

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 ELEANORE HALE,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CITY OF BEAVERTON,)
11)
12 Respondent,)
13)
14 and)
15)
16 COLUMBIA-WILLAMETTE DEVELOPMENT)
17 CO., COSTA PACIFIC HOMES, and)
18 COMMON GROUND: THE URBAN LAND)
19 COUNCIL OF OREGON,)
20)
21 Intervenors-Respondent.)

LUBA No. 90-159

FINAL OPINION
AND ORDER

22
23
24 Appeal from City of Beaverton.

25
26 Eleanore Hale, Beaverton, filed the petition for review
27 and argued on her own behalf.

28
29 Pamela Beery, Beaverton, filed a response brief and
30 argued on behalf of respondent.

31
32 Jack L. Orchard, Portland, filed a response brief and
33 argued on behalf of intervenors-respondent Columbia-
34 Willamette Development Co. and Costa Pacific Homes. With
35 him on the brief was Ball, Janik & Novack.

36
37 Jon A. Chandler, Lake Oswego, filed a response brief
38 and argued on behalf of intervenor-respondent Common Ground:
39 The Urban Land Council of Oregon.

40
41 SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN,
42 Referee participated in the decision.

43
44 AFFIRMED 06/04/91
45

1 You are entitled to judicial review of this Order.
2 Judicial review is governed by the provisions of ORS
3 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a Beaverton City Council order
4 approving a modification to the conditional use permit for
5 the Murrayhill Planned Unit Development (PUD) to increase
6 the allowed density of a subarea within the PUD from 21 to
7 52 housing units.

8 **MOTIONS TO INTERVENE**

9 Columbia-Willamette Development Co., Costa Pacific
10 Homes and Common Ground: The Urban Land Council of Oregon
11 move to intervene in this proceeding on the side of
12 respondent. There is no opposition to the motions, and they
13 are allowed.

14 **MOTION TO AMEND PETITION FOR REVIEW**

15 Pursuant to our February 25, 1991, Order on Objection
16 to Record and Motion to Supplement Record, the petition for
17 review was due on March 18, 1991, and the respondents'
18 briefs were due on April 8, 1991. The petition for review
19 was filed on March 18, 1991, and the respondents' briefs
20 were filed on April 8, 1991. Oral argument was held on
21 April 17, 1991.

22 On April 16, 1991, petitioner filed a Motion to Amend
23 the Petitioner's Brief. This motion seeks to add to the
24 petition for review an additional assignment of error and
25 supporting argument. Petitioner states that omission of the
26 argument contained in the additional assignment of error

1 from her petition for review was an oversight, and was not
2 discovered until April 13, 1991. Petitioner points out she
3 is representing herself in this proceeding and is not an
4 attorney. Petitioner contends the respondents' substantial
5 rights would not be prejudiced by granting her motion
6 because the argument raised in the additional assignment of
7 error was raised in detail in the local proceedings and,
8 therefore, only a minimal amount of additional time would be
9 required for respondents to respond to the additional
10 assignment of error.

11 Respondent and intervenors-respondent (respondents)
12 argue that petitioner's request to add an assignment of
13 error to her petition for review is not the sort of
14 amendment allowed by OAR 661-10-030(4). Respondents contend
15 allowing the petition for review to be amended to add an
16 additional assignment of error would be akin to allowing the
17 petition for review to be filed late, which is not a mere
18 technical violation of the Board's rules. OAR
19 661-10-030(1). According to respondents, that petitioner is
20 not an attorney is not adequate justification for allowing
21 the motion. Respondents also argue that allowing the motion
22 would prejudice their substantial rights, in that as the
23 motion was filed after the respondents' briefs were filed
24 and only one day before oral argument, respondents would not
25 have an adequate opportunity to respond to the additional
26 assignment of error.

1 Under OAR 661-10-030(4), this Board determines whether
2 to allow amendment of a petition for review in accordance
3 with OAR 661-10-005. OAR 661-10-005 provides:

4 "These rules are intended to promote the speediest
5 practicable review of land use decisions, in
6 accordance with ORS 197.805 - 197.855, while
7 affording all interested persons reasonable notice
8 and opportunity to intervene, reasonable time to
9 prepare and submit their cases, and a full and
10 fair hearing. The rules shall be interpreted to
11 carry out these objectives and to promote justice.
12 Technical violations not affecting the substantial
13 rights of parties shall not interfere with the
14 review of a land use decision. Failure to comply
15 with the time limit for filing a Notice of Intent
16 to Appeal under OAR 661-10-015(1) or a Petition
17 for Review under OAR 661-10-030(1) is not a
18 technical violation."

19 The "substantial rights of parties" referred to in OAR
20 661-10-005 are those identified elsewhere in the rule as
21 "the speediest practicable review" and "reasonable notice
22 and opportunity to intervene, reasonable time to prepare and
23 submit their cases, and a full and fair hearing." Kellogg
24 Lake Friends v. City of Milwaukie, 16 Or LUBA 1093, 1095
25 (1988). Therefore, under OAR 661-10-030(4) and 661-10-005,
26 the Board will allow an amendment to correct errors or
27 omissions in a petition for review if doing so would serve a
28 purpose and would neither materially interfere with
29 respondents' ability to respond to the petition for review
30 nor delay issuance of the Board's final opinion and order.
31 Kellogg Lake Friends v. City of Milwaukie, supra; B & L
32 Holdings v. City of Corvallis, 1 Or LUBA 204, 205 (1980).

1 We believe respondents' substantial rights to a
2 reasonable opportunity to prepare and submit their arguments
3 and the speediest practicable review would be prejudiced by
4 allowing petitioner's motion. Petitioner's motion was not
5 filed until the day before oral argument in this appeal. If
6 petitioner's motion were granted, additional time,
7 potentially as much as the 21 days to respond to the
8 original petition for review provided under LUBA's rules,
9 would have to be given to respondents to respond to the
10 additional assignment of error. Further time would be
11 required to have oral argument on the additional assignment
12 of error. This would result in delaying the issuance of the
13 Board's final opinion and order.¹

14 The motion to amend the petition for review is denied.

15 **FACTS**

16 The city approved a conditional use permit for phase I
17 of the Murrayhill PUD (Murrayhill I) in 1986. Parcel 10 of
18 Murrayhill I included the eastern portion of Neighborhood
19 "M." Parcel 10 was approved for a total of 410 units of
20 either single family or multi-family housing. To date, 402
21 units have been constructed in Parcel 10, leaving 8
22 potential units to be built in Neighborhood "M." In 1987,
23 the city approved a conditional use permit for phase II of

¹We do not decide whether amendment of a petition for review to add an additional assignment of error, after the deadline for filing the petition for review has passed, could ever be considered merely a technical violation of LUBA's rules.

1 the Murrayhill PUD (Murrayhill II). This phase included the
2 remainder of Neighborhood "M," and allows 13 units of either
3 single family or multi-family housing in this portion of
4 Neighborhood "M." Thus, the conditional use permits
5 approved for Murrayhill I and II together allow a total of
6 21 housing units to be built in Neighborhood "M," which is
7 6.33 acres in size and zoned Residential Single Family,
8 Urban Standard Density (R-5).

9 Murrayhill I and II are approved for a total of 2,649
10 housing units. However, the current projected actual
11 density at completion of development is only 1,523 housing
12 units. On June 13, 1990, respondents Columbia-Willamette
13 Development Co. and Costa Pacific Homes (applicants) filed
14 an application to modify the previously approved conditional
15 use permits for Murrayhill I and II to transfer 31 housing
16 units from elsewhere in the development to Neighborhood "M,"
17 thereby increasing the allowable density in Neighborhood "M"
18 to 52 units.²

19 On September 12, 1990, the planning commission held a
20 public hearing on the proposed conditional use permit
21 modification. On September 26, 1990, the planning
22 commission issued an order approving the proposed

²The applicants also requested design review approval of the final site plan for Neighborhood "M." The final site plan indicates Neighborhood "M" will be developed with 52 attached "townhouse" units. However, that aspect of the application was subject to a separate review proceeding by the city, and any city decision made in that proceeding is not part of the decision challenged in this appeal.

1 conditional use permit modification, and petitioner appealed
2 that decision to the city council. On November 5, 1990, the
3 city council held a hearing on petitioner's appeal. On
4 November 28, 1990, the city council issued an order
5 approving the conditional use permit modification. This
6 appeal followed.

7 **FIRST ASSIGNMENT OF ERROR**

8 "The procedure used by the city to determine
9 whether the proposed modification to the
10 Murrayhill Planned Unit Development (PUD) was
11 consistent with the original intent of the PUD
12 does not comply with sections 92-96.6 of * * * the
13 Development Code of the City of Beaverton. The
14 city's finding that the requested modification is
15 consistent with [the] original intent [of the PUD]
16 is not supported by substantial evidence."

17 Petitioner argues the city did not properly determine
18 that the proposed modification to the Murrayhill PUD
19 conditional use permits is "consistent with the intent of
20 the original PUD." Record 8. Petitioner contends several
21 provisions of Beaverton Development Code (BDC) §95 ("Planned
22 Unit Developments - Procedural Requirements") require that
23 such a determination be made. Petitioner further argues the
24 city erred by applying three other criteria, unrelated to
25 the original intent of the PUD, in lieu of making a
26 determination of consistency with the original intent of the
27 PUD. See Record 8.

28 Respondents contend the issues of consistency of the
29 proposed modification with the intent of the original PUD
30 approval, or the propriety of city's criteria for

1 determining such consistency, were not raised in the
2 proceeding below. Respondents further argue petitioner does
3 not contend the city failed to follow the procedural and
4 notice requirements of ORS 197.763. Therefore, according to
5 respondents, under ORS 197.835(2) and 197.763(1), the Board
6 may not consider the issues raised by petitioner in this
7 assignment of error.

8 ORS 197.835(2) states that issues raised in an appeal
9 before this Board "shall be limited to those raised by any
10 participant before the local hearings body as provided by
11 ORS 197.763."³ ORS 197.763(1) requires that an issue which
12 is raised in an appeal to this Board have been raised prior
13 to the close of the record in the proceeding before below,
14 with "sufficient specificity so as to afford the governing
15 body * * * and the parties an adequate opportunity to
16 respond to [the] issue."

17 The purpose of ORS 197.763(1) and 197.835(2) is to
18 prevent unfair surprise. If an issue is not raised in the
19 local proceedings, a petitioner may not surprise the local
20 government and other parties by raising that issue for the
21 first time before this Board. However, ORS 197.763(1) does
22 not require that arguments identical to those in the

³ORS 197.835(2)(a) and (b) also provide that new issues may nevertheless be raised in an appeal to the Board if the local government failed to follow the requirements of ORS 197.763 or the local government made a decision which is different from the proposal described in the notice of hearing. However, no party contends that either of these exceptions is applicable to this appeal.

1 petition for review have been presented during local
2 proceedings. What it requires is that the argument
3 presented in the local proceedings sufficiently raise the
4 issue sought to be raised in the petition for review, so
5 that the local government and other parties had a chance to
6 respond to that issue in the local proceedings. Boldt v.
7 Clackamas County, ___ Or LUBA ___ (LUBA No. 90-147,
8 March 12, 1991), slip op 8.

9 Petitioner contends the issues she seeks to raise in
10 this assignment of error were raised in the local
11 proceedings in a statement that she submitted at the city
12 council hearing.⁴ Record 261-265. However, this statement,
13 while recognizing that the city originally approved the
14 Murrayhill PUD for a maximum of 2,649 housing units,
15 concentrates on the difference between (1) the number of
16 single family versus multi-family housing units actually
17 built in the PUD, and (2) the numbers of single family
18 versus multi-family housing units which the developer's
19 information packets told prospective buyers would be built
20 in the PUD. Record 261-262. No mention is made in
21 petitioner's statement of the "intent of the original PUD."
22 This statement does not raise the issues of consistency of
23 the proposed modification with the intent of the original
24 PUD approval, or the propriety of city's criteria for

⁴Petitioner does not identify any other place in the record of the local proceedings where she contends these issues were raised.

1 determining such consistency, sufficiently to have allowed
2 the other parties to respond to these issues in the
3 proceedings below. Accordingly, we conclude petitioner may
4 not raise these issues before this Board.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 "The City erred in that it did not comply or
8 attempt to comply with section 95.6.D of * * * the
9 Development Code of the City of Beaverton. The
10 City improperly construed the applicable law."

11 BDC § 95.6 provides in relevant part:

12 "**Control of the Development After Completion.** The
13 final development plan shall continue to control
14 the planned unit development after it is finished
15 and the following shall apply:

16 "A. The Building Official in issuing occupancy
17 permits for the planned unit development
18 shall note the issuance on the final
19 development plan.

20 "B. After the occupancy permits have been issued,
21 the use of the land and the construction,
22 modification or alteration of buildings or
23 structures within the planned unit
24 development plan shall be governed by the
25 approved final development plan.

26 "C. After the occupancy permits have been issued,
27 no change shall be made in development
28 contrary to the approved final development
29 plan without approval of an amendment to the
30 plan * * *.

31 * * * * *

32 "D. An amendment to a completed planned unit
33 development may be approved if it is required
34 for the continued success of the planned unit
35 development, if it is appropriate because of

1 conditions that have occurred since the final
2 development plan was approved or because
3 there have been changes in the development
4 policy of the City as reflected by the
5 comprehensive plan or related land use
6 regulations.

7 "* * * * *" (Emphasis added.)

8 Petitioner contends the city erred by failing to apply
9 BDC § 95.6 to the proposed conditional use permit
10 modification altering the final development plan for the
11 Murrayhill PUD. Petitioner argues that the conditional use
12 permit modification standards applied by the city are less
13 restrictive than the standards of BDC § 95.6.D for an
14 amendment to a "completed" PUD. Petitioner argues a PUD is
15 "completed," as that term is used in BDC § 95.6.D, when a
16 home has been purchased and an occupancy permit issued
17 anywhere in the PUD. According to petitioner, BDC § 95.6.C
18 does not require that all occupancy permits have been issued
19 for a PUD in order for the provisions of BDC §95.6.D
20 concerning amendments to a "completed" PUD to be applicable.

21 Respondents contend BDC § 95.6.D does not apply to the
22 proposed conditional use permit modification. According to
23 respondents, the Murrayhill PUD is not "completed," as that
24 term is used in BDC § 95.6.D, because occupancy permits have
25 not been issued for all parts of the PUD and site plans for
26 various areas of the PUD are still being brought before the
27 city for review.

28 BDC § 95.6.A-C make it clear that a PUD is not

1 considered "completed" for the purposes of BDC § 95.6.D
2 until occupancy permits for the PUD have been issued. No
3 party contends that occupancy permits can be issued prior to
4 final site plan approval, or that any occupancy permits have
5 been issued for Neighborhood "M," which is the subject of
6 the proposed modification. We agree with the city that
7 where a final site plan for a PUD subarea has not been
8 approved and occupancy permits have not been issued for that
9 subarea of the PUD, BDC § 95.6.D does not apply to a
10 proposal to modify the conditional use permit approving the
11 final development plan for that subarea.

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 "The City erred in finding that adequate school
15 facilities exist. Such a finding is not supported
16 by evidence in the whole record. The record shows
17 public facilities are not adequate to serve the
18 proposed development."

19 Petitioner argues that BDC § 201.2.C and 130.5.C
20 "require an applicant to prove that there will be adequate
21 public facilities to serve the proposal." Petition for
22 Review 19. Petitioner further argues there is not
23 substantial evidence in the record to support the city's
24 finding that there are adequate school facilities to serve
25 the proposed development, but rather clearly demonstrates
26 that the elementary school serving the subject area is
27 significantly over capacity.

28 BDC § 201.2 provides in relevant part:

1 **"Approval of Preliminary Plat.** * * * In order to
2 approve a preliminary [subdivision] plat, the
3 Commission shall make findings of fact to support
4 the following conclusions:

5 "* * * * *

6 "C. Adequate public facilities are available to
7 serve the proposal[.]

8 "* * * * *"

9 BDC § 130.5.C provides that in any quasi-judicial
10 proceeding, "[t]he applicant has the burden of proof on all
11 criteria."

12 BDC § 201.2 applies only to the approval of a
13 preliminary subdivision plat. The challenged decision
14 approves a modification to a conditional use permit, not a
15 preliminary plat. Petitioner cites no approval standard
16 applicable to modification of a conditional use permit which
17 requires the city to determine that adequate public
18 facilities are available to serve the modified use. Without
19 a showing that an applicable approval criterion has been
20 violated by the city's decision, we cannot grant relief.
21 Kieval v. City of Ashland, 17 Or LUBA 571, 575 (1989);
22 Sellwood Harbor Condo Assoc. v. City of Portland, 16 Or LUBA
23 505, 510 (1988); Lane County School District 71 v. Lane
24 County, 15 Or LUBA 150, 153 (1986).

25 The third assignment of error is denied.

26 **FOURTH ASSIGNMENT OF ERROR**

27 "The finding of public need was pivotal to the
28 decision. The City's finding of public need is

1 not supported by substantial evidence."

2 Petitioner argues that a 2-2 vote by the city
3 councillors at the close of the November 5, 1990 public
4 hearing on petitioner's appeal of the planning commission
5 decision required that the mayor vote to break the tie.
6 According to petitioner, oral statements made by the mayor
7 before he cast his tie-breaking vote in favor of denying her
8 appeal indicate the mayor's belief that there is a public
9 need for the proposed townhouse style of housing was
10 critical to his vote to deny the appeal. Petitioner further
11 argues there is not substantial evidence in the record to
12 demonstrate a public need for additional townhouses in the
13 city. According to petitioner, the only evidence in the
14 record relates to market demand, rather than public need.

15 Respondents argue that verbal comments made by city
16 decision makers when casting votes for a tentative decision
17 are not the subject of this Board's review. Respondents
18 contend it is the final written decision adopted by the city
19 council on November 28, 1990, that is properly the subject
20 of this appeal. Respondents point out the findings in
21 support of the final decision correctly state that public
22 need is not an approval criterion for the approved
23 conditional use permit modification. Record 3.

24 Respondents are correct that the subject of our review
25 is the final written decision adopted by the city, not oral
26 comments made by individual decision makers. Bruck v.

1 Clackamas County, 15 Or LUBA 540, 542; Citadel Corporation
2 v. Tillamook County, 9 Or LUBA 401, 404 (1983). Here, the
3 final decision states that the existence of a public need
4 for the proposed use is not a criterion for approval of the
5 proposed conditional use permit modification. Record 3.
6 Petitioner cites no legal standard making public need an
7 approval criterion for the challenged decision, and we agree
8 with respondents that public need is not an approval
9 criterion. Therefore, petitioners' arguments under this
10 assignment of error provide no basis for reversal or remand
11 of the challenged decision.

12 The fourth assignment of error is denied.

13 The city's decision is affirmed.