

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

| | | |
|--------------------------|---|-----------------|
| OSWEGO PROPERTIES, INC., |) | |
| |) | |
| Petitioner, |) | LUBA No. 91-002 |
| |) | |
| vs. |) | FINAL OPINION |
| |) | AND ORDER |
| CITY OF LAKE OSWEGO, |) | |
| |) | |
| Respondent. |) | |

Appeal from City of Lake Oswego.

Stephen T. Janik and Richard H. Allan, Portland, filed the petition for review. With them on the brief was Ball, Janik & Novack. Stephen T. Janik argued on behalf of petitioner.

Jeffrey G. Condit, Lake Oswego, filed the response brief and argued on behalf of respondent.

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

AFFIRMED

04/24/91

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

Petitioner appeals a decision of the city council denying its application for a 39 unit multifamily housing project on land zoned East End General Commercial (EC).

FACTS

The site is zoned EC, and consists of 30,000 square feet. The site contains several trees, some of which are quite old. Among the trees on the site are a Japanese Lace Leaf Maple, Douglas Fir, Big Leaf Maple, American Sweetgum, Golden Chinkapin and a Giant Arborvitae.

Under the Lake Oswego Development Standards (LODS), a multifamily housing project in the EC zone is considered "Major Development." Major developments are subject to certain open space standards. The city's Design Review Board (DRB) approved the proposed development with conditions. Under the DRB's decision, only the Japanese Lace Leaf Maple tree would be protected. A neighborhood association appealed the DRB decision to the city council. The city council reversed the decision of the DRB on the basis that the proposal did not comply with the city's open space standards because it failed to preserve trees which the city determined to be "distinctive" or "specimen trees," and failed to preserve other trees on the site which the city determined to be "necessary to provide a 'scenic aesthetic appearance' on the site." Record 11. This

appeal followed.

FIRST ASSIGNMENT OF ERROR

"The City misconstrued the Park and Open Space Standards."

LODS 8.020(1) provides in relevant part:

"All major residential development * * * shall provide open space or park land approved by the city in an aggregate amount equal to at least 20 percent of the gross land area of the development. * * *" (Emphasis supplied.)

LODS 8.035(4) states "[l]ands shall be selected by the city for reservation as open space in accordance with the following priorities * * * [.]" Ten separate priorities are listed; the first priority is "[d]istinctive natural areas * * * identified in the Comprehensive Plan," the fifth priority is "[s]pecimen trees," and the final priority is entitled "[o]thers."

LODS 8.035(6) lists five "Options for Meeting Park and Open Space Requirements." The options provide that where the city approves all or part of the open space specified in LODS 8.020(1), the city may waive all or part of the "acquisition" and "development" fees required by other city ordinance provisions.

Petitioner's position is that it does not wish to provide open space. Instead, it desires to pay the acquisition and development fees. Petitioner argues that under LODS 8.035(6), the city has no authority to require the provision of open space when the developer wishes

instead to pay the fees. Petitioner cites the following language from our decision in Axon v. City of Lake Oswego, ___ Or LUBA ___ (LUBA No. 90-071, October 15, 1990), slip op 25-26:

"We read LODS § 8.035 to make land dedication or payment of fees equally available options to be selected in whole or in part as the city wishes.
* * *" (Footnote omitted.)

Petitioner contends this means the decision whether to pay the acquisition and development fees, or to provide open space, belongs to the applicant and not to the city. Petitioner contends the city has no authority to require the applicant to dedicate open space where it is willing to pay fees instead.

Alternatively, petitioner contends that if the decision whether to require open space or payment of fees belongs solely to the city, there are no standards to govern the circumstances under which the city requires open space or instead requires payment of fees, in violation of ORS 227.173(1).¹ Under this analysis, petitioner argues the city's decision should be reversed because it purports to

¹ORS 227.173(1) provides:

"Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

deny the proposed development on the basis of the unfettered discretion of the city decision maker.

LODS 8.020(1) requires that all major development provide at least 20 percent of the gross land area of the proposed development as open space or park land. This land must be "approved by the city." LODS 8.035(4) prioritizes the kinds of open space lands the city will approve. LODS 8.035(6) states the circumstances under which the city will waive the "acquisition" and "development" fees, and implies that there are some circumstances in which the city will not require the dedication of open space under LODS 8.020(1), but rather will require payment of the fees. We agree with the city that under the LODS, the decision regarding whether and what open space is to be dedicated belongs to it.

The more difficult question is whether the LODS scheme, which envisions the city choosing between requiring the dedication of open space and the payment of fees, violates ORS 227.173(1). In Axon, supra, we determined the "priorities" listed in LODS 8.035(4) are not mandatory approval standards for determining the circumstances under which the city will require dedication of open space rather than the payment of fees. We stated:

"We disagree with petitioner's assumption that LODS § 8.035(4) establishes a list of priority areas which the city is required to address and, if it finds areas within as proposed development falling within a priority area, require land

dedication rather than the payment of the fee. Under petitioner's interpretation, the city would be required to exhaust a potentially infinite list of priorities under the 'others' category before it could accept fees in lieu of dedication. LODS § 8.035(6) expresses no preference between land dedication and payment of fees, and we will not interpret LODS § 8.035(4) to impose such an obligation absent some basis in the code language for doing so."² Id. at slip op 25.

However, in Axon we went on to state that where the city requires open space, the priorities listed in LODS 8.035(4) must be applied, and could preclude the city from selecting lands falling within a lower priority where higher priority lands are present. Axon, supra, slip op at 26.

LODS 8.020(1) contains a mandatory standard requiring that all major developments provide a certain quantity of open space. The priorities established in LODS 8.035(4) are applicable where the city requires such open space to be provided, and constitute standards to guide city determinations of which lands are to be provided as open space. Where such open space is required to be provided, LODS 8.035(6) provides standards for determining whether and how much of the acquisition and development fees will be waived. While the city has also left itself the option of waiving the open space requirement and instead imposing fees under LODS 8.035(6), there is no standard in the LODS for

²The issue of whether this interpretation of LODS 8.020 and 8.035 raised a potential violation of ORS 227.173(1) was neither raised by the parties in Axon, nor addressed by this Board in its decision.

determining under what circumstances the city will not require open space where such open space could be approved under the priorities established by LODS 8.035(4). Therefore, accepting or requiring the payment of fees in lieu of the land dedication required by LODS 8.020(1), where such open space could be approved under the LODS 8.035(4) priorities, would violate the requirement of ORS 227.173(1) that such decisions be governed by standards in the city's development ordinance.³

However, in this case, the city has not required a fee in lieu of provision of open space, but rather has required that the proposed major development provide open space pursuant to LODS 8.020(1). Further, the city has identified the particular open space to be required in accordance with the priorities listed in LODS 8.035(4). We believe LODS 8.020(1) and LODS 8.035(4) contain adequate standards on which to deny a proposed major development where the applicant does not propose to dedicate the open space lands selected by the city for that purpose. To the extent that our decision in Axon can be read to state that LODS 8.020(1) and LODS 8.035(4) do not contain approval standards

³In view of the very broad definition of open space in the LODS, the city, as a practical matter may rarely, if ever, be able to exercise its option to require fees in lieu of open space. However, if the city wishes to retain the ability to exercise the option to require or accept fees in lieu of open space where open space could be approved under the priorities established by LODS 8.035(4), under ORS 227.173(1) it must provide standards to govern its exercise of that option in such circumstances.

governing such decisions by the city, it is overruled.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

"The City Council erred in finding that petitioner's proposed development would not preserve the Japanese Lace Leaf Maple as a distinctive natural area."

The city's findings state:

"The Comprehensive Plan identifies the Japanese lace leaf maple located on the west side of Second and B Streets within the development as being within a Distinctive Natural Area. The retention of the tree as a 'specimen tree' in the General Landscaping Plan of the development as proposed by the applicant is not sufficient to maintain the tree as a Distinctive Natural Area because of the immediate proximity of the 44 foot high multi-family development. The tree is identified on the development plan as being directly contiguous with the foundation walls of the structure. This would have the effect of probably preserving the tree itself, but effectively destroying its relationship with its existing, immediate environment.* * *" (Emphasis supplied.) Record 7-8.

Petitioner maintains the only permissible basis for denying the proposal on account of the Japanese Lace Leaf Maple tree relates to its identification in the plan as a "Distinctive Natural Area." Petitioner asserts the "Distinctive Natural Area" consists of only the tree itself. Petitioner argues the tree's "existing immediate environment" is not a part of the "Distinctive Natural Area" identified by the Comprehensive Plan. Petitioner contends that the city impermissibly denied the proposal because it

would not protect the tree's "existing immediate environment." According to petitioner, the city has impermissibly expanded the scope of protection for the tree without applying any standards, facts, or justification, in violation of ORS 227.173(1) and (2).

The city argues that it did not expand the scope of the "Distinctive Natural Area" identified in the Comprehensive Plan. The city argues:

"The council did not 'extend' the distinctive natural area; it found the close proximity of the high wall negatively impacted the Japanese maple to such a degree that it did not adequately preserve it. * * *" Respondent's Brief 14.

The city further argues that while only the tree is designated in the plan as a "Distinctive Natural Area," protection of the open space values of that "Distinctive Natural Area" involves protecting not only the viability of the tree, but also protecting its aesthetic appearance. The city contends the aesthetic appearance of the tree depends upon the natural vegetation in its immediate area. The city argues the code's definition of open space allows the city to include the natural vegetation immediately surrounding a "Distinctive Natural Area" as a first priority protection area under LODS 8.035(4)(a)."⁴ The city contends the

⁴LODS 8.015 defines open space as follows:

"Land to remain in its natural condition for the purpose of providing a scenic, aesthetic appearance; protecting natural

proposed location of a 44 foot high wall in the tree's immediate environment fails to adequately protect the open space value of the "Distinctive Natural Area."

The standards the city applied regarding the Japanese Lace Leaf Maple tree are (1) the requirement of LODS 8.020(1) that major development preserve open space approved by the city, (2) the definition of open space in LODS 8.015, and (3) that a "Distinctive Natural Area" as defined in the plan, is a first priority open space area to be preserved under LODS 8.035(4). These standards are adequate under ORS 227.173(1) to control the city's discretion in making determinations regarding the particular open space to be preserved in a major development. We also conclude the city's findings do not violate ORS 227.173(2) because they are adequate to explain the facts the city relied upon and the city's justification for determining that the proposed 44 foot wall will not adequately preserve the open space value of the "Distinctive Natural Area."

Finally, petitioner argues the city's decision that the proposal will not preserve the open space values of the tree's "Distinctive Natural Area" is not supported by substantial evidence in the record.

The city cites petitioner's development plans and drawings as evidence supporting its determinations regarding

processes; providing passive recreational use or maintaining natural vegetation. * * *." (Emphasis supplied.)

the Japanese Lace Leaf Maple tree. The city argues this evidence establishes the proposal includes a 44 foot wall which is proposed to be located extremely close to the tree. Based on this evidence a reasonable person could conclude that the proposed wall will be too close to the tree to protect the open space values of the tree associated with the "Distinctive Natural Area" plan designation. Accordingly, the city's determination that the proposed wall will not preserve the open space values of the "Distinctive Natural Area" is supported by substantial evidence in the whole record. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988).

The second assignment of error is denied.⁵

THIRD ASSIGNMENT OF ERROR

"The City Council erred in finding that the Douglas Fir and the Big Leaf Maple on the Property qualify as 'specimen trees.'"

The LODS definition of a "specimen" tree is not

⁵Petitioner also argues that it did not have an opportunity to respond to the idea that the distinctive natural area to be preserved as open space is a greater area than the tree itself. We disagree. As far as we can tell from the record, the primary issues at the hearing involved the protection of trees. In addition, petitioner addressed this and other issues in a written memorandum to the city council prior to the time it adopted its final decision. Petitioner also contends there are discrepancies between oral comments of the decision makers and the final written order of the city council which establish that petitioner did not have an adequate opportunity to respond to the issues regarding the scope of the area surrounding the tree to be protected. However, the discrepancies between oral comments of the decision maker and the final decision provide no basis for reversal or remand of the challenged decision. Cook v. City of Eugene, 15 Or LUBA 344, 355 (1987).

demanding. LODS 8.015(4) defines a "specimen" tree as a:

"Particularly fine or unusual example of any tree specie, including smaller trees such as dogwood, cherry, or Japanese maple."

A "specimen" tree is a fifth priority open space area under LODS 8.035(6).

The city's findings regarding the Douglas Fir and Big Leaf Maple trees are as follows:

"The large Douglas fir tree on the site, identified as Tree No. 16 on the Tree Inventory, also constitutes a 'specimen tree,' which should be retained. The tree, although sustaining some storm damage in the past, has been climbed and inspected by an experienced arborist and found to be a large and vital tree which can be retained preserving its present vitality with proper professional care. The tree is a fine example of its species with a circumference of 14'4" and is one of the largest trees in the vicinity.

"The big leaf maple, identified as Tree No. 12 on the Tree Inventory, also constitutes a 'specimen tree,' which should be retained. It is a very fine, healthy an hardy native tree with a huge circumference of 16'4". We find it will respond well to professional care and makes a very significant age and character statement for the property.

"Both the Douglas fir and big leaf maple would be entirely removed by the proposed development. LODS 8.035 includes specimen trees as one of the objectives of open space preservation. We find that the removal of the Douglas fir and large maple tree would be inconsistent with the Open Space Preservation Standards." Record 9.

Petitioner argues the city's findings that the Douglas Fir and Big Leaf Maple trees located on the site are "specimen" trees fail to adequately explain why those trees

are "particularly fine examples" of their species, and are conclusory.

The findings describe the Douglas Fir as "large and vital" and state that it is "one of the largest trees in the vicinity." Record 9. The findings describe the Big Leaf Maple as "fine and hardy" and state that it makes a "significant age and character statement." Record 9. Id. We believe the city's findings are not conclusory and that they adequately explain why the city concludes these trees are "specimen" trees.

Petitioner next argues the city's determinations that the Douglas Fir and the Big Leaf Maple are "specimen" trees are not supported by substantial evidence in the whole record.

The city cites evidence from a professional arborist as substantial evidence to support its conclusions as follows:

"[The arborist] states that the big leaf maple makes an "immense age/character statement for the property." (Rec. 265, discussion regarding Tree #12.) [He] further states that the maple 'could be turned into a unique symbiotic/aesthetic statement' in conjunction with an adjacent arborvitae. Rec. 264.

"In [sic] regard to the Douglas fir, [the arborist] states that it has 'special significance' and makes a 'great character statement on the site.' Rec. 265, description of Tree #16. [He] concluded that both of these trees could and should be preserved. Rec. 265.

"When one reviews [the arborist's] comments regarding these two trees in relation to his description of the remainder of the trees on the

site, it is clear that these trees are of special significance. Rec. 265." (Footnote omitted.) Respondent's Brief 18-19.

While petitioner cites conflicting testimony, we believe the evidence cited by the city, in view of the whole record, is evidence from which it is reasonable to conclude that the Douglas Fir and Big Leaf Maple trees are "specimen" trees within the meaning of LODS 8.015(4). The choice between different reasonable conclusions to be drawn from the evidence in the whole record belongs to the city, and we do not disturb that choice here. Younger v. City of Portland, supra.

The third assignment of error is denied.⁶

FOURTH ASSIGNMENT OF ERROR

"The City Council erred in finding that three other trees on the property also must be protected as 'open space.'"

The city determined that three other trees on the site constitute "open space" within the "other" LODS 8.035(4)(j) priority category and should be protected. In this regard, the city's findings state:

⁶In this assignment of error, petitioner also argues that the city erroneously interpreted provisions of the comprehensive plan as being approval standards. However, the relevant approval standards for determining the particular open space in a major development to be preserved, are those contained in LODS 8.020 and 8.035, as explained above. We agree with the city that its findings regarding the requirements of the comprehensive plan, vis a vis the Douglas Fir and the Big Leaf Maple trees, are simply surplusage. We need not review the adequacy of or evidentiary support for findings which are unnecessary to the challenged decision. Vestibular Disorders Consult. v. City of Portland, ___ Or LUBA ___ (LUBA No. 89-112, April 6, 1990), slip op 13.

"The City Council concludes that although not meeting the criteria of being 'specimen trees,' the following trees on the site should be retained as constituting valuable open space in the 'others' category:

"A. American Sweetgum [Tree No. 4 on the Tree Inventory]. Although somewhat storm damaged, this is a vigorous old tree '* * * with unusual configurative beauty and character in its overall crown appearance.' '* * * It should be magnificent in its full color if its vigor is retained.'

"B. Golden Chinkapin [Tree No. 18 on the Tree Inventory]. Although a native tree, it is quite unusual in urban landscapes. It will react well to professional care.

"C. Giant Arborvitae [Tree No. 11 on the Tree Inventory]. A very viable older tree in close proximity to the big leaf maple [Tree No. 12]. With proper professional care it '* * * could be turned into [a] unique symbiotic/aesthetic statement * * *.'

"The City Council concludes that these three trees are necessary to provide '* * * a scenic aesthetic appearance' on the site, and constitute an important part of the natural vegetation on the site, and therefore, constitute necessary open space in the 'others' category, which must be preserved. * * *" Record 10-11.

Petitioner contends that the LODS 8.035(4)(j) "other" open space priority is too vague to constitute a standard on which to deny petitioner's application for major development. Petitioner argues the city's decision violates ORS 227.173(1) because it denies the proposed development on the basis of the unfettered discretion of the city decision maker. Petitioner states "[g]iven the broad definition of

'open space,' the problem is to determine what is not open space." Petition for Review 28.

As we stated under the first assignment of error, we disagree with petitioner's fundamental assumption that the city could, consistent with ORS 227.173(1), disregard natural phenomena on a particular site meeting the LODS 8.015 definition of open space and, instead of requiring the preservation of such open space, require the applicant to pay fees. LODS 8.020(1) requires that all major development provide a certain percentage of the property as "open space," as defined in LODS 8.015. LODS 8.035(4) is a list of priorities governing the order in which certain natural characteristics on a site are to be approved by the city as "open space." The "other" category is the final priority category for approving open space. This category refers to circumstances in which the city cannot reasonably identify the requisite percentage of open space from higher LODS 8.035(4) priority lands. Under these circumstances, the city must evaluate whether there are any remaining lands on the site which meet the LODS 8.015 definition of open space. If there are remaining lands on the site which meet the definition of open space, the city must then determine which land it will approve as open space. If there are lands on the site which do not qualify as a higher priority of open space under LODS 8.035(4), and which do not meet the definition of open space in LODS 8.015, then the city will

impose the warranted portion of the fees under LODS 8.035(6).

Under this interpretation, the "other" priority category of LODS 8.035(4) is not impermissibly vague, but rather is an approval standard for determining what land is to be approved as open space by the city. LODS 8.035(4) does not violate ORS 227.173(1).

The fourth assignment of error is denied.

The city's decision is affirmed.