

& Wyatt and Preston, Thorgrimson, Shidler & Gates. Daniel H. Kearns argued on behalf of respondent and Steven W. Abel argued on behalf of intervenor-respondent.

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

REMANDED

02/27/91

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the Oregon City Commission granting conditional approval of a preliminary plan for a planned development (PD).

MOTION TO INTERVENE

V. Gordon Linville moves to intervene on the side of respondent in this appeal proceeding. There is no objection to the motion, and it is allowed.

FACTS

Intervenor-respondent (intervenor) applied for permission to expand the existing Barclay Village Planned Development (Barclay I) to place 74 residential units on the subject property.¹ Specifically, the proposal is to construct 66 apartment units in five buildings and eight "attached single-family residential units on individual lots." Record 7.

The subject property is 5.26 acres in size, zoned R-6 Single Family Residential and designated on the city comprehensive plan map as Low Density Residential. The subject property is undeveloped. Barclay I consists of 146 multifamily units located across the street from the subject property. Barclay I is located on 8.5 acres of land zoned Multifamily Residential Development and designated on the

¹The applicant initially requested approval for construction of 74 units. However, the city approved the construction of 73 units.

comprehensive plan map as High Density Residential Development. Properties to the west and south of the proposed development are zoned R-6 and R-10 Single Family Residential.

The planning commission denied intervenor's application. Intervenor appealed the planning commission's decision to the city commission. The city commission reversed the decision of the planning commission and approved the preliminary plan for the proposed PD expansion. This appeal followed.

FIRST ASSIGNMENT OF ERROR

"The City adopted findings inadequate to demonstrate compliance with the criteria and rendered a decision not supported by substantial evidence in the record when they concluded that 'to the extent that sidewalks are necessary in new development' Transportation Policy #5 is met." (Emphasis in original.)

Petitioners argue the proposal violates Comprehensive Plan Transportation Policy 5 (policy 5) because the proposal includes inadequate provision for sidewalks along certain developed properties which are not part of the proposed development, but are situated along streets providing access to the proposed development.

Policy 5 states:

"New development will include sidewalks in their [sic] design, where needed." (Emphasis supplied.)

Intervenor and respondent (respondents) argue policy 5 is satisfied because the challenged decision requires

sidewalks in and along all proposed new development, to the extent needed. Respondents contend the scope of policy 5 is limited to requiring the establishment of necessary sidewalks only along and within proposed new development, but that policy 5 does not require provision of sidewalks in areas not a part of the proposed new development.

We agree with respondents. By its terms, policy 5 applies only to new development. The error petitioners claim with respect to policy 5 is that sidewalks should have been required along property which is not part of the proposed new development.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

"The City adopted findings inadequate to demonstrate compliance with the criteria and rendered a decision not supported by substantial evidence in the record when they concluded that the proposal to expand the Barclay Village Planned Development is consistent with the requirements of section 11-10-1."

Petitioners argue that the proposal violates the below emphasized language in City of Oregon City Zoning and Development Ordinance (ZDO) section 11-10-1, which provides as follows:

"DEFINITION AND PURPOSE: A Planned Development (hereafter referred to as PD) is not a land use zone, but rather a special approach to land development applied to achieve the basic objectives of good zoning practices. The use of this approach is intended to permit a greater degree of flexibility in the use and design of structures and land in situations where

modification of specific provisions of this Ordinance will not be contrary to its intent and purpose or significantly inconsistent with the planning on which it is based and will not be harmful to the neighborhood in which they occur. It is further intended to achieve land economies in land development, maintenance, street systems and utility networks, while providing building groupings for privacy, usable and attractive open spaces, safe circulation and the general well being of the inhabitants." (Emphasis supplied.)

In Anderson v. Peden, 284 Or 313, 320, 587 P2d 59 (1978), the Supreme Court acknowledged that a purpose statement in a zoning ordinance could contain approval standards applicable to individual development applications. The Court stated:

"When a statute or other legislation is prefaced by a list of 'purposes,' these purposes are not ipso facto standards to govern administrative decisions under it. Depending what other standards the legislation states or requires to be adopted, the statement of purposes may or may not be intended to serve that role." (Citations omitted.)

The language employed in the purpose statement at issue here evidences only what the city intends the consequences of application of the specific PD provisions contained in ZDO 11-10 et seq to be. ZDO 11-10-1 does not, of itself, establish independent approval standards for individual applications for PD approval. See Foster v. City of Astoria, 16 Or LUBA 879, 885 (1988); see also Cornell Park Assoc. v. Washington County, 16 Or LUBA 897, 904 (1988). The approval standards applicable to PD preliminary plans which address impacts to the neighborhood from a proposed

planned development are found in ZDO 11-10-3(A)(4) and ZDO 11-10-12(B). We consider the proposal's compliance with ZDO 11-10-3(A)(4) under the third assignment of error. Petitioners do not include an assignment of error regarding ZDO 11-10-12(B).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

"The City erroneously determined suitability in relation to the character of the area and adopted findings not supported by evidence in the record when it adopted findings that traffic safety and capacity can be adequately addressed through conditions of approval."

Petitioners argue that the proposed PD does not comply with ZDO 11-10-3(A)(4), which provides:

"Conditional Approval by the Planning Commission. Following the public hearing, the Planning Commission may conditionally approve in principle the preliminary plan and program, require amendment and modification thereto, or reject said planned development. Such action shall be based upon the Comprehensive Plan, the standards of this Title, and other applicable regulations and the suitability of the proposed development in relation to the character of the area * * *. Approval in principle of the preliminary acceptability of the land uses proposed and their inter-relationships * * * shall not be construed to endorse precise location of uses nor engineering feasibility. The Planning Commission may require additional information to be submitted with the final development plan and program." (Emphasis supplied.)

The findings addressing this standard are as follows:

"* * * The City Commission finds that

- "A. Utilities are adjacent to the site and adequate to serve the development.
- "B. The development will be similar in design to [Barclay I]. There will be single-family residences fronting on Magnolia Street, which is primarily developed with single-family residences.
- "C. The proposed development has been designed to preserve the existing wooded areas and will not significantly encroach on the drainage swale. In steeply sloped locations, the development must conform with the unstable slopes overlay zone.
- "D. The development will provide a 100-foot setback from the existing single-family lot on Magnolia Street to any apartment buildings.
- "E. Traffic safety and capacity can be adequately addressed through conditions as discussed in these findings." Record 17.

Petitioners contend these findings are inadequate to establish the proposed PD is suitable "in relation to the character of the area." Petitioners also argue finding (E) quoted above is not supported by substantial evidence in the whole record.

Petitioners argue that the area surrounding the proposed PD is characterized, in large part, by existing homes within the Ely neighborhood, including homes along Magnolia Street, which has a substandard width.² Many of

²There is no dispute regarding the scope of the "area" considered in the determination of the suitability of the proposed PD under ZDO 11-10-3(A)(4). See Sweeten v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-024, July 24, 1989), slip op 14; See also Murphey v. City of

the homes within the Ely neighborhood are within a subdivision platted during the late nineteenth century. Consequently, petitioners state many of the existing homes along both Magnolia Street are very close to the street right of way. Record 26, 48, 76, 78. Under these circumstances, petitioners argue the proposed PD is not suitable for the area in which it is proposed because (1) it will increase traffic on Magnolia Street, and (2) the increased traffic will pose a safety hazard to pedestrian traffic, because pedestrians will have no place to walk but the street. Petitioners contend the findings do not explain how it is possible to construct sidewalks along Magnolia Street to alleviate this situation, due to the proximity of the existing residences to the street right of way.

Petitioners also argue that if sidewalks were constructed along Magnolia Street, they would pose a serious threat to existing homes because such sidewalks would necessarily be constructed so close to the foundations of existing homes that their integrity will be seriously compromised.

Respondents argue the above quoted city findings, together with the conditions of approval, are adequate to establish compliance with ZDO 11-10-3(A)(4). They point out

Ashland, ___ Or LUBA ___ (LUBA No. 89-123, May 16, 1990), slip op 28, aff'd, 103 Or App 238 (1990).

that the city imposed a condition of approval which requires the following:

"Sidewalks shall be constructed on both sides of Magnolia Street, between Cascade Street and Barclay Hills Drive, within the existing right of way. Sidewalks shall be located to meet the city standard (5 feet) as closely as possible. The planning commission shall be involved in the final review process with regard to the final sidewalk location." Record 19.

We agree with petitioners that, under the circumstances, the city's findings are inadequate to establish compliance with ZDO 11-10-3(A)(4). Petitioners submitted evidence below that the proposal will have negative impacts on pedestrian safety, and that sidewalks would be necessary to address these safety concerns. Petitioners also presented evidence that it may not be possible to construct sidewalks along Magnolia Street within the existing right of way because of the proximity of the existing street to the edge of the right of way. Additionally, petitioners submitted evidence that if sidewalks are constructed within the right of way, existing homes along Magnolia Street will be jeopardized because they are so close to the edge of the existing right of way. These issues are relevant to the determination required by ZDO 11-10-3(A)(4), i.e. that the proposal is suitable in view of the characteristics of the area for which it is proposed. The city must address in its findings these issues relevant to compliance with ZDO 11-10-3-(A)(4) which

were raised by petitioners' evidence. Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Grover's Beaver Electric v. City of Klamath Falls, 12 Or LUBA 61, 66 (1984).

While the city arguably did address the issue of traffic safety by requiring as a condition of approval the construction of sidewalks along Magnolia Street, it did not explain how or to what extent construction of sidewalks will solve pedestrian safety concerns in view of petitioners' evidence regarding the narrowness of the Magnolia Street right of way. Further, the city did not address whether the PD is suitable for the area in which it is proposed, considering that construction of sidewalks is contemplated in an area extremely close to the foundations of existing homes.³

Because we determine that the city's findings are inadequate, no purpose is served in addressing the evidentiary support for the city's findings.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

"The City committed a procedural error when it allowed new evidence on appeal."

³We express no opinion regarding whether construction of sidewalks within the existing right of way, if possible, would violate ZDO 11-10-3(A)(4) solely because houses are immediately adjacent to or in very close proximity to the Magnolia Street right of way.

The parties do not dispute that the hearing before the city commission leading to the challenged decision was an "on the record review." Further, the parties do not dispute that at the beginning of the hearing all participants were admonished that no additional evidence would be allowed.

Petitioners argue that the city commission erroneously authorized the applicant to submit additional evidence during the hearing, in the form of "three new colored drawings and an aerial photograph over the objections of the Ely Neighbors * * *." Petition for Review 15. Petitioners also argue that the city development director was allowed to testify regarding new matters.⁴

The "colored drawings" are simply colored versions of material which is already in the record. We agree with respondents that these drawings were submitted to the city commission as argument only and are not new evidence.

Regarding the aerial photograph and the testimony of the development director, petitioners do not argue that they were denied an opportunity to rebut this evidence, if it was "new." Petitioners could have rebutted this material and testimony, but did not do so. Under these circumstances, petitioners have not established how the alleged procedural

⁴Respondents argue that petitioners consented to the introduction of the "new" evidence at this hearing. We disagree. Petitioners clearly objected to the introduction of the allegedly new evidence and nothing suggests that they abandoned that position. Record 22.

error caused any harm to their substantial rights. ORS 197.835(7)(a)(B).⁵

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

"The City committed a procedural error and prejudiced petitioners' substantial rights by not allowing Daniel Huiras the right to speak in opposition to the application."

Petitioners argue that Mr. Daniel Huiras asked to provide argument at the city commission hearing, but was not allowed to do so. The minutes state:

"Dan Huiras, * * * requested to testify. It was ascertained that his testimony would be new and could not be accepted." Record 27.

Petitioners do not identify what Mr. Huiras would have said had he been allowed to speak. Petitioners do not claim that Mr. Huiras' testimony would not have included new evidence. It is petitioners' responsibility to identify a basis upon which we might grant relief. As far as we can

⁵ORS 197.835(7)(a)(B) provides:

"[T]he board shall reverse or remand the land use decision under review if the board finds:

"(a) The local government or special district:

"* * * * *

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner * * *"

"* * * * *."

tell, Mr. Huiras was not allowed to speak because he would have presented new evidence, something all parties agree would have been inappropriate for the city commission to consider.

The fifth assignment of error is denied.

The city's decision is remanded.