

BEFORE THE LAND USE BOARD OF APPEALS FEB 3 4 49 PM '87

OF THE STATE OF OREGON

DOLORES BERARD, et al,)
) LUBA No. 86-082
Petitioners,)
) FINAL OPINION
vs.) AND ORDER
)
CITY OF PORTLAND,)
)
Respondent.)

Appeal from City of Portland.

Jackie Williams, Portland, filed the petition for review and argued on her own behalf.

Adrienne Brockman, Portland, filed a response brief and argued on behalf of Respondent City.

DuBAY, Chief Referee; BAGG, Referee; KRESSEL, Referee; participated in the decision.

AFFIRMED 02/03/87

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

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 This is an appeal from an approval of a zone change from
4 R-5 to R-2.5.

5 FACTS

6 The city approved an application for a zone change, a
7 variance and a subdivision. Approval of the eight lot
8 subdivision would permit construction of "zero lot line"
9 rowhouses. The variance exempts the lots from the lot coverage
10 requirement.

11 After the hearings officer approved all three requests,
12 Petitioner Jackie Williams appealed all three decisions to the
13 city council. Record 97. Williams later notified the city
14 that the appeal was directed only at the zone change approval.
15 Record 92, 94.

16 At the appeal hearing before the council, Petitioner
17 Williams appeared and gave both oral and written testimony.
18 The council denied the appeal, affirmed the hearings officer's
19 decision and adopted the findings of fact, conclusions and
20 decision of the hearings officer.

21 ASSIGNMENT OF ERROR

22 Petitioner Williams' alleges the council failed to give her
23 a fair hearing. Specifically, she charges the city council did
24 not allow her to make a full and complete presentation of her
25 objections to the decision. She alleges that members of the
26 council repeatedly interrupted her while she was speaking and

1 informed her she was taking too much time. She does not allege
2 anyone told her that her time was up. Instead, she says that
3 members of the council harrassed her by their manner, tone of
4 voice and repeated interruptions. As a result, she alleges she
5 prematurely ended her oral presentation and tendered her
6 written notes to the council.

7 Petitioner does not articulate a legal basis for her
8 claim. We read her petition to assert violations of the Due
9 Process clause of the U.S. Constitution. See Fasano v.
10 Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973).

11 In Fasano, supra, the court stated that the procedural
12 requirements for quasi-judicial land use proceedings include an
13 opportunity to present and rebut evidence. Fasano v.
14 Washington Co. Comm., supra at 588. This requirement, like the
15 other procedural rules stated in Fasano, has a constitutional
16 basis. West v. City of Astoria, 18 Or App 212, 524 P2d 1216
17 (1974). If the opportunity to present and rebut evidence is
18 denied, a remand is warranted for failure to meet
19 constitutional standards of due process. See 1000 Friends of
20 Oregon v. Wasco County Court, 80 Or App 532, ___ P2d ___
21 (1986).

22 For the reasons set forth below, we deny petitioners' claim
23 that her right to present and rebut evidence was so impaired
24 that the minimum requirements of due process were not met.

25 Petitioners allege that completion of their presentation
26 was prevented by some of the council's members. Petition at

1 2. However, petitioners provide no verbatim transcript of the
2 meeting to support the claim. Instead, they invite the Board
3 to listen to a tape recording of the council meeting.

4 We are reluctant to listen to the entire tape in search of
5 evidence supporting petitioners' due process claim. Our reason
6 is the same as stated in City of Salem v. Families For
7 Responsible Government, 64 Or App 238, 668 P2d 395 (1983). In
8 a footnote, the court stated:

9 "We decline to conduct an independent search of the
10 record for evidentiary support. Both LCDC and the
11 city should be intimately familiar with the record,
12 and we are not. When they are unwillingly or unable
13 to direct us to the documentary evidence upon which
14 the findings are based, we will assume that none
15 exists." City of Salem, supra at 249.

16 Petitioners stand on the same footing as respondents did in
17 the Salem case. They bear the burden of directing our
18 attention to the specific evidence in the record that supports
19 this claim. Petitioners have not done this.

20 However, the present circumstances warrant a departure from
21 our practice of refusing to search the record to find evidence
22 that the parties should identify for our review. Petitioners
23 are not represented by an attorney. The tape recording is not
24 long. These factors justify our review of the tape to assess
25 petitioners' claim.

26 The tape discloses that Petitioner Williams gave a lengthy
presentation. After more than twenty minutes, she was urged by
a council member to focus and speed up her testimony. However,
at no time was Petitioner Williams harrassed into yielding the

1 floor. In fact, just before she handed her notes to the
2 council, Petitioner Williams was told by the presiding officer
3 that the council wished to hear her testimony. Our
4 interpretation of the tape is that the presiding officer made
5 the offer sincerely; it was not a perfunctory gesture designed
6 to hide a demand to terminate the testimony.

7 At bottom, the due process claim rests on Petitioner
8 Williams' belief that it would have been pointless for her to
9 complete her testimony because the council was not receptive to
10 it. However, the city council did not refuse to accept either
11 her oral or written testimony. We decline to find error based
12 petitioner's subjective belief that further attempts to
13 continue oral testimony would have been futile.

14 We therefore deny petitioner's assignment of error.

15 The city's decision is affirmed.
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