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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

3	WILMA MCNULTY and)	
4	LINDA SIMPSON,)	
)	LUBA No. 86-086
5	Petitioners,)	
)	FINAL OPINION
6	vs.)	AND ORDER
)	
7	CITY OF LAKE OSWEGO and)	
8	CHURCH OF JESUS CHRIST OF)	
	LATTER-DAY SAINTS,)	
9	Respondents.)	

10 Appeal from City of Lake Oswego.

11 Barbara Gay Canaday, Lake Oswego, and Barry L. Adamson,
12 Portland, jointly filed the petition for review and Barry L.
13 Adamson argued on behalf of petitioners. With them on the
14 brief were Williams, Fredrickson, Stark & Weisensee, P.C.

15 James M. Coleman, Lake Oswego, filed a response brief and
16 argued on behalf of Respondent City.

17 James H. Bean, Leslie M. Roberts and Frank Josselson,
18 Portland, jointly filed a response brief and James Bean and
19 Frank Josselson argued on behalf of Respondent Church of Jesus
20 Christ of Latter-Day Saints. With them on the brief were
21 Lindsay, Hart, Neil & Weigler and Josselson, Potter & Roberts.

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

24 AFFIRMED 02/20/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 This appeal challenges City Council Order DR 17-85-405
4 which approved the design of a temple proposed by Respondent
5 Church of Jesus Christ of Latter-Day Saints.

6 FACTS

7 The city's order was entered in response to a remand by
8 this Board in McNulty v. Lake Oswego, ___ Or LUBA ___ (LUBA No.
9 86-050, October 2, 1986), or McNulty II.¹ Our remand was
10 based on the city's Building Design Standard. We directed the
11 city to explain how the design was complementary in visual
12 appearance to adjacent structures of good design with regard to
13 rooflines height and overall proportions."

14 FIRST ASSIGNMENT OF ERROR

15 "The City lacked authority to act and to render a new
16 decision during the pendency of an appeal."

17 On December 30, we issued an order which rejects this
18 assignment of error. We held the city had authority to act on
19 our order of remand, notwithstanding that our order was on
20 appeal.² We see no reason to alter our decision.

21 The first assignment of error is denied.

22 SECOND ASSIGNMENT OF ERROR

23 "The City's decision sets forth no facts or evidence
24 relied upon; the City improperly reincorporates prior
remanded decisions."

25 Petitioners complain that the city's most recent decision
26

1 simply reaffirms and incorporates by reference the findings and
2 order issued in previous cases on this same development
3 application. Petitioners argue that this process (1)
4 perpetuates deficiencies in the prior orders, and (2) is
5 lacking in specificity because it incorporates the city's
6 previous two decisions without indicating what portions of
7 those decisions are incorporated.

8 We do not find error with the city's action. We found the
9 city's prior order lacked certain findings. We did not find
10 the city made erroneous findings or committed other errors.
11 The city's new order does not, then, perpetuate error. The
12 city's prior actions are supplemented by its subsequent
13 orders.

14 The second assignment of error is denied.³

15 THIRD ASSIGNMENT OF ERROR

16 "The City's 'findings' are not findings at all."

17 Petitioners complain that there are no findings separated
18 from "the otherwise conclusionary narrative." Petition for
19 Review at 19. Petitioners state that while the city's decision
20 need not be in any particular form or employ special language,
21 the present order is simply a "stream-of-consciousness
22 exposition" which is inappropriate to a land use decision.
23 Petitioners insist that this exposition fails the city's
24 statutory duty found in ORS 227.173(2) to "explain the
25 justification for the decision."⁴

26 The applicable standards in the city's code is found in

1 Section 2.020 "Standards for Approval."

2 "1. Buildings shall be designed and located to
3 complement and preserve existing buildings, streets
4 and paths, bridges and other elements of the built
5 environment.

6 "a. Design buildings to be complementary in
7 appearance to adjacent structures of good design
8 with regard to:

- 9 "i. Materials
- 10 "ii. Setbacks (for retail/commercial part
11 specifically)
- 12 "iii. Roof lines
- 13 "iv. Height
- 14 "v. Overall Proportions"

15 In McNulty II, supra, we found the city failed to fully
16 address this standard. The only issue before the city on
17 remand, and before us here, is compliance with Section
18 2.020(1)(a). This standard, by its terms, involves aesthetic
19 analysis.⁵

20 The city's findings are appropriate under the particular
21 standard applicable. The city describes the Centerpointe
22 Office Campus as containing two office buildings with "imposing
23 brick and concrete facades alternating with rows of windows."
24 The order describes the buildings as five stories in height,
25 with flat roofs and of "rectilinear design." The findings
26 discuss the setting for the office campus and its relationship
to the temple. The city then states that

"The overall bulk and height of the proposed temple
structure is consistent with the bulk and size of the
Centerpointe office buildings. The temple's tall
spires, marble exterior, four-story size and gable
roof create a visual image of more spiritual values
than the spartan image created by the office buildings

1 and develops an aesthetically pleasing transition from
2 the business oriented image of the office buildings to
the private, family oriented structures to the north."

3 * * *

4 "The distance provided by the site plan between the
5 Centerpointe development and the proposed temple will
6 prevent their contrasts from clashing. The natural
7 growth buffering and distance between the structures,
8 and the landscaping which includes trees and natural
9 plantings, both in the Centerpointe campus and on the
10 grounds of the temple, control and soften the contrast
11 between the forms of the two buildings characterized
12 by their different roof lines, overall proportions and
13 height, among other factors. Given that distance and
14 buffering, the proposed variation in roof lines, from
15 the Centerpointe utilitarian flat roofs, to the
16 graceful upwardly sweeping gabled roof lines and
spires of the Temple, provides a pleasing
architectural image which actually enhances the
appearance of the Centerpointe structures. This
enhancement occurs by the creation an overall image
which includes a larger more complete and rounded
sense of the values of the human environment in
contrast to the existing single focus image of a
business environment created by Centerpointe's office
buildings. The structures do not overpower one
another and their contrasting styles and comparable
proportions compete in an aesthetically interesting
and pleasing way."

17 The city concludes that the overall proportions of the
18 structures, the office buildings and the temple, "complete the
19 visual relationship with their architectural styles in an
20 aesthetically pleasing way."

21 The city goes on to describe the Southwood Park subdivision
22 in terms of the setting, rooflines and size of the houses. The
23 findings then go on to explain that

24 "The lowest side of the temple faces the Southwood
25 Park residential area, and the Southwood Park houses
26 bordering the property face away from the temple
property. Thirty-four feet of natural vegetation and
planned landscaping will separate the houses from the

1 temple parking lot with its additional 116 feet of
2 landscaped parking (including nearly 200 trees), all
3 of which screen the temple from the residential yards
4 at normal levels of sight. The grade rises toward the
5 north, through the temple grounds. The roof line of
6 the Southwood Park houses are therefore at an
7 elevation near or above that of the temple roof line.
8 This elevated location of the single-family homes will
9 decrease the apparent mass of the temple from the
10 vantage point of the residences because much of the
11 temple building will be below the grade of the
12 residences and not visible from them, and because the
13 view will include mostly the sloping slate roof and
14 tapering spires. The difference in grade from the
15 median grade of the temple building site to that of
16 the Southwood Park houses is at least twenty feet. As
17 shown in the Comprehensive Plan data base, the grade
18 continues to increase gently to the north through
19 Southwood Park so that the farther residences, if they
20 can perceive any part of the roof or walls of the
21 temple, will view it as even lower."

12
13 The city finds the temple and the residences can exist
14 together "without visual confusion or clutter." The city
15 explains that structures of differing scale and style do retain
16 their own identity even if in close proximity because of the
17 differences in scale.

18 "The residences and temple, by the relationship
19 established by the site design, (spacing, buffering,
20 building orientation) each stand on their own as
21 elements within a diverse picture."

22 We do not agree with petitioners' characterization of these
23 findings as not responsive to Section 2.020(1)(a). While
24 stated in aesthetic terms, the city's discussion responds to
25 the criteria in Section 2.020 (1)(a), and, we believe,
26 satisfies the standard. We decline, therefore, to find that
the city has failed to make findings responsive to our Order of
Remand and the applicable criterion in the ordinance.

1 The third assignment of error is denied.

2 FOURTH ASSIGNMENT OF ERROR

3 "The record lacks 'substantial evidence' to support
4 any finding that Respondent's application fulfills and
 complies with the City's Building Design Standard."

5 Petitioners complain that there is no evidence in the
6 record discussing design, appearance or composition of the
7 Centerpointe Office Campus. It is against this nearby office
8 campus that the city compared the new structure. Petitioners'
9 view is that any findings making an architectural comparison
10 between the new structure and Centerpointe must be discounted
11 because there is nothing in the record discussing the office
12 campus.⁶

13 Petitioners add there is no evidence in the record about
14 the pitch of the roofs of the Southwood Park residences. This
15 issue is important because the city compares the residences in
16 the Southwood Park subdivision with the temple design.

17 Petitioners state the only sources of evidence in this
18 record are the respondent's application, the city staff report,
19 the testimony introduced at the hearing and the minutes of the
20 hearing. Petitioners claim that these sources of evidence do
21 not furnish substantial evidence to support the city's
22 decision. In particular, petitioners say there is no evidence
23 in the record about the design of the Centerpointe Commercial
24 Development or the Southwood Park subdivision.

25 Petitioners note the presence in the record of sketches
26 showing the proposed temple and the surrounding area. However,

1 petitioners say there are no pictorial descriptions of the
2 surrounding residences. In short, petitioners claim the only
3 evidence to support the comparison between the temple and
4 nearby structures are drawings and sketches from respondent's
5 development application, some exhibits simply termed "site and
6 vicinity section from south to north," and the "typical north
7 section." According to petitioners, these drawings and
8 exhibits are not fully explained in the record nor do they
9 yield evidence of rooflines, height and overall proportion of
10 the Centerpointe Office Campus, the very issues which the
11 city's findings address.

12 With respect to the Centerpointe Office Campus, the record
13 does show that the office buildings are constructed of brick.
14 Record 295, 322, 411, 415, 423.⁷ However, we are cited to
15 nothing in the record describing the general shape of the
16 Centerpointe office buildings. That is, the city's findings
17 describing the buildings as having flat roofs and being of
18 "rectilinear" shape, findings which are critical to the
19 complementary analysis under the code, are not supported by
20 testimony, drawings or documents in the record.

21 The city attempts to fill the evidentiary gap in several
22 ways. First, it argues that it is entitled to rely on previous
23 city council approvals of the Centerpointe and Southwood Park
24 developments. See Record 7, 164, 271. The city claims that by
25 taking judicial notice of the prior approvals, evidence
26 submitted in the course of those approvals is available to

1 support the city's decision.

2 We disagree. Judicial notice of the prior approvals does
3 not encompass evidence submitted supporting those approvals.⁸

4 The city also alleges that the necessary evidence was
5 obtained during a site visit made November 15, 1985 by members
6 of the city council and one of the petitioners. The city's
7 order of July 1, 1986 recites that the council visited the site
8 and observed "the general design of the two existing office
9 buildings." Record 7. This observation, according to the
10 city, provides evidence of the shape of the Centerpointe
11 buildings. We note also the order discusses the "multi-story
12 office buildings" and the flat roof systems of the office
13 campus buildings. Record 20.

14 The council's observation of the Centerpointe site could
15 provide the evidence needed to support the findings.
16 Substantial evidence is that which a reasonable mind would rely
17 on to make a decision. Christian Retreat Center v. Board of
18 Commissioners of Washington County, 28 Or App 673, 560 P2d 1100
19 (1977). A reasonable mind would rely on a personal observation
20 of the general outward characteristics of the Centerpointe
21 buildings to support findings about the shape, size and general
22 design of those buildings. These are the findings at issue
23 here.

24 Petitioners object to reliance on the site visit claiming
25 that what was seen was not described; and, as a matter of fact,
26 the site visit was at a point at which the Centerpointe

1 development would not even be visible.

2 Respondents note petitioners' objection to the site visit
3 is late. The petitioners had the opportunity to complain to
4 this Board about propriety of the view and of any evidence
5 gained under it when petitioners appealed the city's decision
6 in McNulty II.⁹ Petitioners made no such objection.

7 Respondents are correct that petitioners made no specific
8 objection to the site visit or to the description of
9 Centerpointe in McNulty II or in the petition for review in
10 this case. The objection to the site view is found in
11 memorandums filed in response to this Board's questions about
12 the view and the city's claim of judicial notice of certain
13 facts. Given that there was no timely objection to the site
14 visit or the finding that the city council members observed the
15 "general design" of Centerpointe, we believe the city council's
16 view provides evidentiary support for the city's decision.¹⁰

17 With respect to the Southwood Park Neighborhood
18 development, there is discussion of the scale and dimensions of
19 nearby houses in the transcript of the August 19, 1985 hearing
20 before the Development Review Board. Record 198-257; see also
21 Record 411-423, 63, 70. Also, there is a drawing showing the
22 scale of the church and a residence. While the drawing lacks a
23 particular description, its presence before the Design Review
24 Board makes it clear the drawing was submitted for the purpose
25 of showing the relationship between the proposed church and a
26 nearby residence. This drawing, then, along with the other

1 evidence cited, supra, provides an adequate factual base for
2 the city's findings on relationship between the church and
3 surrounding residences.

4 The decision of the City of Lake Oswego is affirmed.
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This is the third time the case has been before us. McNulty v. Lake Oswego, 14 Or LUBA 366 (1986); McNulty v. Lake Oswego, ___ Or LUBA ___, aff'd 83 Or App 275, ___ P2d ___ (1986).

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Our order of remand was affirmed by the Court of Appeals in McNulty v. Lake Oswego, 83 Or App, supra.

3

The city's order in the instant case states, in part,

"The city reaffirms and incorporates by this reference the Findings, Inclusions and Orders previously entered as its orders DR 17-86-323, dated December 4, 1985, and DR 17-85-354, dated July 1, 1986. The findings and conclusions contained in this order supplement those earlier orders." Record iii.

This incorporation clearly states that the instant findings and conclusions "supplement" previous findings and conclusions. We believe the clear effect of this language is to make the current order controlling. Therefore, any inconsistencies in earlier orders no longer exist.

4

Petitioners add that there is no evidence in the record to support the city's findings. We discuss this issue under Assignment of Error No. 4, supra.

5

The term "complementary" is not deferred in the ordinance. The city's interpretation of the term was upheld in McNulty II, supra.

6

Petitioners also argue that the findings stating the church spires present a "pleasing backdrop" are in error. Petitioners state this conclusion has nothing to do with criteria found in the Building Design Standard. We note that if petitioners are correct, there is no ground for remand or reversal. An error

1 must go to a standard. Gratuitous findings, even if wrong, are
2 mere surplusage and require no response from this Board.

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The discussion of the Centerpointe buildings and the nearby residences between pages 411 and 423 is found in a series of suggested findings presented by attorneys for the temple. The memorandum including fact statements about the area and proposed findings was prepared on June 3, 1986.

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During oral argument, respondent moved to supplement the record under review by inclusion of drawings of the Centerpointe office facility. These drawings were made and presented to the city during the course of the approval of the original Centerpointe development. Respondent does not assert that the drawings were present during the course of respondent's consideration of the church application on appeal here.

We conclude the drawings are not properly part of the city's record before us in this proceeding.

With regard to respondent's claim of judicial notice. We note that while there may be indeed no room for argument about what drawings of Centerpointe show or the general size and shape of the Centerpointe development, judicial notice is only appropriate where the parties have an opportunity to challenge noticed facts. That is, in order to rely on judicial notice, the city should have provided petitioners the opportunity to comment on the facts to be noticed prior to the issuance of the city's final order. See 3 K.C. Davis, Administrative Law Treatise, Section 15.13 (2d ed., 1980). See also Ohio Bell Telephone Company v. Public Utilities Commission, 301 US 292, 57 S. Ct. 724, 81 L. Ed 1093 (1937) in which the Supreme Court reversed a public utilities commission reliance on judicial notice where the public utilities failed to provide opponents with the opportunity to comment on the evidence noticed.

9

Site visits present evidentiary and procedural issues. While we need not discuss the circumstances of this visit because of our holdings, infra, we note issues about site visits have been before this Board. See Friends of Benton County v. Benton County, 3 Or LUBA 165 (1981); Concerned Property Owners v. Klamath County, 3 Or LUBA 182 (1981); and Pierron v. Eugene, 8 Or LUBA 113 (1983). See also 4 R.M. Andersen, American Law of Zoning, Section 22.38 (3d ed., 1986).

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3 Petitioners objected that there was no substantial evidence
4 to support the findings prepared by the city in McNulty II.
5 The substantial evidence objection, however, made no mention of
6 the site visit. Petitioners' objection was to particular items
7 of evidence introduced by the proponents of the development and
8 by a city staff. Specifically, petitioners objected to the
9 development application, the Development Review Board staff
10 report, testimony received at the Development Review Board
11 hearing, and minutes of the Development Review Board
12 proceeding. This series of objections ignored the evidence
13 gained at the site visit and the procedural property of the
14 visit itself.
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