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

THE TERRACES CONDOMINIUM)
ASSOCIATION,)
)
Petitioner,)
)
vs.)
)
CITY OF PORTLAND,)
)
Respondent,)
)
and)
)
FRANKLIN G. DRAKE and)
PRESTON HIEFIELD,)
)
Intervenors-Respondent.)

LUBA No. 91-048
FINAL OPINION
AND ORDER

Appeal from City of Portland.

J. David Bennett, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Copeland, Landye, Bennett & Wolf.

Peter A. Kasting, Portland, filed a response brief on behalf of respondent.

Stephen T. Janik, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Ball, Janik & Novack.

KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON, Referee, participated in the decision.

REVERSED 10/10/91

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the city council
4 affirming a decision of the planning director interpreting
5 the Portland City Code (PCC).

6 **MOTION TO INTERVENE**

7 Franklin G. Drake and Preston Hiefield move to
8 intervene on the side of respondent in this appeal
9 proceeding. Petitioner does not object to the motion, and
10 it is allowed.

11 **FACTS**

12 Intervenors-respondent (intervenors) propose to
13 construct 150 condominium units on tax lot 59. Tax lot 59
14 consists of 2.04 acres and is zoned Multifamily Residential
15 (R-1). The R-1 zone limits the development density of tax
16 lot 59 to approximately 80 units. Intervenors did not
17 request a variance to the density limitations of the R-1
18 zone to gain approval to construct the proposed 150
19 condominium units. Rather, intervenors requested an
20 interpretation from the city that 150 units could be built
21 on tax lot 59 on the basis of prior city zoning approvals
22 and prior property transactions involving tax lot 59 and tax
23 lot 60 (an adjacent parcel). To understand intervenors'
24 request, it is necessary to outline the development history
25 of tax lots 59 and 60.

26 Tax lot 59 was formerly a part of a parcel totalling

1 approximately ten acres.¹ This ten acre parcel was
2 previously owned by a single developer.²

3 In 1973, developer applied for variance approval to
4 enable construction of taller buildings on the entire ten
5 acre site than permitted by the applicable residential
6 zone.³ The city approved the requested height variance.⁴
7 The 1973 variance authorized building heights of up to seven
8 stories on the ten acre site to enable construction of a 220
9 unit condominium project. However, developer did not
10 construct these units.

11 In 1977, developer requested another variance to
12 increase the height of two buildings planned for the portion
13 of the ten acre site which is now known as tax lot 59.
14 Developer sought to increase the height of such buildings
15 from the seven stories authorized by the 1973 variance, to

¹The numerical references to parcels within the ten acre site have changed over time. There are now three parcels which comprise the ten acre site. For simplicity, we refer to these parcels using the same references as are utilized in the challenged decision. In the challenged decision, these three parcels are referred to as tax lot 59, tax lot 60 and the "North Area." Record 49. Tax lot 60 is a steep, wooded 2.05 acre parcel, and the north area of the ten acre site consists of six acres.

²Hereafter, we refer to the original developer of these parcels as "developer."

³The applicable zoning at this time was Residential (A-1). The A-1 zoning requirements were very similar to the current R-1 zoning requirements for the 10 acre site. However, the previous A-1 zoning designation is not relevant to this opinion.

⁴In this opinion, we refer to this variance approval as the 1973 variance.

1 eleven stories for one building, and fourteen stories for
2 the other. The city approved the second height variance,
3 subject to the following condition:

4 "By accepting this variance, height variances
5 granted [in 1973] are rescinded."⁵ Record 65-66.

6 In 1978, developer developed the north area of the ten
7 acre site with 56 condominium units, and foundations and
8 garages for 14 additional units (for a total project of 70
9 units), which developer then sold.⁶ A homeowners
10 association was formed for the condominium units developed
11 on the north area of the ten acre site. At this point,
12 developer owned only what is now tax lots 59 and 60.

13 While developer retained its interest in what is now
14 known as tax lot 59, it never developed it due to financial
15 difficulties. In 1986, pursuant to the homeowners
16 association master agreement, developer conveyed what is now
17 known as tax lot 60 to the homeowners association.⁷ This
18 conveyance was subject to the following restrictive
19 covenant:

⁵We refer to this variance approval as the 1977 variance.

⁶The challenged decision states variously that the condominium development on the north area of the ten acre site consists of 72 (Record 49) and 70 units (Record 50). However, for purposes of our review, it does not matter whether the north area has 72 or 70 condominium units.

⁷There is no dispute that, until 1986, tax lots 59 and 60 were one parcel and were not separately described. In other words, as of 1986, they had not been divided. The parties agree that developer's conveyance of tax lot 60 in 1986 effected a division of the original parcel, creating tax lots 59 and 60.

1 "The real property conveyed by the foregoing deed
2 may not be developed or improved and no
3 improvements may be built upon this property,
4 except for walking trails, and landscaping,
5 without Grantor's prior written consent, recorded
6 in the appropriate deed records. This covenant is
7 for the benefit of Grantor and its successors in
8 interest. This covenant benefits adjacent land
9 owned by Grantor and other adjacent land owned by
10 an affiliate of Grantor FMD Corporation. This
11 restrictive covenant is perpetual. * * *"⁸ Record
12 212.

13 Subsequently, developer sold its interest in tax lot 59, and
14 any interest it may have retained in tax lot 60, to
15 intervenors.

16 When intervenors were ready to develop tax lot 59, they
17 requested an interpretation of the PCC from the planning
18 director regarding the development rights of tax lot 59.
19 Specifically, intervenors requested that the city determine
20 tax lot 59 had acquired the development rights which would
21 otherwise belong to tax lot 60, and that tax lot 59 could
22 lawfully be developed with 150 condominium units. The
23 planning director rendered the interpretative decision
24 requested by intervenors, determining the proposed
25 development of tax lot 59 with 150 condominium units was
26 permissible. The planning director specifically determined:

27 "[The Portland City Code density limitation] does
28 not apply and Tax Lot 59 * * * can be developed

⁸The parties dispute whether this covenant is effective to give developer an interest in tax lot 60 after conveying it to the homeowners association, such that developer retained the development rights of tax lot 60. We address the effect of this restrictive covenant infra.

1 for 150 units because an adjacent parcel (Tax Lot
2 60 * * *) is restricted to open space use for
3 [intervenor's project] and an adjacent 72-unit
4 condominium project.

5 "150 units can be constructed on Tax Lot 59 * * *
6 subject to the condition that a legal agreement be
7 established by the owner of the property which
8 prohibits the development of Tax Lot 60 * * *
9 unless approved by the City of Portland." Record
10 178.

11 Petitioner appealed the planning director's
12 interpretation to the planning commission. The planning
13 commission reversed the planning director's interpretation,
14 and determined that 150 condominium units could not be
15 lawfully built on tax lot 59 on the basis of prior zoning
16 and development history of that parcel. Intervenor
17 appealed to the city council. The city council reversed the
18 decision of the planning commission, and affirmed the
19 planning director's interpretation as reflected in the
20 following statement:

21 "The City Council concludes that [intervenor] may
22 construct 150 units on Tax Lot 59 * * * subject to
23 [conditions of approval]. This conclusion is
24 based on two grounds, each of which is set forth
25 below." Record 7.

26 The first ground for the city's decision is "[t]he
27 proposed development is consistent with the previously
28 approved variance and is not affected by the dedication of
29 open space." Record 7. The second ground for the
30 challenged decision is "[t]he variance in this case runs
31 with the land." Record 8. The reasoning supporting these

1 bases for the city's decision is as follows:

2 "[1] The transfer of an interest in Tax Lot 60 to
3 the unit owners association was in
4 fulfillment of the plan imposed on the
5 Project Site as part of [the 1977 variance
6 approval]. It is analogous to the effect of
7 commonly owned open spaces in Planned Unit
8 Developments and Subdivisions. Just as in
9 those cases a transfer of open space to the
10 unit owners association does not reduce
11 approved density.

12 "While [the 1977 variance] did not
13 specifically address density issues, the
14 variance did grant approval of a specific
15 site plan that included structures designed
16 for high density development on Tax Lot 59.
17 Approval of the height variances necessarily
18 incorporated approval for the level of
19 housing density appropriate for the approved
20 structures. The application that was
21 approved in the variance decision required
22 the maintenance of Tax Lot 60 as open space,
23 but did not mandate that any particular party
24 hold title to Tax Lot 60. The proposal now
25 before the Council fits within the parameters
26 of the approved variance since it retains the
27 open space required by the approved plan and
28 retains the level of density that is implicit
29 in the structures that were approved in the
30 height variances." Record 7-8.

31 "[2] * * * [T]he approvals and conditions
32 contained in the [1973 and 1977 variance
33 approvals] run with the Project Site, and
34 [intervenors have] acquired a vested right to
35 complete the project described in the
36 submission made in conjunction with these
37 approvals, and [intervenors] may therefore
38 construct 150 dwelling units on Tax Lot 59 as
39 approved [under the 1977 variance]." Record
40 9.

41 Petitioner appeals the city council's decision.

1 **JURISDICTION**

2 Intervenor's point out that under ORS 197.825, this
3 Board only has jurisdiction to review land use decisions as
4 defined in in ORS 197.015(10).⁹ Intervenor's argue the
5 challenged decision is not a land use decision, because it
6 does not apply comprehensive plan provisions, land use
7 regulations or the Statewide Planning Goals.

8 We disagree with intervenors. The question in this
9 appeal is whether current PCC zoning provisions apply to
10 govern development of the subject property or whether the
11 property's prior zoning history establishes a right to a
12 greater development density than allowed by the R-1 zone.
13 This requires the application of a host of city land use
14 regulations ranging from those in effect in 1973 to the
15 present.

16 Accordingly, we determine this Board has jurisdiction
17 to review the decision challenged in this appeal.

18 **FIRST ASSIGNMENT OF ERROR**

19 "The city council's first finding is flawed."

⁹ORS 197.015(10)(a) defines land use decision as follows:

"(A) A final decision or determination made by a local
government * * * that concerns the * * * application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; * * *

"* * * * *."

1 In this assignment of error, petitioner challenges the
2 correctness of the city's interpretation of the legal effect
3 of the 1977 variance. Petitioner also challenges the
4 evidentiary support for the those findings labeled as [1],
5 quoted above, determining that the 1977 variance designated
6 tax lot 60 as open space and implicitly approved a density
7 of 150 units for tax lot 59, based on a transfer of the
8 density rights belonging to tax lot 60.

9 The city's findings outline an interpretation of the
10 1977 variance as approving a kind of master plan allowing a
11 150 unit residential density for tax lot 59 and requiring
12 that tax lot 60 be dedicated as open space. Further, the
13 findings reflect a determination that through the presumed
14 dedication of tax lot 60 for open space use, a density
15 transfer of tax lot 60's development rights to tax lot 59
16 was accomplished.

17 While some deference may be due to the city's
18 interpretation of its 1977 variance, it is this Board's
19 responsibility to determine the correct interpretation of
20 the 1977 variance and to determine whether it accomplished a
21 density transfer. See McCoy v. Linn County, 90 Or App 271,
22 275-76, 752 P2d 323 (1988).

23 In 1977, the city did not have any code provisions
24 authorizing city approval of a master development plan or
25 the transfer of development rights. Accordingly, it was not
26 possible for the city to approve any master development plan

1 or density transfers as a part of the 1977 variance.¹⁰ It
2 is erroneous to conclude that such approval was given at a
3 time when the PCC did not authorize such master development
4 plan approvals or density transfers.

5 Further, even if the city could have lawfully approved
6 a master development plan authorizing density transfers in
7 1977, we do not believe the 1977 variance approved a master
8 plan and a density transfer enabling tax lot 59 to be
9 developed with 150 condominium units. At the time of the
10 1977 variance, tax lots 59 and 60 did not exist as separate
11 tax lots. In 1977, the land now comprising those tax lots
12 was a single parcel. The 1977 variance purported only to
13 grant approval to allow the height of two buildings on this
14 single parcel, consisting of 4.09 acres, to be increased
15 from a maximum of seven stories (the height previously
16 allowed by the 1973 variance), to eleven and fourteen
17 stories respectively. The 1977 variance did not purport to
18 authorize any particular density for those two buildings,
19 and no such authorization can reasonably be implied.
20 Further, the 1977 variance did not purport to require or
21 authorize the creation of tax lot 60 to be dedicated to open
22 space use. In addition, we see nothing in the 1977 variance
23 to suggest that variance attempted to transfer the

¹⁰The PCC currently contains detailed standards for approval of development density transfers, allowed only in conjunction with Planned Unit Development (PUD) approval. However, there has never been any specific PUD approval for tax lot 59.

1 development rights of the land that is now tax lot 60 to the
2 land that is now tax lot 59.

3 Finally, the 1977 variance contained the following
4 limitation:

5 "The approval is based generally on the plans
6 submitted for [the 1977 variance] only. Any
7 substantial changes in plans would invalidate
8 approvals made under [the 1977 variance]."
9 Record 65.

10 However, the record does not contain the original or a copy
11 of the plans submitted with the application for the 1977
12 variance. Petitioner states that because the plans
13 submitted for the 1977 variance are not in the record, it is
14 impossible to determine that a particular development
15 density for tax lot 59 was approved by the 1977 variance or
16 whether the 1977 proposal has been substantially changed
17 (and thus whether the 1977 variance remains valid).

18 Intervenors cite an unlabeled document in the record as
19 being the site plan for the 1977 variance. Intervenors also
20 cite a tax lot map in the record and state it is "clear"
21 from a comparison of that map with the unlabeled document
22 that certain of the buildings shown on the unlabeled
23 document are proposed for tax lot 59. Further, the city
24 cites untranscribed audio tapes as providing testimony which
25 further explains what was shown in the plans submitted for
26 the 1977 variance.

27 We do not believe the unlabeled document together with
28 the tax lot map, and testimony in the untranscribed tapes,

1 establish a basis upon which a reasonable person would rely
2 to determine the 1977 variance designated what is now tax
3 lot 60 as open space or that a particular number of
4 residential units was authorized to be constructed on what
5 is now tax lot 59. We agree with petitioner that there is
6 not substantial evidence in the whole record to support a
7 determination that the 1977 variance approved any particular
8 development density on tax lot 59.

9 In sum, we see nothing in the 1977 variance to excuse
10 compliance with any applicable zoning requirement other than
11 applicable height limitations for the land which is now tax
12 lots 59 and 60.¹¹ We conclude the city's interpretation of
13 the 1977 variance is incorrect.

14 The first assignment of error is sustained.

15 **SECOND ASSIGNMENT OF ERROR**

16 "The city council's second finding is flawed."

17 This assignment of error challenges the city's
18 determination that intervenors possess a vested right to
19 construct a 150 unit condominium development on tax lot 59.

20 In order to establish a vested right to construct 150
21 units on tax lot 59, the city must determine that qualified

¹¹In addition, we agree with petitioner that there is nothing in the record upon which a reasonable person could conclude that the plans for the current proposal at issue in this appeal do not constitute a substantial change from the proposal approved by the 1977 variance. Accordingly, under the terms of the limitation in the 1977 variance, the record does not support a determination that the 1977 variance from applicable height limitations is still valid.

1 expenditures were made toward development of tax lot 59 at a
2 time when the construction of 150 units on that tax lot did
3 not require city approvals, or at a time when required
4 approvals were given. Clackamas County v. Holmes, 265 Or
5 App 193, 508 P2d 190 (1973); Schmaltz v. City of Hood River,
6 ___ Or LUBA ___ (LUBA No. 91-047, September 30, 1991), slip
7 op 12-13; DLCD v. Curry County, ___ Or LUBA ___ (LUBA No.
8 90-022, June 5, 1990), slip op 8. Here, there are no
9 findings in the challenged decision identifying any
10 expenditures made toward the construction of 150 condominium
11 units on what is now tax lot 59. Even if there were such
12 findings, as we state supra, the 1977 variance did not
13 approve any particular density of development for tax lot
14 59. As far as we can tell, there has been no point since
15 1977 when it was permissible to place 150 condominium units
16 on what is now tax lot 59 without further city approvals,
17 perhaps in the form of a PUD approval including a density
18 transfer from what is now tax lot 60, or a variance to the
19 applicable density standards, approvals which neither
20 intervenors nor their predecessor in interest ever obtained.

21 Further, even if we assume, as intervenors argue we
22 should, that the 1977 variance approved the construction of
23 220 condominium units on the ten acre parcel (of which what
24 is now tax lot 59 was a part), and that 70 units have been
25 constructed on that ten acre parcel pursuant to the 1977
26 variance, we would nevertheless conclude no vested right has

1 been established to construct 150 units on what is now tax
2 lot 59. This is because tax lots 59 and 60 did not exist as
3 separate tax lots or parcels in 1977, and the 1977 variance
4 did not purport to grant particular development densities
5 for not yet existent tax lots.

6 In sum, intervenors could never have established a
7 vested right to construct 150 unit condominium units on what
8 is now tax lot 59 because intervenors never obtained city
9 approvals necessary for such development. We believe the
10 city's determination to the contrary is erroneous.

11 The second assignment of error is sustained.

12 **FOURTH ASSIGNMENT OF ERROR**

13 "Developer is not the 'owner' of Tax Lot 60."

14 Petitioners argue that intervenors do not own tax lot
15 60 and consequently are not entitled to any of the
16 development rights which tax lot 60 possesses. However, the
17 city did not base its decision on the ownership of tax lot
18 60. Consequently this assignment of error provides no basis
19 for reversal or remand of the challenged decision.

20 The fourth assignment of error is denied.

21 **THIRD ASSIGNMENT OF ERROR**

22 "The proceedings below violated ORS 197.763
23 because the issues were not raised with sufficient
24 specificity to permit comment."

25 **FIFTH ASSIGNMENT OF ERROR**

26 "The city council violated Chapter 33 of the
27 Portland Zoning Code and ORS 197.835(7) by failing
28 to permit comment on the proposed findings."

1 The city's decision must be reversed for the reasons
2 explained below. No purpose would be served in determining
3 whether the city also made procedural errors in adopting the
4 challenged decision.

5 The third and fifth assignments of error are denied.

6 We determine under the first and second assignments of
7 error that the challenged decision is unsupported as a
8 matter of law. OAR 661-10-071(1). Accordingly, we reverse
9 the challenged decision.

10 The city's decision is reversed.

11