BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES LONG,
Petitioner,

vs.

CITY OF TIGARD,
Respondent,

and

STAFFORD DEVELOPMENT COMPANY, LLC,
Intervenor-Respondent.

LUBA No. 2017-015

FINAL OPINION
AND ORDER

Appeal from City of Tigard.

Kenneth P. Dobson, Portland, filed the petition for review and argued on behalf of petitioner.

Shelby Rihala, Lake Oswego, filed a joint response brief and argued on behalf of respondent. With her on the brief was Jordan Ramis, PC.

Andrew H. Stamp, Lake Oswego, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Andrew H. Stamp, PC.

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

AFFIRMED 06/07/2017

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 approves comprehensive plan and zoning map amendments and approves a planned development concept plan.

FACTS

A Fred Meyer shopping center is located on the north side of Highway 99W, between the intersections of Highway 99W with Interstate-5 and Highway 217. Spruce Street runs along the backside of the Fred Meyer shopping center in an east-west direction. The subject property is located on the north side of Spruce Street, directly behind the Fred Meyer shopping center, so that the Fred Meyer shopping center and Spruce Street separate the subject property from the heavily travelled Highway 99W.

The subject property is made up of three parcels that total 1.54 acres. The subject property is currently designated Professional Commercial (C-P) on both the city comprehensive plan map and zoning map. The challenged decision changes those comprehensive plan map and zoning map designations to Medium Density Residential and Residential R-12 respectively. The challenged decision also grants planned development concept plan approval for 18 attached dwelling units with common open space.

FIRST ASSIGNMENT OF ERROR

In his arguments before the city, petitioner argued that after a city has enacted a comprehensive plan and zoning ordinance, a change in a property's zoning is only appropriate if the change is "consistent with the overall objectives of the plan and in keeping with changes in the character of the area or neighborhood to be covered thereby." Record 36 (citing *Smith v. Washington County*, 241 Or 380, 383-84, 406 P2d 545 (1965)). Petitioner argued the challenged comprehensive plan and zoning map amendments are not based on any change in the neighborhood other than a general increase in the population, and therefore constitute impermissible "spot zoning." Record 36-37. Petitioner argued below that Tigard Community Development Code (TCDC) 18.380.030(b) sets out the procedures and standards for quasi-judicial zoning map amendments.[1] TCDC 18.380.030(B)(3) requires "[e]vidence of

[1] TCDC 18.380.030(B) provides:

> "Standards for making quasi-judicial decisions. A recommendation or a decision to approve, approve with conditions or to deny an application for a quasi-judicial amendment shall be based on all of the following standards:
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> "1. Demonstration of compliance with all applicable comprehensive plan policies and map designations;
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> "2. Demonstration of compliance with all applicable standards of any provision of this code or other applicable implementing ordinance; and

change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or zoning map * * *." We do not understand petitioner to argue that the common law prohibition against "spot zoning" remains viable in Oregon's now heavily regulated land use planning environment. *See NWDA v. City of Portland*, 47 Or LUBA 533, 571 (2004), *aff'd in part and rem'd in part on other grounds*, 198 Or App 286, 108 P3d 589, *rev den*, 338 Or 681 (2005) ("Given the ubiquity of land use regulations in today's regulatory environment, it is doubtful that the spot zoning standard described in *Smith* continues to have independent application. In other words, it seems highly unlikely that a rezoning decision could satisfy all applicable criteria and yet constitute arbitrary or spot zoning under *Smith.*") Rather we understand petitioner to argue the challenged rezoning violates the "change or mistake" standard set out at TCDC 18.380.030(B)(3). *See* n 1.

In his first assignment of error, petitioner also argues the rezoning violates TCDC 18.380.030(B)(1), which requires that a zoning map amendment must comply with "applicable comprehensive plan policies." Petitioner contends the rezoning is inconsistent with Tigard Comprehensive Plan (TCP) Land Use Planning Policy 15 D (Policy 15 D), which requires an applicant for rezoning to demonstrate there is "an inadequate amount of

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> "3. Evidence of change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application."

developable, appropriately designated, land for the land uses that would be allowed by the new designation."[2] We address petitioner's TCDC 18.380.030(B)(3) and Policy 15 D arguments below.

A. TCP Policy 15 D – Inadequate Residentially Zoned Land for Residential Uses

Intervenor argues petitioner failed to raise any issue concerning whether the challenged map amendment complies with Policy 15 D and therefore has waived his right to raise that issue for the first time at LUBA.

ORS 197.763(1) 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."

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[2] TCP Policy 15 provides, in part:

> "In addition to other Comprehensive Plan goals and policies deemed applicable, amendments to Tigard's Comprehensive Plan/Zone Map shall be subject to the following specific criteria:
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> "* * * * *
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> "D. Demonstration that there is an inadequate amount of developable, appropriately designated, land for the land uses that would be allowed by the new designation[.]"

Relatedly, ORS 197.835(3) provides that in a LUBA appeal "[i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."[3]

Petitioner did not file a reply brief to respond to intervenor's waiver argument. LUBA routinely allows reply briefs to respond to waiver arguments. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16, 20 (2007); *Wetherell v. Dougals County*, 51 Or LUBA 699, *aff'd*, 209 Or App 1, 146 P3d 343 (2006); *Caine v. Tillamook County*, 24 Or LUBA 627 (1993). And a reply brief is the preferable way to respond to waiver arguments so that the issue that is the subject of the waiver argument and the precise places in the record where petitioner believes the issue was raised can be clearly identified. Waiting until oral argument to respond to numerous waiver challenges, such as we have in this appeal, increases the risk that the response will be inaccurate or inadequate and lead LUBA to conclude that issues were waived.

At oral argument, petitioner responded to intervenor's Policy 15 D waiver argument in two ways. First, petitioner argued the notice that preceded the November 21, 2016 planning commission meeting failed to list Policy 15 D as an applicable approval criterion, and therefore under ORS 197.835(4)

[3] There is no dispute that the challenged map amendment decision is a quasi-judicial decision and the city followed quasi-judicial procedures. ORS 197.763 therefore applies here.

petitioner is entitled to raise the issue presented in the first subassignment of error for the first time at LUBA.[4]

Petitioner's right to raise an issue concerning an applicable approval criterion that is not listed in the prehearing notice required by ORS 197.763(3) is a qualified right under ORS 197.835(4). LUBA may refuse to consider that issue if LUBA finds that notwithstanding the notice failure "the issues could have been raised before the local government[.]" *Van Dyke v. Yamhill County*, 35 Or LUBA 676, 687-88 (1999) (citing ORS 197.835(4)). In this matter, the staff report that preceded the November 21, 2016 planning commission hearing identified Policy 15 D as an applicable standard and included findings which concluded that the proposal complies with that policy. Record 101-102. That staff report discussion of Policy 15 D was incorporated into the planning commission's recommendation to the city council. Record 88-89. Petitioner therefore knew or should have known that Policy 15 D is an applicable

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[4] ORS 197.835(4) provides, in part:

> "(4) A petitioner may raise new issues to [LUBA] if:
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> > "(a) The local government failed to list the applicable criteria for a decision under ORS 197.195(3)(c) or 197.763(3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, [LUBA] may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government[.]"

approval criterion and petitioner knew or should have known that the planning commission believed that the proposal complied with Policy 15 D. Petitioner is not excused by ORS 197.835(4)(a) from his obligation to raise below the issue he now raises under this sub-assignment of error, *i.e.*, that the proposal does not comply with Policy 15 D.

Petitioner next argues that he adequately raised that issue in his testimony before the city council. Record 37, 73. Petitioner's testimony before the city council does not mention Policy 15 D or its operative terms and does not take the position that the applicant failed to demonstrate that there is an inadequate amount of R-12 zoned land. *See Spiering v. Yamhill County*, 25 Or LUBA 695, 712 (1993) (where testimony below does not refer to applicable rule or policy by title or abbreviation and does not employ operative terms of the rule or policy, a reasonable decision-maker would not have understood the issue was raised below, and petitioner may not raise the issue before LUBA). Petitioner also cites Record 127. The closest petitioner comes to raising the issue that the proposal does not comply with Policy 15 D is a single sentence in his testimony to the planning commission: "The city has not projected the population need for R-12." *Id*. That is not sufficient to raise the issue, particularly when that sentence is viewed with the statement petitioner later made to the city council: "There is a Deficiency of R-12 residential zoning as shown in the Angelo report." Record 67. That statement seems to take the

opposite position on the issue that petitioner now attempts to raise in this subassignment of error.

Because petitioner failed to raise below any issue concerning whether the proposal complies with Policy 15 D, the issue raised under this subassignment of error is waived.

Subassignment of error A is denied.

B. TCDC 18.380.030(B)(3) – Change in the Neighborhood or Mistake in Original Zoning

As stated earlier, TCDC 18.380.030(B)(3), one of the TCDC 18.380.030(B) criteria for rezoning, requires "[e]vidence of change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application."

The city's findings regarding TCDC 18.380.030(B)(3) are extensive. Intervenor argues those findings describe four separate changes in the neighborhood: (1) a shortage of affordable housing, (2) an increased demand for smaller lots to construct affordable housing, (3) an increase in traffic that could be mitigated by the requested change from commercial to residential zoning, and (4) an increase in demand for open space such as would be provided by the proposed development.

Petitioner dismisses the significance of and public benefit from the small amount of open space proposed, but petitioner does not really challenge the other findings other than to argue that "[t]o allow zoning map changes based on

just overall and inevitable growth by itself would invite chaos and dysfunction and render comprehensive plans largely useless." Petition for Review 20.

Because petitioner fails to acknowledge or challenge all of the ways the city found the property's neighborhood and the community have changed, this subassignment of error does not state a basis for reversal or remand. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132, 149 (2014), *rev'd and rem'd on other grounds*, 269 Or App 176, 344 P3d 503 (2015).

Subassignment of error B is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted earlier, the challenged decision approves a concept plan. TCDC 18.350.050(A) sets out a number of criteria for approval of a concept plan.[5]

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[5] TCDC 18.350.050 provides, in part:

"18.350.050 Concept Plan Approval Criteria

"A. The concept plan may be approved by the commission only if all of the following criteria are met:

"1. The concept plan includes specific designations on the concept map for areas of open space, and describes their intended level of use, how they relate to other proposed uses on the site, and how they protect natural features of the site.

"2. The concept plan identifies areas of trees and other natural resources, if any, and identifies methods for their maximized protection, preservation, and/or management.

The city adopted three pages of findings to address each of those criteria. Record 11-13. In five subassignments of error, petitioner challenges the findings that address the TCDC 18.350.050(A)(1) to (4) and (6) concept plan approval criteria.

Intervenor argues that petitioner waived all the subassignments of error under the second assignment of error, which challenge the city's findings that

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> "3. The concept plan identifies how the future development will integrate into the existing neighborhood, either through compatible street layout, architectural style, housing type, or by providing a transition between the existing neighborhood and the project with compatible development or open space buffers.
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> "4. The concept plan identifies methods for promoting walkability or transit ridership, such methods may include separated parking bays, off street walking paths, shorter pedestrian routes than vehicular routes, linkages to or other provisions for bus stops, etc.
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> "* * * * *
>
> "6. The concept plan must demonstrate that development of the property pursuant to the plan results in development that has significant advantages over a standard development. A concept plan has a significant advantage if it provides development consistent with the general purpose of the zone in which it is located at overall densities consistent with the zone, while protecting natural features or providing additional amenities or features not otherwise available that enhance the development project or the neighborhood."

those five criteria are satisfied. Intervenor argues petitioner never took the position below that the proposal violates those criteria.

At oral argument, petitioner's only response to intervenor's contention that petitioner waived all the issues presented under the second assignment of error was to cite the planning staff's position that the application only "minimally" meets several of the TCDC 18.350.050(A) concept plan approval criteria.[6] If we understand petitioner correctly, he takes the position that the following statement in his presentation to the city council, which references the staff report's proposed findings, is adequate to raise the issues presented in the second assignment of error, *i.e.*, that the city's findings fail to demonstrate that the proposal complies with the TCDC 18.350.050(A)(1) to (4) and (6) concept plan approval criteria:

> "The review criteria [are] loosey-goosey. Staff report says minimally meets the criteria not once, but multiple times. If the applicant proposes minimally meeting the criteria once (may be OK) but multiple times of just minimally meeting the criteria (It is not acceptable. We deserve better.) How many times do you want to be just 'minimal[']? The city can ask for more. Why doesn't [sic] make this a model/ask for something better? If they can't improve their proposal, negotiate with them." Record 69.

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[6] Petitioner cited Record 11-13, but those are pages of the city council's decision, not the planning staff report. The staff report to the planning commission appears at Record 97-109. The findings that the city council adopted at Record 11-13 appear to be identical to the recommended findings in the staff report to the planning commission that address TCDC 18.350.050(A). Record 106-08.

In addition to being a bit difficult to follow in places, the issue petitioner raised in the above-quoted text is simply not the issue he attempts to raise in the second assignment of error. In the second assignment of error, petitioner alleges the city's findings fail to demonstrate the proposal complies with the TCDC 18.350.050(A) concept plan approval criteria. In the above-quoted text, petitioner raises a different issue: that the city should require the proposal be modified so that it more than "just minimally" complies with the TCDC 18.350.050(A) concept plan approval criteria. Because petitioner has failed to demonstrate where he raised the issues below that he now attempts to raise under the second assignment of error, those issues are waived. ORS 197.763(1); 197.835(3).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner's final assignment of error concerns the city's failure to respond in a timely manner to petitioner's requests for a copy of the application that led to the appealed decision. That application appears at Record 185-266. Petitioner and other parties apparently had access to the application when this matter was pending before the planning commission and city council by visiting the planning department to view the application. But when some participants complained about not being able to obtain their own copy of the application, they were advised at the November 21, 2016 planning commission hearing that the application was available on the city's website. But that

apparently was not true, or at least the city does not contend in this appeal that the application was available on the city's website at that point in time. Petitioner also alleges the city denied several requests from petitioner and others for a copy of the application. The city does not deny that allegation. Although petitioner cites no local or statutory requirement that the city provide parties with a copy of the application upon request, we will assume the city committed a procedural error when it stated the application was available on the city's website, when it was not, and by refusing petitioner's requests for a copy of the application.[7]

It is not enough for petitioner to allege the city committed a procedural error. Petitioner must also establish that the procedural error prejudiced his substantial rights. ORS 197.835(9)(a)(B); *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498, 504 (1998).[8] And while petitioner attempts to assert the prejudice other participants below may have suffered as a result of

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[7] Petitioner also argues the notice posted on the subject property itself was difficult to read and fell over on the ground. Petitioner cites no legal standard regarding the required readability of the posted notice and no legal standard that requires the posted sign be maintained in any particular way. Absent a developed argument concerning the allegedly defective posted notice, we do not consider that argument further. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

[8] ORS 197.835(9)(a)(B) provides that LUBA may reverse or remand a local government land use decision if it finds the local government "[f]ailed to follow the procedures applicable to the matter before it *in a manner that prejudiced the substantial rights of the petitioner*." (Emphasis added.)

the city's failure to make copies of the application available, those participants are not parties to this LUBA appeal and petitioner is required to show *his* substantial rights were prejudiced. *Bauer v. City of Portland*, 38 Or LUBA 432, 436 (2000).

Although the city's failure to give petitioner his own copy of the application likely made it more difficult for petitioner to prepare and submit his case, we are not persuaded that the city's failure prejudiced petitioner's substantial rights. Petitioner concedes he was given access, throughout the planning commission's and city council's review, to the only copy of the application the city apparently had, although he had to travel to the planning department to review that application. In addition, the notice of hearing that petitioner received includes a copy of the proposed conceptual development plan from the application; and the planning staff report, which describes the application in great detail, was available to the parties. Record 97-109. Finally, petitioner concedes he was given a copy of the application on January 17, 2017, seven days before the city council's *de novo* January 24, 2017 public hearing. Record 68. While petitioner appeared and testified at the January 24, 2017 city council hearing, and complained about the city's delay in providing him with a copy of the application, petitioner did not request a continuance of the January 24, 2017 hearing to allow him more time to review the application and submit his objections. Had he done so, the city might well have granted his request. Based on these circumstances, viewed in their entirety, we conclude

petitioner's substantial rights were not prejudiced by the city's initial failures to provide him with a copy of the application.

The third assignment of error is denied.

The city's decision is affirmed.