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

WESTLAKE HOMEOWNERS ASSOCIATION,)
)
Petitioner,)
)
vs.)
) LUBA No. 92-222
CITY OF LAKE OSWEGO,)
) FINAL OPINION
Respondent,) AND ORDER
)
and)
)
GSL PROPERTIES, INC.,)
)
Intervenor-Respondent.)

Appeal from City of Lake Oswego.

Robert E. Barton and Donald J. Ekman, Portland, filed the petition for review and argued on behalf of petitioner. With them on the brief was Cosgrave, Vergeer & Kester; and Ekman & Bowersox.

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

Timothy V. Ramis and Michael C. Robinson, Portland, filed a response brief. With them on the brief was O'Donnell, Ramis, Crew & Corrigan. Timothy V. Ramis argued on behalf of intervenor-respondent.

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

AFFIRMED 04/05/93

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 affirming a
4 Lake Oswego Design Review Board (DRB) decision approving a
5 352 unit multi-family housing project.

6 **MOTION TO INTERVENE**

7 GSL Properties Inc. moves to intervene on the side of
8 respondent. There is no opposition to the motion, and it is
9 allowed.

10 **FACTS**

11 The city granted Overall Development Plan and Schedule
12 (ODPS) approval for the Westlake PUD in 1981.¹ The Westlake
13 PUD includes both single-family and multi-family dwellings,
14 in six phases. In 1984, the planning commission extended
15 the Westlake ODPS approval to 1990, and gave the city
16 manager authority to grant additional extensions. In
17 November 1990, the city manager granted a three year
18 extension.

19 The Westlake ODPS authorizes multi-family development
20 for Phase 3, at a density of between 347 and 391 units.
21 The challenged decision approves a 352 unit multi-family
22 housing project for Phase 3.

¹Different terminology was employed for ODPS approval in 1981. We explained the city's planned unit development (PUD) approval process and the history of the Westlake PUD in Hoffman v. City of Lake Oswego, 20 Or LUBA 64, 66-68 (1990).

1 **THIRD ASSIGNMENT OF ERROR**

2 Under this assignment of error, petitioner contends
3 certain comprehensive plan standards are violated by the
4 challenged decision due to traffic related impacts
5 associated with the PUD's internal street system. The city
6 takes the position in the challenged decision that these
7 issues were resolved in the prior ODPS approval decision and
8 are not properly raised in the current proceeding regarding
9 Phase 3. Petitioner contends the OPDS does not have this
10 legal effect.

11 **A. Timeliness of the Westlake Phase 3 Application**

12 In its first and third subassignments of error,
13 petitioner alleges the challenged Phase 3 approval came
14 after the deadline imposed by the Westlake ODPS for final
15 PUD approval. According to petitioner, the untimely
16 application for Phase 3 approval either should have been
17 rejected (first subassignment of error) or, if the
18 application was not required to be rejected, the traffic
19 impact issues petitioner raises were not precluded by the
20 ODPS approval because the ODPS had expired (third
21 subassignment of error).

22 We reject petitioner's initial premise that the
23 Westlake Phase 3 approval came after the Westlake ODPS
24 approval expired. As noted supra, in 1984 the planning
25 commission extended the ODPS until 1990 and granted the city
26 manager authority to further extend the ODPS approval. The

1 city manager granted a three year extension in November
2 1990. The challenged Westlake Phase 3 approval was granted
3 within that final extension.

4 Neither the planning commission's 1984 decision nor the
5 city manager's 1990 decision extending the Westlake ODPS
6 approval were appealed to this Board. Whatever merit there
7 may be to petitioner's arguments that the planning
8 commission exceeded its authority in granting the city
9 manager authority to extend ODPS approval, or that the city
10 manager exceeded his authority in exercising that grant of
11 authority, those arguments may not be considered in the
12 present appeal. See Corbett/Terwilliger Lair Hill Neigh.
13 Assoc. v. City of Portland, 16 Or LUBA 49, 52 (1987).

14 These subassignments of error are denied.

15 **B. Discretion to Revisit Traffic Issues**

16 Petitioner argues that while LUBA held in Hoffman v.
17 City of Lake Oswego, supra, that the city "need not" revisit
18 comprehensive plan compliance issues addressed at the time
19 ODPS approval is given, Hoffman does not hold that the city
20 may not do so.

21 We explained the city's ODPS approval process in
22 Hoffman, supra, 20 Or LUBA at 70-71, as follows:

23 "[Lake Oswego Code (LOC)] 49.405(1) requires that
24 approval of each phase of a PUD 'conform to the
25 ODPS, as well as the Comprehensive Plan and
26 Development Standards.' However, we do not
27 believe that LOC 49.405(1) necessarily requires
28 that all comprehensive plan policies be reapplied
29 each time a new phase of a PUD is approved. We

1 agree with the city that where comprehensive plan
2 compliance issues have been fully resolved for a
3 PUD in approving an ODPS under LOC 49.400 to
4 49.440, those comprehensive plan issues need not
5 be reconsidered in approving subsequent phases of
6 the PUD." (Emphasis in original; footnote
7 omitted.)

8 It is possible to read the above quoted language, in
9 isolation, to leave the city free to reconsider
10 comprehensive plan compliance issues, if it wishes to do so.
11 However, the quoted language is followed by a discussion
12 which clarifies that under the LOC, so long as ODPS approval
13 remains valid, an applicant may submit a final development
14 plan, consistent with the ODPS, without having to address
15 changes in factual circumstances that might have prevented
16 ODPS approval in the first place.² In other words, during
17 the time in which the ODPS is in effect, the ODPS rather
18 than the comprehensive plan standards that were applied in
19 approving the ODPS, governs final PUD approval.

20 We address petitioner's argument that the ODPS approval

²In Hoffman, we explained as follows:

"* * * Where the impact on public services of the entire PUD has been addressed and relevant plan policies found to be complied with in approval of the ODPS, we agree * * * it would be inconsistent with purpose expressed in LOC 49.410 to require approval of each developmental phase to readdress plan public services policies, where the requested phase approval is consistent with the type and intensity of development envisioned by the approved ODPS. Under the procedures adopted by the city, as long as a PUD phase is consistent with the ODPS and remains on the approved time schedule, there is no requirement that the factual predicates underlying the original ODPS approval be reexamined when the anticipated phases are approved." 20 Or LUBA at 72.

1 did not address certain traffic related comprehensive plan
2 compliance issues under the next subassignment of error.
3 However, we reject petitioner's argument that under the
4 city's PUD approval procedures, the city remains free to
5 reconsider comprehensive plan issues that were resolved in
6 granting ODPS approval.

7 This subassignment of error is denied.

8 **C. Internal Roadway Traffic Related Issues**

9 We explained in Hoffman that the ODPS only governs
10 comprehensive plan issues actually addressed in granting
11 ODPS approval. Petitioner contends the ODPS does not
12 address traffic issues regarding internal roadways.

13 The challenged decision finds the earlier decision
14 granting ODPS approval determined that the project as a
15 whole, including the internal road system, complies with the
16 comprehensive plan. Record 10, 100-01. We agree with
17 respondent and intervenor-respondent that there is
18 substantial evidence to support that finding. Record 312,
19 601, 820-22, 864, 870, 886, 985-87.

20 Petitioner may be arguing it may now raise specific
21 questions it has with regard to internal streets that were
22 not specifically addressed during ODPS approval, and that
23 under the above quoted language in Hoffman, the city is
24 obligated to address those questions. If so, we reject the
25 argument.

26 The transportation related comprehensive plan "issues"

1 the city was required to address in granting ODPS approval
2 relate to the entire PUD and its impact on internal and
3 external roadways and intersections. As long as the city
4 addressed those issues, and the city did so here, it does
5 not matter that particular questions concerning those issues
6 may not have been raised or addressed in granting ODPS
7 approval.³ If particular questions were not addressed at
8 the time of ODPS approval or were addressed inadequately,
9 the appropriate course would have been an appeal of the ODPS
10 approval decision. Petitioner may not raise such questions
11 in this appeal.

12 This subassignment of error is denied.

13 The third assignment of error is denied.

14 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

15 Under these assignments of error, petitioner alleges
16 the city committed error by considering new evidence
17 concerning traffic impacts that was not included in the
18 record established before the DRB.⁴ Alternatively,
19 petitioner alleges the city erred by failing to allow

³It is clear from the record that the "issue" of adequacy of the internal roadway system was addressed in granting ODPS approval. While the questions petitioner now raises concerning the adequacy of the internal roadway system may not have been specifically addressed when ODPS approval was given, that does not provide a basis for reopening the larger PUD traffic circulation issue in approving Phase 3 to address those questions, so long as the proposal for Phase 3 is within the housing types and densities allowed by the ODPS approval.

⁴Pursuant to LOC 49.625(7)(F), the city council's review of the DRB decision was limited to the record compiled by the DRB.

1 petitioner an opportunity to rebut such evidence.

2 Under the third assignment of error, we affirm the city
3 council's determination that the traffic issues, which were
4 the subject of the disputed evidence, were resolved by the
5 ODPS approval and, therefore, are not subject to
6 reconsideration in the challenged decision. The evidence
7 petitioner challenges goes to the city's alternative finding
8 that even if it could consider the traffic impact issues
9 petitioner raises, the relevant approval standards are met.
10 Therefore, even if the city committed procedural error in
11 accepting and considering the disputed evidence, that error
12 would not provide a basis for reversal or remand. Griffith
13 v. City of Milwaukie, 19 Or LUBA 300, 304 (1990); Cann v.
14 City of Portland, 14 Or LUBA 254, 257, aff'd 80 Or App 246
15 (1986).

16 Petitioner suggests that we should remand the decision
17 because the city council was in fact influenced to vote for
18 the project by the challenged evidence concerning traffic
19 impacts. Petitioner argues we may determine from the record
20 that the city would not have adopted this independent basis
21 for approving Westlake Phase 3, but for the disputed
22 evidence of acceptable traffic impacts.

23 We reject petitioner's argument that we may look past
24 the written decision. As we have explained on numerous
25 occasions, it is the local government's written decision
26 that is subject to review by this Board. Waker Associates,

1 Inc. v. Clackamas County, 21 Or LUBA 588, 591 (1991) (and
2 cases cited therein). The written decision takes the
3 position that the Westlake ODPS approval precludes
4 consideration of the traffic issues petitioner asserts, and
5 that position is not dependent on the disputed evidence.
6 Further, even if we could look beyond the written decision,
7 we do not agree that the record shows the disputed evidence
8 had the effect on the city council that petitioner claims.
9 The first and second assignments of error are denied.
10 The city's decision is affirmed.