BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WEST COAST MEDIA, LLC,
Petitioner,

vs.

CITY OF GLADSTONE,
Respondent.

LUBA No. 2002-098

ORDER

Before the Board are petitioner's record objection and the city's motion to dismiss.

MOTION TO DISMISS

The city moves to dismiss this appeal, arguing that the challenged decision is not a land use decision subject to LUBA's jurisdiction.[1]

We take the following undisputed facts from the record and the parties' pleadings. On May 5, 2002, petitioner filed four building permit applications with the city, proposing to construct four billboards on property zoned for commercial and industrial uses, adjacent to Interstate 205. The proposed billboards are each 14 by 48 feet, with a total area of 672 square feet per billboard. Upon receipt of the applications, planning staff and the city attorney reviewed the proposal and concluded that such signs are not permitted within the city. The city attorney instructed county building officials to deny the applications and, on July 11, 2002, sent petitioner a letter stating that the city's code does not permit billboards in any zone within the city. Petitioner appeals the July 11, 2002 letter.

[1] No party contends that the challenged decision is a limited land use decision, as defined at ORS 197.015(12).

The city argues that its decision is not a "land use decision" as defined at ORS 197.015(10).[2] The city concedes that the challenged decision applies a land use regulation, and thus nominally falls within the definition of "land use decision" at ORS 197.015(10)(a). However, the city argues, the decision falls within one or both of the exceptions to that definition, at ORS 197.015(10)(b)(A) and (B), and is therefore not subject to LUBA's jurisdiction.

The city explains that the an application to construct a sign within the city is governed by Gladstone Municipal Code (GMC) Chapter 17.52. GMC 17.52.010 states that "[t]he standards of this chapter shall apply to all signs." GMC 17.52.020 provides that "[s]igns shall be allowed in commercial and industrial zoning districts pursuant to the standards of GMC Sections 17.52.020 through 17.52.070," and sets forth a number of general provisions governing all signs.[3] GMC 17.52.040 through 17.52.090 set forth specific standards for

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[2] ORS 197.015(10) defines "land use decision" as follows:

> "'Land use decision':
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> "(a) Includes:
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> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "* * * * *
>
> "(iii) A land use regulation[.]
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> "* * * * *
>
> "(b) Does not include a decision of a local government:
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> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;
>
> "(B) Which approves or denies a building permit issued under clear and objective land use standards[.]"

[3] GMC 17.52.020 provides, in relevant part:

> "Signs shall be allowed in commercial and industrial zoning districts pursuant to the standards of GMC Sections 17.52.020 through 17.52.070. Except as otherwise set forth in this chapter,

seven types of signs: free-standing identification signs (GMC 17.52.040); on-building identification signs (17.52.050); electronic message center signs (17.52.055); traffic control signs and directories (17.52.060); temporary signs (17.52.070); campaign signs (17.52.080); and signs in residential zoning districts (17.52.090). GMC Chapter 17.52 does not expressly address billboards. With the exception of GMC 17.52.080, governing campaign signs, the provisions at GMC 17.52.040 through 17.52.090 specifically limit the area of the particular sign type governed by those provisions. For example, GMC 17.52.040 imposes a 60 square foot maximum area size for free-standing identification signs, while GMC 17.52.050 imposes a 200 square foot maximum area size for on-building identification signs, the largest allowed under GMC Chapter 17.52.

The city argues that because nothing in GMC Chapter 17.52 allows billboards, it is clear that billboards are not a permitted use anywhere within the city. To the extent a billboard could be described as a "free-standing identification sign" for purposes of GMC 17.52.040, the city argues, it is clear that the proposed signs exceed the maximum area size under GMC 17.52.040, and therefore are not allowed under that provision. Similarly, the city argues that the proposed billboards exceed the maximum area for every sign type described in GMC 17.52.040 through 17.52.090. According to the city, GMC Chapter 17.52 unambiguously prohibits a 672 square foot sign of any type. Therefore, the city argues, its decision to deny petitioner's applications was made under standards that do not require interpretation or the exercise of policy or legal judgment, and is thus exempt from LUBA's

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review shall be provided by the city administrator, or designee[.] * * * General provisions for signs shall be as follows:

"* * * * *

"(8) Area Calculation.

"(a) Where this chapter establishes a maximum area standard for signs, the maximum shall apply on a per side basis to a maximum of two sides.

"(b) Additional sides shall be of no greater area than that necessary to provide a frame or support structure for the sign faces."

review under ORS 197.015(10)(b)(A). In the alternative, the city argues that its decision to deny petitioner's application for building permits was issued under "clear and objective" standards, and is thus exempt from LUBA's review under ORS 197.015(10)(b)(B).

Petitioner responds that the pertinent GMC standards are vague and subjective, and require interpretation and the exercise of legal judgment. At the outset, petitioner notes that the city had to involve its attorney to help determine whether billboards were allowed under its code, which belies the city's claim that the standards require no interpretation or exercise of legal judgment. In any case, petitioner argues that GMC Chapter 17.52 is ambiguous with respect to whether it allows billboards and whether any maximum area limitation applies to billboards. Petitioner begins by noting that GMC 17.52.020, which sets out general provisions governing signs, states that "signs shall be allowed in commercial and industrial zoning districts pursuant to the standards of GMC 17.52.020 through 17.52.070." According to petitioner, that statement is a broad authorization for any type of sign, including billboards, subject to the general standards at GMC 17.52.020 and any applicable standards governing specific types of signs at GMC 17.52.040 through 17.52.090. Because billboards are not one of the seven specific types of signs governed by GMC 17.52.040 through 17.52.090, petitioner argues, the only standards governing billboards are those at GMC 17.52.020. Petitioner notes further that GMC 17.52.020(8)(a) states that "[w]here this chapter establishes a maximum area standard for signs, the maximum shall apply on a per-side basis to a maximum of two sides." According to petitioner, that language suggests that, for some signs, no maximum area standard is provided.[4]

Petitioner's view of the city's sign ordinance is considerably strained. Among other things, petitioner's view of the code would allow a sign of any size, if it is not one of the seven types of signs addressed under GMC 17.52.040 through 17.52.090, a result that would

[4] As noted above, the provisions governing campaign signs at GMC 17.52.080 contain no maximum area or other size restrictions.

seem at odds with a principal theme of the sign ordinance to limit the size of signs. However, the question before us is more narrow one: whether the terms of GMC Chapter 17.52 can plausibly be interpreted in more than one way with respect to whether billboards are allowed and what standards apply to them. *See Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000) (code provisions for measuring building height can plausibly be interpreted in more than one way, and therefore a decision applying those provisions is not subject to either ORS 197.015(10)(b)(A) or (B)). We cannot say that the city's code answers that question unequivocally or without the aid of interpretation. Nor can we say that the relevant terms of GMC Chapter 17.52 are "clear and objective" on this point, for purposes of ORS 197.015(10)(b)(B).

Because the city concedes that the challenged decision is otherwise a "land use decision" as defined by ORS 197.015(10)(a), and no exception to that definition applies, we have jurisdiction over this appeal. The city's motion to dismiss is denied.

RECORD OBJECTIONS

Petitioner objects that the record contains seven items that were not placed before the final decision maker during the proceedings before the final decision maker. OAR 661-010-0025(1).[5] Petitioner requests that those items be removed from the record. OAR 661-010-0026(2).

The record contains 16 items. Petitioner argues that items 3, 4, 7, 9, 10, 15 and 16 are letters to and from the city regarding a proposal to pay the city "user fees" in exchange for

[5] OAR 661-010-0025(1) provides, in relevant part:

> "Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:
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> "(a) The final decision including any findings of fact and conclusions of law;
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> "(b) All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker."

the right to construct billboards in the city.[6] Petitioner contends that these letters involve a separate proposal that was being negotiated with the city, a proposal that is not related to the four building permit applications denied in the challenged decision. Accordingly, petitioner argues that these letters were not "placed before" the final decision maker during the course of the proceedings before the final decision maker, and are not properly part of the record of this appeal.

The city responds that the four applications submitted May 5, 2002, and the "user fee" proposal discussed in items 3, 4, 7, 9, 10, 15 and 16 were part of a single effort by petitioner to obtain the city's permission to site billboards in the city. The city argues that the disputed items were "placed before" the final decision maker within the meaning of OAR 661-010-0025(1), and are properly considered part of the record of the challenged decision.

The "final decision maker" here, apparently, was the city attorney. The city attorney was also involved in the discussions regarding the "user fee" proposal. However, the city attorney directed that proposal to the city council for its consideration. Record 4. As far as we can tell, the two proposals sought the same end, but were not linked in any particular manner and were directed to different decision makers within the city. We do not believe that correspondence regarding the "user fee" proposal between petitioner's representatives and the city attorney, in his capacity as legal advisor to the city council, was placed before the "final decision maker" of the decision challenged here "during the course of the

[6] Item 3 is a letter from petitioner's attorney to the city attorney dated June 26, 2002. Item 4 is a letter from the city attorney to petitioner's attorney dated June 18, 2002. Item 7 is a letter from petitioner's attorney to the city attorney, labeled "For Settlement purposes Only," dated May 31, 2002. Item 9 is a letter from the city attorney to petitioner's representative dated May 21, 2002. Item 10 is a letter from petitioner's representative to the city attorney dated May 10, 2002. Item 15 is a letter from petitioner's Texas counsel to the city attorney, dated April 23, 2002. Item 16 is a letter from Pacific Northwest Capital to the city attorney, dated March 27, 2002. With one minor exception, each of these items appears to relate exclusively to the "user fee" proposal, and none references the four applications petitioner submitted on May 5, 2002. Item 10 mentions the applications, apparently in passing. Record 15.

proceedings" before the final decision maker, within the meaning of OAR 661-010-0025(1)(a). Consequently, we sustain petitioner's record objection.

Rather than require the city to submit an amended record that omits items 3, 4, 7, 9, 10, 15 and 16, we will simply strike through the pages that include those items on our copy of the record. The parties should do the same. Therefore, the record is settled as of the date of this order. The petition for review is due 21 days, and the response brief is due 42 days, from the date of this order.

Dated this 11th day of October, 2002.

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Tod A. Bassham
Board Member