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

R. JAMES CLAUS,)
)
 Petitioner,)
)
 vs.)
)
 CITY OF SHERWOOD,)
)
 Respondent,)
)
 and)
)
 GENSTAR LAND COMPANY NORTHWEST,)
)
 Intervenor-Respondent.)

LUBA No. 98-096

FINAL OPINION
AND ORDER

Appeal from City of Sherwood.

R. James Claus, Sherwood, file the petition for review and argued on his own behalf.

Derryck H. Dittman, Tigard, filed a response brief and argued on behalf of respondent. With him on the brief was Anderson & Dittman.

Jack L. Orchard and Linly Ferris Rees, Portland, filed a response brief and argued on behalf of intervenor-respondent. With them on the brief was Ball Janik.

HOLSTUN, Board Member; HANNA, Board Member, participated in the decision.

AFFIRMED 01/21/99

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision approving a preliminary subdivision plat.

4 **MOTION TO INTERVENE**

5 Genstar Land Company Northwest, the applicant below, moves to intervene on the
6 side of respondent. There is no opposition to the motion, and it is granted.

7 **FACTS**

8 Woodhaven is a multi-phase planned unit development (PUD). The Master
9 Development Plan for Woodhaven was approved on August 16, 1994. On March 26, 1997,
10 the city council approved a modified Master Development Plan with conditions.¹ On June 9,
11 1998, the city council adopted the decision challenged in this appeal. The challenged
12 decision approves a preliminary subdivision plan for Woodhaven Phase 7A. The central
13 dispute in this appeal is whether Phase 7A is inconsistent with the March 26, 1997 modified
14 Master Development Plan.

15 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

16 **A. Introduction**

17 Before turning to the merits of petitioner's assignments of error, we note that we are
18 confused by the manner in which the city proceeded in this matter. It does not appear that
19 the procedures set out in the code for approval of PUD subdivisions were followed.² The
20 approach taken in the petition for review also makes our review more difficult. While the

¹The city's March 26, 1997 decision apparently approved a modified Master Plan dated February 18, 1997. Record 262. That Master Plan is sometimes referred to as a "phasing map" and shows Phase 7 divided into Phase 7A and Phase 7B.

²For example Sherwood Zoning and Community Development Code (SZCDC) 2.202.02(B)(5) and 2.202.03(B) require that where a PUD involves subdivision of land, the preliminary and final subdivision plats be processed and approved concurrently with the PUD Master Plan. Because the preliminary plat for Phase 7A was approved long after the March 26, 1997 modified PUD Master Plan was approved, it appears to us that procedure was not followed in this case, and we do not know why.

1 petition for review includes 28 pages discussing the facts, it does not set out separate
2 assignments of error as such and includes only 4 pages of argument.

3 We have held that a petitioner's failure to set out separate assignments of error, as
4 required by OAR 661-010-0030(4)(d), does not justify rejecting the petition for review, so
5 long as we are able to "determine with reasonable certainty the error petitioner asserts."
6 Freels v. Wallowa County, 17 Or LUBA 137, 140-41 (1988).³ However, in reviewing land
7 use decisions, we limit our review to the allegations of error that are fairly stated in the
8 petition for review. In order for this Board to sustain petitioner's assignments of error,
9 petitioner's arguments must be sufficiently developed to demonstrate that the city committed
10 an error that warrants reversal or remand under ORS 197.835. Deschutes Development v.
11 Deschutes Cty., 5 Or LUBA 218, 220 (1982). Where a petitioner fails to do so, we will not
12 sustain an assignment of error even though there may be a meritorious argument to be made
13 in support of an assignment of error. With this understanding of our review, we turn to
14 petitioner's arguments under the first two assignments of error.

15 **B. Discussion**

16 The "Woodhaven Conditions of Approval" that were adopted with the approved
17 modified Master Development Plan on March 26, 1997, apply to "all subsequent Woodhaven
18 preliminary and final plats[.]" One of those conditions provides as follows:

19 "14. Prior to Phase 7 (See Phasing map dated 2-18-97) plat approval, the
20 following items shall be resolved to the satisfaction of the City:

21 "A. The City shall review and approve the incorporation of a park
22 adjoining Meinecke Road. In the event that a park is not
23 located at its proposed location, the use of that location is to be

³While it is not this Board's function to supply assignments of error or arguments that are not included in the petition for review, neither do we impose technical rules of pleading. See Hilliard v. Lane County Commrs, 51 Or App 587, 595, 626 P2d 905 (1981) (LUBA may not invoke "technical requirements of pleading having no statutory basis"). Our understanding of petitioner's assignments of error is derived from the arguments at pages 32-36 of the petition for review, which petitioner refers to as assignments of error, and from the "Summary of Arguments" appearing at pages 3-4 of the petition for review.

1 determined prior to planning approval of Phases 7A, 7B and 8,
2 and shall generally be used reflecting the original approval of
3 PUD 93-3.

4 "B. Identify the location of a street that starts at Sunset Boulevard,
5 goes through Phase 7 and ultimately connects with Meinecke
6 Road. The applicant will pay all costs for the full length of the
7 road. The applicant will provide a letter of credit in an amount
8 sufficient to complete the collector street from Sunset
9 Boulevard to Meinecke Road as part of Phase 6 conditions."
10 Record 36 (emphases added).

11 Under his first assignment of error, petitioner appears to argue the city failed to
12 satisfy the obligation imposed by condition 14A with regard to the proposed park. Under his
13 second assignment of error, petitioner appears to argue the city failed to satisfy the obligation
14 imposed by condition 14B with regard to the street connection with Meinecke Road. We
15 understand petitioner to argue that either prior to approval of the preliminary plat for Phase
16 7A, or as part of that approval, the city must do two things. First, it must "review and
17 approve the incorporation of a park adjoining Meinecke Road." Record 36. Second, it must
18 "[i]dentify the location of a street that starts at Sunset Boulevard, goes through Phase 7 and
19 ultimately connects with Meinecke Road." Id. Petitioner does not cite condition 14 by
20 number or set out the above quoted language of condition 14 in his argument under the first
21 two assignments of error.⁴ Nevertheless, it is clear from respondent's and intervenor-
22 respondent's briefs that they both understand that petitioner is alleging that the challenged
23 decision violates condition 14.

24 The preliminary plat for Phase 7A approved by the challenged decision does not
25 include "review," "approv[al]" and "incorporation of a park adjoining Meinecke Road."
26 Neither does the approved preliminary plat for Phase 7A "[i]dentify the location of a street
27 that starts at Sunset Boulevard, goes through Phase 7 and ultimately connects with Meinecke

⁴Petitioner does, however, quote condition 14 at page 13 of the petition for review, under his discussion of the facts.

1 Road." The findings adopted in support of the challenged decision explain:

2 "In approving Phase 7A Preliminary Plat the Planning Commission concluded
3 that the matters of the park and the road in Conditions 14A and 14B will be
4 considered as part of Phase 7B. In the opinion of the Planning Commission,
5 there was nothing in Phase 7A that would impact the park and road matters
6 and, therefore, that Phase 7A should be allowed to go forward. The City
7 Council concurs with the conclusion of the Planning Commission." Record
8 28.

9 The city council's decision defers "review [approval and] incorporation of a park
10 adjoining Meinecke Road" until Phase 7B. The decision also defers identification of "the
11 location of a street that starts at Sunset Boulevard, goes through Phase 7 and ultimately
12 connects with Meinecke Road" to Phase 7B. The question presented under the first two
13 assignments of error is whether deferring those considerations until Phase 7B violates
14 condition 14. We conclude that it does not.

15 Condition 14 imposes two substantive obligations concerning the proposed park and
16 connecting street, but the precise nature of the actions that may be required to comply with
17 these two substantive obligations is not specified in the condition. Rather, the condition
18 merely specifies that the substantive requirements must be "resolved to the satisfaction of the
19 City." The above condition also specifies when the two substantive requirements must be
20 satisfied, i.e., "[p]rior to phase 7 * * * plat approval."

21 Under the just-quoted language of condition 14 it is possible that the substantive
22 requirements of condition 14 are to be met before "any part" of Phase 7 (i.e., before Phase 7A
23 or Phase 7B) receives preliminary plat approval.⁵ If that is what condition 14 requires, the
24 first two assignments of error must be sustained. There are some practical considerations

⁵As a point of clarification, we do not understand petitioner to argue that condition 14 must literally be satisfied before the city can consider preliminary plans for Phases 7A and 7B. Indeed it is clear from the record and the language of condition 14 that the road and park issue are to be addressed as part of the city's approval of Phase 7. Petitioner simply contends that condition 14 must be satisfied as part of the city's decision concerning Phase 7A and that compliance with condition 14 may not be deferred until the city considers Phase 7B.

1 that argue in favor of that interpretation. First, condition 14 requires that if the proposed
2 park site shown on the February 18, 1997 phasing map is to be put to some other use, that
3 other use must "be determined prior to planning approval of Phases 7A, 7B and 8."⁶
4 Approving the preliminary plan for Phase 7A prior to approving the preliminary plan for
5 Phase 7B would appear to eliminate the possibility of approving Phase 7B without at the
6 same time approving and incorporating the park as it is shown on the February 18, 1997
7 phasing map. In addition, approval of Phase 7A in advance of Phase 7B will limit the
8 options that might otherwise be available for complying with the road connection required by
9 condition 14B.

10 However, the quoted language of condition 14 does not expressly say that "no part"
11 of Phase 7 may receive plat approval prior to compliance with condition 14. Under the city's
12 decision, preliminary plat approval for Phase 7 will not be complete until Phase 7B is
13 approved.⁷ We cannot say that it is unreasonable or incorrect for the city to interpret
14 condition 14 to require that condition 14 be met as part of preliminary plat approval of Phase
15 7, viewed as a whole.⁸ It may well be that, by approving the preliminary plat for Phase 7A
16 in advance of the preliminary plat for Phase 7B, the city and the applicant have foreclosed

⁶As shown on the February 17, 1997 Phasing map, the proposed park adjoins Phase 7B only. Record 262.

⁷ Phase 7B was approved after the decision challenged in this appeal, and the city decision approving Phase 7B has been appealed to LUBA by the applicant. Genstar Land Company Northwest v. City of Sherwood, LUBA No. 98-208. That appeal is currently pending before this Board.

⁸The city's interpretation of condition 14 is implied rather than express. Alliance for Responsible Land Use v. Deschutes Cty., 149 Or App 259, 942 P2d 836 (1997), rev dismissed 327 Or 555 (1998). Nevertheless, it is adequate for our review. Weeks v. City of Tillamook, 117 Or App 449, 452-53 n 3, 844 P2d 914 (1992). Neither respondent nor intervenor-respondent argue that the city's interpretation of condition 14 is entitled to deference under Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), and in view of Gage v. City of Portland, 319 Or 308, 877 P2d 1187 (1994), we seriously question whether Clark deference is appropriate where the city council is interpreting a condition of approval rather than a comprehensive plan or land use regulation. See also ORS 197.829 (LUBA is to defer to local government interpretations of "its comprehensive plan and land use regulations"). We therefore review to determine whether the city's interpretation is "reasonable and correct." McCoy v. Linn County, 90 Or App 271, 752 P2d 323 (1988).

1 options that would otherwise be available to achieve compliance with condition 14.⁹
2 However, be that as it may, we do not agree with petitioner that condition 14 requires final
3 resolution of the location of the park and road prior to preliminary plat approval for Phase
4 7A.

5 In summary, we agree with petitioner that the city's decision challenged in this
6 appeal, which approves a preliminary plat for Phase 7A, does not establish compliance with
7 the park and street requirements in condition 14. However, we do not agree with petitioner
8 that the city was required to comply with these requirements before granting preliminary
9 approval for Phase 7A. Rather, we agree with the city and intervenor-respondent that so long
10 as approval of Phase 7A does not preclude compliance with condition 14 at the time Phase
11 7B is approved, which appears to be the case here, Phase 7A may be approved in advance of
12 Phase 7B.

13 The first and second assignments of error are denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 Petitioner appears to argue under this assignment of error that the city erred by
16 approving a further modification of the March 26, 1997 modified Master Plan which
17 significantly reconfigured Phase 7A and 7B.¹⁰ However, even if the city has approved such
18 a further modification of the March 26, 1997 modified Master Plan, petitioner has not
19 appealed that decision to this Board.¹¹

⁹Approving the preliminary plat for Phase 7A in advance of Phase 7B may also present other problems that we are not aware of in approving Phase 7B.

¹⁰The configuration of the Phase 7A preliminary plat approved by the challenged decision is significantly different than the configuration of Phase 7A shown on the March 26, 1997 modified Master Plan.

¹¹We do not know whether the city has adopted a decision further modifying the March 26, 1997 modified Master Plan. There is language in the challenged decision that suggests that the city may have approved such a modification. Record 28. However, at oral argument, the city advised the Board that the March 26, 1997 modified Master Plan has not been modified further.

1 We note that petitioner does not argue under this assignment of error that the
2 configuration of Phase 7A approved by the challenged decision should be remanded because
3 it is inconsistent with the March 26, 1997 modified Master Plan. We have no way of
4 knowing whether that argument might have merit, because petitioner does not sufficiently
5 articulate or develop that argument to allow review. Deschutes Development, 5 Or LUBA at
6 220.

7 The third assignment of error is denied.

8 **FOURTH ASSIGNMENT OF ERROR**

9 Petitioner's arguments under the fourth assignment of error express concerns that
10 removal of the park site from the PUD will mean that the city rather than the developer will
11 have to fund the costs of development, improvement and maintenance of the park.

12 The challenged decision does not appear to have any direct effect on the proposed
13 park site which, as shown on the March 26, 1997 modified Master Plan, adjoins Phase 7B.
14 Petitioner does not explain how the challenged decision has any bearing on how the costs of
15 development, improvement and maintenance of the proposed park will be paid or, if it does,
16 how that would provide a basis for reversal or remand.

17 The fourth assignment of error is denied.

18 The city's decision is affirmed.