expressly referenced in the Zoning Limitation Provision, "[e]lectronic message centers per [TDC] 18.780.090.D shall be permitted". No other zoning district regulated under TDC 18.780.130 expressly provides that EMCs "shall be permitted," although all zones generally allow "[s]pecial condition signs in accordance with TDC 18.780.090[.]" Additionally, some of the other "Special Condition Signs" regulated under TDC 18.780.090 contain locational limits similar to the Zoning District Limitation Provision: bench signs are permitted at designated transit stops only in commercial, industrial and certain specified residential districts (TDC 18.780.090.B.1); freeway-oriented signs are permitted only in certain zoning districts (TDC 18.780.090.E.2); and awning signs are specifically permitted in all zoning districts (TDC 18.780.090.F.1). Thus the city's reading is consistent with other provisions of the TDC limiting special condition signs to specified zoning districts.

Finally, relevant context provided by other parts of the TDC demonstrates that the city regulates signs within the city in a fairly stringent manner. For example, billboards are prohibited within the city and changes to existing billboards are strictly regulated. TDC 18.780.070.M (prohibiting billboards); TDC 18.780.110 (requiring all nonconforming signs to be immediately brought into compliance if the sign is structurally altered, relocated, or replaced). As described above, the city also regulates particular signs, including EMCs, in a fairly stringent manner. Petitioner's interpretation would allow an EMC of any size, in any zone, where an existing billboard is located. The narrower city interpretation is more consistent with the city's prohibition on billboards and strict regulation of alterations to existing billboards, and of EMCs.

Accordingly, the city did not err in concluding that the April Sign

Approvals were inconsistent with the TDC.

B. The City's Authority to Revoke the April Sign Approvals

In the third subheading under the first assignment of error, we understand petitioner to argue that the city "[e]xceeded its jurisdiction" in revoking the April Sign Approvals. ORS 197.835(9)(a)(A). Petitioner argues that the city erred in revoking the April Sign Approvals because the April Sign Approvals are final land use decisions that were not appealed. However, as we explain above, the city concluded that "it was not within the City's authority to approve the permits at the time of their issuance (TDC 18.210.070)." Record 1. TDC 18.210.070.B provides in relevant part that "[a]ny permit or approval issued or granted in conflict with the provisions of this chapter shall be void." The city relied on TDC 18.210.070.B and petitioner has not explained why that provision fails to provide the city with the authority to revoke the April Sign Approvals. Accordingly, the arguments under the third subheading provide no basis for reversal or remand of the decisions.

C. Applicable Criteria

ORS 227.178 provides in relevant part that for an application for a "permit" as defined in ORS 227.160(2) "* * * approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted." ORS 227.178(3). In the fourth subheading under the first assignment of error, petitioner argues that the city violated the statute in deciding to revoke the April Sign Approvals. Citing *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993) and *Holland v. City of Cannon Beach*, 154 Or App 450, 459, 962 P2d 701 (1998), petitioner argues that the city's interpretation of the TDC set out in the challenged decisions "involves new criteria adopted months after the permits

were granted and not appealed." Petition for Review 22. Petitioner also argues that the city "retroactively appl[ied] a preferred interpretation of its code to revoke permits that were previously granted and became final consistent with a reasonable and plausible interpretation of the code." *Id*.

First, for the reasons we explain below in our resolution of the second assignment of error, petitioner has not established that either the April Sign Approvals or the challenged decisions fall within the definition of "permit" at ORS 227.160(2). Accordingly, ORS 227.178(3), which applies to decisions on an application for a "permit," simply does not apply to the city's decision.

Second, even assuming for purposes of this opinion that the April Sign Approvals and the challenged decisions are "permit[s]," *Davenport* and *Holland* are inapposite. *Davenport* involved the city's application of newly adopted but not yet acknowledged amendments to its transportation map to an application for a permit that was submitted one day after the map amendments were adopted. The Court of Appeals agreed with LUBA that the city erred in applying the unacknowledged transportation map amendments rather than the acknowledged, unamended map. No newly adopted criteria are involved in the city's decision to revoke the April Sign Approvals.

Holland involved the city's denial, on remand from LUBA, of an application for a subdivision based on slope and density standards that the city in its initial decision had interpreted not to apply to the subdivision application. The Court of Appeals held that the city erred on remand in attempting to circumvent ORS 227.178(3) by re-interpreting the standards to apply during the course of the proceedings.

Holland also does not assist petitioner. In the present appeal, petitioner argues that the city impermissibly applied a different interpretation of the TDC

in its decision to revoke the April Sign Approvals than the interpretation the city initially applied in approving them. However, there is nothing in the record that contains a city interpretation of the relevant TDC provisions that it applied in issuing the April Sign Approvals. As the city explains, the city's decision to issue the April Sign Approvals was not based on an interpretation of the TDC, it was simply a decision that conflicted with the relevant provisions of the TDC. Put another way, it was not a decision based on any interpretation; it was a wrong decision and one that conflicted with the TDC. As explained above, TDC 18.210.070.B provides that "[a]ny permit or approval issued or granted in conflict with the provisions of this chapter shall be void." The city did not err in revoking the April Sign Approvals based on the applicable provisions of the TDC.

D. Equitable Estoppel

In the fifth subheading under the first assignment of error, petitioner argues that the doctrine of equitable estoppel bars the city from revoking the April Sign Approvals. We understand petitioner to argue that equitable estoppel principles require LUBA to reverse the city's decision to revoke the April Sign Approvals.[4]

---

[4] ORS 197.835 sets out LUBA's scope of review and requires LUBA to adopt rules defining the circumstances in which it will reverse rather than remand a land use decision that is not affirmed. Those rules are set out in OAR 661-010-0071(1) and (2).

Additionally, ORS 197.835(10)(a)(A) and (B) require LUBA to reverse a local government decision and order the local government to approve an application for development that was denied by the local government if, in relevant part "the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing

LUBA has questioned on numerous occasions whether LUBA has authority to decide an appeal based on equitable estoppel principles.[5] LUBA has exclusive jurisdiction to review land use decisions "in the manner provided in ORS 197.830 to 197.845." ORS 197.825(1). We continue to question whether LUBA has authority under ORS 197.830 to 197.845 to decide an appeal based on equitable estoppel theories.

However, as in each of the cases cited in the margin LUBA concluded that even if a LUBA appeal could be decided based on equitable estoppel theories, in the circumstances presented in those appeals there was no equitable estoppel, making it unnecessary to decide the question. This is another such case. The elements of estoppel were set out in *Coos County v. State of Oregon*, 303 Or 173, 734 P2d 1348 (1987):

> "[T]here must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; [and] (5) the other party must have been induced to act upon it." *Id*. at 180-81 (quoting *Oregon v. Portland Gen. Elec. Co.*, 52 Or 502, 528, 95 P 722 (1908)).

Petitioner does not attempt to demonstrate that any of the five elements of estoppel set out in *Coos County v. State of Oregon* are present here.

---

ordinances" or "the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or ORS 227.178." Petitioner does not cite ORS 197.835(10)(a) or argue that the city's decisions must be reversed pursuant to the statute.

[5] *Chaves v. Jackson County*, 56 Or LUBA 643, 645 (2008); *Heidgerken v. Marion County*, 35 Or LUBA 313, 323 (1998); *Mazeski v. Wasco County*, 30 Or LUBA 442, 446 *n* 4 (1995); *Pesznecker v. City of Portland*, 25 Or LUBA 463, 466 (1993); *Lemke v. Lane County*, 3 Or LUBA 11, 15, *n* 2 (1981).

Accordingly, petitioner's argument provides no basis for reversal or remand of the decision. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218 (1982) (denying assignment of error due to the petitioner's failure to sufficiently develop it.)

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In its second assignment of error, petitioner argues that the city committed a procedural error that prejudiced its substantial rights in failing to process its decisions to revoke the April Sign Approvals in accordance with the procedures in ORS 227.175(3) and (10) that apply to a "permit," as defined in ORS 227.160(2).[6] ORS 197.835(9)(a)(B). Petitioner first argues that the April Sign Approvals are ORS 227.160(2) "permit[s]" (statutory permits). Petition for Review 28. Based on that argument, petitioner next argues that a decision to revoke a statutory permit is also a statutory permit subject to the procedural requirements of ORS 227.175(3) and (10), including a right of local appeal. Petitioner argues in relevant part that "* * * the revocations at issue here should also be considered permit decisions because they are tantamount to a decision to deny the permits." Petition for Review 29.

---

[6] ORS 227.175(3) requires the city to hold at least one public hearing on an application for a permit, unless the city processes the permit application according to the statutory procedures for a city decision on an application for an ORS 227.160(2) permit that is made without a prior hearing. Those procedures are set out and described in detail at ORS 227.175(10)(a) through (c).

ORS 227.160(2) defines "permit" to mean "discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation."

First, we reject petitioner's assertion that the April Sign Approvals are statutory permits. Petitioner does not develop or otherwise explain why the April Sign Approvals are statutory permits and does not identify any discretionary approval standards that the city either applied or should have applied in issuing the April Sign Approvals.[7] Absent any identification by petitioner of any discretionary standards that the city either applied or was required to apply in issuing the April Sign Approvals, we disagree with petitioner that the April Sign Approvals are "permit[s]" as defined in ORS 227.160(2). Accordingly, petitioner's second assignment of error provides no basis for reversal or remand of the decisions.

Second, even if the April Sign Approvals are statutory permits, petitioner has not established that a permit revocation proceeding is a proceeding on an application for a "permit" that is subject to ORS 227.175(3) and (10). Nothing in the language of ORS 227.175(3) or (10) supports the conclusion that an action to revoke a previously issued statutory permit is necessarily also a statutory permit.

The second assignment of error is denied.

The city's decision is affirmed.

---

[7] The city's Sign Code at TDC 18.780 contains standards allowing different types of signs as long as those signs meet height and other objective requirements. *See* TDC 18.780.085 (setting out sign measurements for various types of signs); TDC 18.780.090 (setting out additional special dimensional, locational, illumination, maximum number and other requirements in addition to other applicable regulations); TDC 18.780.100 (regulating the types and locations of temporary signs).